Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: October 12, 2021 **CASE NO(S).:** PL130592

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant(s):	Multiple Appellants
Subject:	By-law No. 569-2013
Municipality:	City of Toronto
OLT Case No.:	PL130592
OLT File No.:	PL130592
OLT Case Name:	Bahardoust v. Toronto (City)

Heard: March 5, 2021 by video hearing

APPEARANCES:

Parties	**Counsel**
Ontario Association of Architects Makow Associates Architect Inc. Conservatory Group	Ron Kanter William Annab (student-at-law)
City of Toronto	Gabriel Szobel Marc Hardiejowski
Swansea Area Ratepayers Group	William Roberts

DECISION DELIVERED BY D. COLBOURNE AND G. BURTON AND ORDER OF THE TRIBUNAL

Sub-phase 2 of Phase 2 Hearing

[1] On March 1, 2018, the Ontario Municipal Board ("OMB") (now the Ontario Land Tribunal ("OLT"), referred to in this Decision as "the Tribunal") issued its Decision (the "2018 Decision") on the first part of the Phase 2 Hearing on multiple appeals against the City of Toronto ("City") Zoning By-law No. 569-2013 (the "By-law"). The By-law exercise had been undertaken following the consolidation of the several municipalities now known as the City of Toronto. This process encompassed 41 previous zoning by-laws ("ZBL"). The resulting By-law as enacted is known as the Comprehensive Zoning By-law for the City.

[2] There were 324 Appeals from the By-law, followed by many settlements and withdrawals, and subsequent approvals by the Tribunal of unchallenged portions. The Tribunal's 2018 Decision by Vice Chair Conti on appeals from Chapter 10, Residential Zone, dealt with many of these. Approvals and dismissals (see para. 29 of the Decision) brought many of the Chapter 10 sections into force. Many of the more general issues were also determined in that Decision.

[3] However, the 2018 Decision identified provisions that in the Tribunal's view required further study by the City, based on the Appellants' submissions (para. 210). The present Decision then results from the **continuation** of the Phase 2 Hearing on the Residential appeals, to determine if the results of this further exercise by the City are acceptable. Mr. Szobel emphasised that this hearing is not a hearing *de novo*, but a continuation of the previous hearing, just with a different panel due to a retirement. The Tribunal will term the earlier Hearing, "Sub-phase 1 of Phase 2", and the recent one "Sub-phase 2 of Phase 2".

[4] This present Decision for Sub-phase 2 relies on the evidence and findings as set out in the earlier 2018 Decision, where the applicable Official Plan ("OP") provisions were discussed as well. A Zoning By-law must of course comply with the policies in the OP (s. 24(1) of the *Planning Act* (the "Act"). There are policies for developments in

residential zones principally in Chapter 4, the *Neighbourhoods* section in the OP. These are found in s. 4.1.5 and s. 4.1.8, recently amended by OPA 320 (approved July 4, 2016 but still partially under appeal) to include references to “prevailing” building types (see Findings below respecting the issue of the *Clergy* principle in these Appeals). Policy 4.1.8 states in part that ZBLs will contain performance standards to ensure that new development “will be compatible with the physical character of established residential neighbourhoods”. Another important policy for these appeals is s. 3.1.2 respecting Built Form, which requires that new development “fit” within its existing and/or planned context.

[5] Preparation of the By-law prior to its passage in 2013 had been mainly by devising common standards for each zoning category, a “harmonization” exercise. It was not a detailed review of the zoning standards themselves. This would be conducted later. Standards that made sense and had applied in one or more of the former municipalities were adopted to apply to the whole City. As expressed by Mr. Szobel in his submissions, this “best practice” approach was upheld in the 2018 Decision. It ensured a common language, and a single method of creating building rules across the former municipalities.

[6] Details of the By-law’s structure were set out in the 2018 Decision. Chapter 10, the “Residential Zone”, deals generally with lower scale residential developments. These include single and semi-detached dwellings, duplexes, townhouses and low-rise apartment buildings with a maximum height of four storeys. The zones in question are Residential (R), Residential Detached (RD), Residential Single (RS), Residential Townhouse (RT), and Residential Semi-detached (RS) zones.

[7] As the previous panel noted, while the Chapter 10 regulations apply to all zones of the Residential category, zoning standards for specific areas may vary by means of exceptions, special districts and overlays maps. The regulations are intended to apply to new applications only. Buildings that existed either before any zoning applied, or that

complied with former regulations or had previous approvals, were exempted from the more restrictive provisions of the new 2013 By-law.

[8] The planning policy issues that needed to be addressed in this subphase were categorized in para. 38 of the 2018 Decision as:

- whether a By-law provision would conform to the OP;
- whether the By-law would permit appropriate and acceptable development in all residential areas; and
- whether there were unnecessary restrictions on development that would require additional variances in the future.

[9] Some of the proposed standards were not approved in the 2018 Decision, as in the Tribunal's view they would be inequitable, or would not comply with the OP.

[10] Mr. Kanter summarized the "principles" that he stated were established in the Decision for the City's review of challenged provisions, [to]:

> - Compensate homeowners for change in measurement of height which would result in shorter buildings than previously permitted ("Height Compensation") (Decision Par. 203)
> - Allow homeowners to provide suitable living space while incorporating an integral garage with suitable living space ("Integral Garage") (Decision Par. 183)
> - Allow homeowners to construct a standard (typical) size two storey dwelling on narrower lot (12 m or less) without variances (Standard House No Variances)
>
> (2018 Decision – paras. 38, 99 and 204).

[11] The details for this additional review were stated in the 2018 Decision:

> [202] ...The regulations subject to the review include all listed in Exhibit 126 and some additional regulations that have been identified in the Board's findings discussed above. As noted above the review of the regulations in item 1, 2 and 3 below should not be limited to lots with frontages of 12 m and less. The definitions of first floor and basement should also form part of the review for all lots as noted in item 8. While

they are of primary concern for smaller lots, through the review it may be appropriate to amend these definitions for all lots. The review of the other regulations listed below in items 4, 5, 6 and 7 should focus on lots of 12 m and smaller frontages although changes to the regulations for these lots may entail changes to the regulations generally. The regulations which are subject to further review are as follows:

1. Regulation 10.5.40.10 (1) for determining the height of buildings (as noted above the review should not be limited to lots with frontages of 12 m. and less);
2. Regulations 10.10.40.10 (1), 10.20.40.10 (1), 10.40.40.10 (1), 10.80.40.10 (1) maximum height (as noted above the review should not be limited to lots with frontages of 12 m. and less);
3. Regulations 10.10.40.10 (2), 10.20.40.10 (2), 10.40.40.10 (2), 10.80.40.10 (2) maximum height of specified pairs of main walls (may require adjustment for all lots);
4. Regulation 10.20.40.10 (4) restrictions for a detached house with a flat or shallow roof;
5. Regulations 10.10.40.10 (6), 10.20.40.10 (6), 10.40.40.10 (4), 10.80.40.10 (4) height of the first floor above established grade;
6. Regulations 10.10.40.10 (5), 10.20.40.10 (7), 10.40.40.10 (5), 10.80.40.10 (5) width of dormers;
7. Regulations 10.5.80.1 (1), 10.5.80.10 (1), 10.5.80.10 (3) parking provisions;
8. The definitions of first floor and basement (may need to be revised for all lots).

[203] The above provisions for maximum height, height of specified pair of main walls, for the height of the first floor above established grade and for width of dormers includes the regulations for the RM zone ... Since the method of determining height is potentially changing for some parts of the City in the RM zone, the Board considers it appropriate to **review the maximum height provision for all lots where the height limits have not been changed to compensate for the reduction in height due to the roof point of measurement. If height limits change then the maximum height of the specified pairs of main walls may need to be adjusted.** This provision should also be reviewed for all lots. The other provisions identified above that apply to the RM zone should be reviewed only as they apply to lots with frontages of 12 m or less.

[204] The above are the only regulations of the By-law that the Board is directing that further review be undertaken by the City. The Board has included the By-law's definitions of basement and first floor in the provisions to be considered, since the evidence indicated that these definitions could be affected or need to be amended as part of the review. It is recognized that other provisions of the By-law may come under consideration in the review if changes to those provisions would assist in accomplishing the **objective of permitting a standard sized two-storey dwelling on lots of 12 m or less frontage. Furthermore, the provisions as they apply to all lots may be amended if it determined to be appropriate through the review of the provisions related to lots with frontages of 12 m and less.** Therefore, those regulations that require further review will not be approved until the review has been completed and an acceptable final form of the regulations is determined." (*emphasis added*).

[12] The Tribunal ordered that the City and the Parties bring forward to the Tribunal for further consideration the above-noted regulations and definitions, with the relevant evidence (para. 210). As can be seen, the 2018 Decision states that revisions proposed for narrow lots of 12 metres (“m”) or less could be found to be appropriate for wider lots as well.

[13] The rationale expressed by the previous panel can be seen clearly in para. 55. Vice Chair Conti was concerned that some provisions of the By-law would not allow for the construction of the types of dwellings which define the “predominant physical character” of individual areas within the Residential Zone category. Zoning by-laws must comply with the OP, he reiterated. Thus if a By-law provision offends either the OP “identified parameters for development” or the intent of the OP provisions, it would not comply (para. 54, restated).

PARTIES

[14] The Appellants in this continuation of the Phase 2 Hearing are as set out above. They are those with remaining issues to be determined in the Chapter 10, Residential provisions. All had taken part in the Phase 2 Hearing resulting in the 2018 Decision. Three of these, Ontario Association of Architects, Makow Associates Architects Inc. and Conservatory Group, were consolidated for purposes of this continuation under the rubric of Joint Appellants (“JA”) and were represented by Mr. Kanter here. The Swansea Area Ratepayers Group (“SARG”) continued to be represented by Mr. Roberts. The City was represented in this continuation by Messrs. Szobel and Hardiejowski.

THE EVIDENCE

[15] Most of the witnesses taking part in the previous Sub-phase 1 were recalled to provide or update their opinions on the revisions suggested by the City in this Sub-phase 2. These included Dwayne Tapp for the City, James Pfeffer, Michael Goldberg,

Stephen Hunt and Peter Swinton for the JA, and Terry Mills for SARG. All were previously qualified in their respective fields of expertise, and thus remained so for this continuation of the Phase 2 Hearing.

[16] Klaus Lehmann testified for the City in this Sub-phase 2, and was qualified as an expert in planning in general and in the development of this By-law in particular. He had been the Manager, Zoning By-law and the Committee of Adjustment ("COA") sections of the City Planning Division for many years, and has had 43 years' experience in both the private and public realms. He was the Manager of the team tasked with preparation of the 2013 By-law, commencing in 2003 on to its enactment, and had also prepared policy directives, amendments and corrections to it. His evidence will be set out in some detail, as it presented a complete outline of the issues in contention in this continuation of the Phase 2 Hearing. Witnesses for the Appellants addressed the same issues.

ISSUES REMAINING

[17] Mr. Lehmann set out the City's proposed revisions to the By-law resulting from the further studies mandated by the Tribunal. He summarised that the regulations remaining in issue related mainly to building height, the height of certain elements of the building, and aspects of the roof. He categorized the remaining issues as:

1. Maximum Height
2. Maximum Main Wall Height
3. Flat Roof Houses
4. Width of Dormers
5. Height of the First Floor, and Definitions of Basement and First Floor
6. Location of Required Parking Spaces

[18] The specific revisions now proposed to the text of the By-law are set out in Appendix B to Mr. Lehmann's Witness Statement (Exhibit 132A).

[19] The City undertook an extensive review of a year's worth of recent building permits for new detached houses, and also minor variance applications and COA results back to the enactment of the By-law in 2013. This was to highlight the issues and to determine if minor variances had been required for the building permits. This would assess the potential demand for changes to existing by-law standards. The examples of houses on narrower lots provided by the Appellants were also reviewed.

[20] This study assisted in demonstrating, he testified, that the zoning standards now proposed by the City would indeed respect and reinforce existing *Neighbourhood* character, as required in policy 4.1.5 of the OP. This policy, as amended by OPA 320, is critical to the City's argument, so some of its detail is set out here:

> 5. Development in established *Neighbourhoods* will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:
>
> …
>
> (c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;…
>
> The geographic neighbourhood for the purposes of this policy will be delineated by considering the context within the *Neighbourhood* in proximity to a proposed development, including: zoning; prevailing dwelling type and scale; lot size and configuration; …
>
> Proposed development within a *Neighbourhood* will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts. In instances of significant difference between these two contexts, the immediate context will be considered to be of greater relevance. The determination of material consistency for the purposes of this policy will be limited to consideration of the physical characteristics listed in this policy.
>
> In determining whether a proposed development in a *Neighbourhood* is materially consistent with the physical character of nearby properties, only the physical character of properties within the geographic neighbourhood in which the proposed development is to be located will be considered…
>
> **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.** Some *Neighbourhoods* will have more than one prevailing building type or physical character. …

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

[21] Mr. Lehmann opined that this policy requires only that development be generally consistent in form, so that some slight height differences within an area, for example, would comply with these policies.

[22] He pointed out that many of the regulations, and the reasons for requiring their review, are interrelated. Thus he dealt with the issues in the groupings he provided above.

Issue 1 – Maximum Height

[23] The Tribunal had approved in general the proposed measurement of a building height to the highest point of the roof, replacing the former measurement to the midpoint of the roof in some of the former by-laws (para. 69). It desired more clarity, however, as to how the new measurement would "reinforce the existing character" of heights permitted in certain areas (former Toronto itself, former York and possibly North York). The City should therefore review the maximum heights for all areas where the maximum height was **not** changed, "to **compensate** for the reduction in height" caused by the new measurement to the highest point of the roof (para. 203). The Tribunal's concern was "it is not clear to the Board how the character will be reinforced by only permitting buildings that will generally be approximately 1 m to 1.5 m shorter because of the change in the point of measurement on roofs" (para. 72)

[24] Mr. Lehmann analysed the permitted heights in the former North York, York and City of Toronto. In the former North York By-law, the maximum heights for residential buildings were generally lower than those in other Cities' by-laws. Also, in North York heights had been measured from the centre line of the road, rather than from the (newly adopted) established grade. The maximum height for sloped-roofed houses had been 8.8 m. In the new By-law, in North York, the maximum height for detached residential zones was increased by 1.2 m to 10 m to provide the "compensation" desired by the Tribunal.

[25] Existing building permit applications for North York were reviewed in the staff study. These proved that there was an effective correlation between this 1.2 m increase and the difference in measurement between the former center line of the road and the present established grade. Mr. Lehmann opined therefore that a 10 m maximum height for residential detached in North York is appropriate. He found support in the City's review of variance applications. The 1.2 m increase for North York is warranted, to "compensate" for the reduced height where the mid-point measurement had been used (2018 Decision, para. 78). However, in his opinion there is no planning rationale for a further increase of 1.8 m here, as the Appellants desire (The Tribunal notes that the total increase would then be 2.2 m, as seen in Mr. Goldberg's evidence).

[26] The maximum height in the former City of York had been even higher, 11 m. The limit elsewhere for residential detached was 9.5 m or less. The building permit and minor variance review showed no planning rationale to require an adjustment to the maximum height in York. Mr. Lehmann opined that it would be inappropriate there to provide any additional height.

[27] Respecting the former City of Toronto, the former Zoning By-law No. 438-86 had permitted a wide range of heights in various areas, from 9 to 12 m. These were not increased in the new By-law, despite the change in height measurement to the peak. As mentioned, this is now taken to the highest point of a building with a pitched roof, rather than to the midpoint of the roof. Following the Board's direction and the review of

COA decisions, it was determined that an increase of 1 m in height in the R and RD zones in the former City is indeed appropriate. As there are many lots with widths 7.6 m or less in these areas, this height increase will result in a roof peak similar to the existing heights there. These would be more in keeping with the character of those neighbourhoods, as the OP requires. He illustrated this by sketches in Attachment “B” to his Witness Statement (Exhibit 132, also in Exhibit 131B, p. 319).

Issue 2 – Maximum Main Wall Height

[28] In the 2018 Decision, the Tribunal accepted in principle the establishment of new regulations governing the maximum height of specified pairs of main walls. It observed that these limits are intended to ensure that roofs of dwellings have appropriate slopes (para. 83). It envisaged a revision of some of the proposed main wall heights (“MWH”) to ensure that such slopes are maintained. As well, it found that numerical values for the portions of the main walls that can exceed the height permissions may also require review for smaller lots with frontages of 12 m or less.

[29] Mr. Lehmann testified that it was necessary to consider further the areas of the City that already measured height to the roof peak, for which overall height would not be increased. There, if an increase in the height of main walls were implemented, the results in these areas would be buildings with flatter rooflines. This change would not maintain the character of these neighbourhoods, as required in the OP policies. In his opinion, a 7 m MWH limit is thus appropriate for the residential zones in Etobicoke, East York and Scarborough, where the maximum overall height is 10 m. Houses with one storey above an integral garage are more in keeping with the existing physical character of these neighbourhoods.

[30] For the former City, the proposed MWH are the higher of 7 m, or 2.5 m below the permitted maximum height. Therefore a building with a height limit of 10 m can have a 7.5 m MWH. An increase in overall dwelling height to 10 m in the former City, where most of the narrower lots are located, will automatically result in a permitted MWH of

7.5 m. This would be in keeping with the character of these neighborhoods, as required by the OP.

[31] The staff review of building permits and variance applications demonstrated that many variances for MWH would not have been necessary if more design flexibility had been allowed. Therefore the new By-law would permit various “elements” of main walls to exceed the maximum MWH, with different percentages for various lot widths. Therefore there is no planning justification to increase the maximum height of the main walls, but merely to create permissions for variations within them, depending on lot width. His illustrative sketches (Exhibit 131B, p. 321, and in Exhibit 132) help demonstrate these proposals.

[32] For the front and rear main walls, the staff review illustrated that for lots of 12 m wide or more, permitted extensions above the height of the walls could appropriately be set at 60% of the maximum MWH. However, for lots less than 12 m wide, the total width of the main wall is narrower. Thus it is reasonable to reduce the percentage of the main walls which must comply with the maximum MWH. A minimum of 50% of the front and rear main walls would have to comply with the maximum MWH on lots narrower than 12 m but wider than 7.5 m. For even narrower lots 7.5 m and less, that required percentage is further reduced to 40% (see sketches, p, 321 above).

[33] Mr. Lehmann then described the proposed revisions to the MWH rules, which he considered appropriate and consistent with the character of the various neighbourhoods:

1. On narrower lots, a reduction in the **percentage** of the **front and rear** walls that must comply with the standard limit on MWH (see wording below). This would provide design flexibility and facilitate components such as a gable on narrower lots, while permitting pitched roof houses of two-and-a-half storeys.

2. Permission for a percentage of a **side** main wall to exceed the maximum main wall height. The minor variance study demonstrated that an exemption for 30% of the side main wall is reasonable and would reduce variances from this regulation.

[34] Mr. Lehmann's wording for amendments to the R, RD, RS and RM zones is, using the RD zone as an example:

> 10.20.40.10 (2) **Maximum Height of Specified Pairs of Main Walls**
>
> In the RD zone, the permitted maximum height of the exterior portion of **main walls** for a **detached house** is the higher of 7.0 metres above **established grade** or 2.5 metres less than the permitted maximum height in regulation 10.20.40.10(1), for either (A) or (B) below:
>
> (A) all side **main walls**, for at least 70% of the total width of each side **main wall**; or
> (B) all front **main walls** and all rear **main walls**, for at least:
> (i) 60% of the total width of all front **main walls** and all rear **main walls** if the **building** is on a lot with a **lot frontage** of 12.0 metres or more;
> (ii) 50% of the total width of all front **main walls** and all rear **main walls** if the **building** is on a **lot** with a **lot frontage** greater than 7.5 metres but less than 12.0 metres; and
> (iii) 40% of the total width of all front **main walls** and all rear **main walls** if the **building** is on a **lot** with a **lot frontage** of 7.5 metres or less.
>
> (emphasis from original retained)

[35] Mr. Lehmann opined that these revisions would provide increased design flexibility, yet maintain the existing character of neighborhoods as the OP requires. They are reasonable and appropriate in his view.

Issue 3 – Flat Roof Houses

[36] The 2018 Decision had noted a concern that "for houses on lots with frontages of 12 m or less, it will be difficult to construct two storey dwellings of an acceptable size without needing variances". This applied to both pitched and flat roofed dwellings

(para. 99). The Tribunal thus ordered that detached houses on narrow lots with a flat or shallow roof be reviewed as well.

[37] The 2018 Decision recognized that flat-roofed houses are not a predominant built form in most areas of the City. Yet they can be compatible with two-storey pitched roof dwellings, Mr. Lehmann confirmed, even when they are above the 7.2 m height limit. However, restricting their height minimizes potential privacy issues, thus complying with OP policy 3.1.3 (d).

[38] Mr. Lehmann testified that the By-law's policy objective was to ensure that the **top** of a flat roof house is approximately the same height as the **eaves** of pitched-roof houses. This would promote neighbourhood consistency as the OP requires. In their review therefore staff proposed that the height of flat roof dwellings be similar to that of the permissible **main wall height** of pitched roof homes. The maximum MWH for a flat roof building should thus be revised to the higher of 7.2 m or 2.5 m below the maximum allowable building height for the area.

[39] Also proposed is the removal of the restriction that a flat roof building be only two storeys, although the Tribunal initially approved of this restriction (para. 98). If the maximum allowable height would permit a three-storey building, one with a flat roof can also be three storeys.

[40] In addition to these amendments, it is important in Mr. Lehmann's opinion to reconsider what constitutes a flat roof. The City's building permit and minor variance review found that the regulation for a detached house with a flat or shallow roof, as worded, was capturing roofs that appear to have a definite slope. To rectify this, it is proposed that the current 1:4 ratio for a flat roof be changed to the 1:10 ratio from the former North York by-law. This would be more accurate in distinguishing roofs that are closer to level or flat. The City proposes to apply this change in the description of a flat roof to all lot widths in the RD zone throughout the City. In Mr. Lehmann's opinion, this is fair and appropriate.

[41] The proposed amendment for a flat roof building in the RD zone (as one example) would be:

Despite regulation 10.20.40.10(2), if a **detached house** in the RD zone has a roof with a slope of less than 1.0 vertical units for every 10.0 horizontal units for more than 50% of the total horizontal roof area, the permitted maximum height of all **main walls** is the higher of 7.2 metres above **established grade** or 2.5 metres less than the permitted maximum height in regulation 10.20.40.10(1).

Issue 4 – Width of Dormers

[42] Mr. Lehmann testified that the 2018 Decision recognized that the By-law limit on the size of dormers to 40% of the width of the side, front or rear main walls might well restrict certain house designs. This would not actually conflict with the OP, the Tribunal found, because "roof dormers will still be allowed and they can continue to form part of the physical character of neighbourhoods" (para. 88). However, dormer widths could well be too restrictive on smaller lots of 12 m or less, and so a review of the percentage was ordered for such lots.

[43] In its review, the staff recognized that the way dormers relate to the maximum MWH could be clarified. The revision would not change the intent of the original, but would ensure that the exterior sides of a dormer are not "main walls", so long as two criteria are met:

1. the “face” of the dormer must be above any part of the main wall that does not exceed the MWH; and
2. the width of the face of the dormer(s) may not exceed 40% of the width of the portions of main wall that do not extend above the MWH limit.

[44] These proposals are illustrated in Exhibit 131B, p. 323. This approach provides consistency and fairness, he opined, and should be applied to all low-rise residential buildings. Proposed amendments for the width of dormers would be made to all zones. For the RD zone, for example, the regulation would read as follows:

> (7) **Width of Dormers in a Roof Above a Second Storey or Higher**
>
> In the RD zone, on a **detached house** with two or more **storeys**, the exterior sides of a dormer are not **main walls** if:
>
> (A) the face of the dormer is in a roof directly above a part of a **main wall** that does not exceed the permitted maximum **main wall** height; and
> (B) the total width of the faces of dormers in the roof described in (A) above is no greater than 40% of the width of the parts of the **main wall** below that does not exceed the permitted maximum **main wall** height, measured at the level of the uppermost **storey** below the roof.

Issue 5 – Height of the First Floor, and Definitions of Basement and First Floor

[45] During the 2017 Hearing, the City had proposed an amendment to the By-law provisions, on consent of all the Parties, that (effectively) limited the maximum permitted height of a first floor to 1.2 m above established grade. This acknowledged that the prior wording could have created confusion for split-level houses (The By-law defines established grade as the average elevation of the ground measured at the two points where the projection of the required minimum front yard setback line of 0.01 m past each side lot line.)

[46] The amended regulation was approved in the 2018 Decision. It adjusted the first-floor height limit to the lowest point of the main pedestrian entrance. Despite this, the Tribunal ordered the City and Parties to undertake further review of this for lots with smaller frontages of 12 m or less.

[47] The Tribunal's concern was that "the requirement of the first-floor height above established grade can push the height of dwellings upwards particularly on lots with narrower frontage". (paras 106-107). However, the 1.2 m first-floor height was not a minimum height, Mr. Lehmann pointed out, but a **maximum** height, intended to keep the first floor near the main pedestrian entrance closer to established grade.

[48] In Mr. Lehmann's opinion, this proposed standard is still fair and equitable for all low-rise residential buildings, no matter the lot width. This would read, as an example for the RD zone:

> 10.20.40.10(6) **Height of Main Pedestrian Entrance**
>
> In the RD zone, for a **detached house**, the elevation of the lowest point of a main pedestrian entrance through the **front wall** or a side **main wall** may be no higher than 1.2 metres above **established grade**.

[49] **Definitions** – The definitions of "First Floor" and "Basement" also relate to building height. Therefore the Tribunal ordered that they be included in a review for all residential lots.

[50] Another purpose of the 1.2 m maximum height for a first floor was to ensure that basements do not excessively project above the ground. This is important, he emphasised, because the floor area of a "basement" as defined is generally not included in gross floor area ("GFA"). Limits to GFA in the By-law control the overall size or volume of a building. The City's proposed **definitions** of "basement" and "first floor" in Chapter 800 of the By-law would therefore ensure that **most of the basement height remains below established grade**. Then the basement floor area does not count as GFA, and the limits on GFA control the massing of the floors above. The definition of "Basement" is thus proposed to be the following, which would apply to buildings in all zones:

Basement

means any part of a **building** where the elevation of the midpoint between the floor and the bottom of the joists directly above it is lower than the elevation of:

(A) **established grade** in the Residential Zone category and the Residential Apartment Zone category; and

(B) in all other zone categories, the average elevation of the ground along the front lot line.

[51] Under this revised definition, if the midpoint of the vertical dimension between the basement floor and the joists of any part of the building above it is located below established grade, this part of the building is a "basement". It is therefore excluded from GFA. It is also not counted as a storey, where the By-law limits the number of storeys. This revision assists in applying the rule to split-level or multiple-level buildings, because portions of the building can be evaluated as a basement independent of the others (see Exhibit 131B, p. 324).

[52] Mr. Lehmann stated that a corollary to the definition of “Basement” is a proposed clarification of the definition of “First Floor”. The proposal is:

First Floor

means the floor of any part of a **building**, other than an area used for parking, that is:

(A) directly above a **basement**; or

(B) if there is no **basement**, closest to the elevation of:

(i) **established grade** in the Residential Zone category and the Residential Apartment Zone category; and

(ii) the average elevation of the ground along the **front lot line**, in all other zone categories.

Issue 6 – Location of the Required Parking Space

[53] Providing parking spaces on a lot has been a long-standing issue in the City, Mr. Lehmann recounted. Since about 40% of buildings were constructed before zoning was enacted in the early 50's, there was little control over parking spaces on a lot. Many houses were built without such spaces, especially in the downtown. With the growth in automobiles, there was pressure to find alternatives for lots without parking spaces.

[54] Residential parking is a complex issue across the former municipalities, he stated, with varied approaches in response. In former Toronto, the issue of parking spaces on lots that could not accommodate them resulted in complex solutions. One example was on-street permit parking. In some areas a "parking space" was not required on lots of 7.6 m or less, and integral garages were prohibited on these lots. As well, many owners applied for minor variances to a requirement that a parking space be behind the front wall of the building. "It was a bit of a mess", he testified.

[55] Staff reports in 2004-2006 considered parking in a front yard from a zoning and licensing perspective, including required driveway dimensions and front yard landscaping. The Province passed the *City of Toronto Act, 2006* authorizing a permitting system for parking spaces in a front yard. This was recognised in Regulation 10.5.80.11(3) of the revised By-law.

[56] The Appellants had argued in the earlier Hearing that the need to provide a parking space, and the requirement that it be located behind the main wall of a house, created problems for designing reasonably-sized dwellings on smaller lots (2018 Decision, para. 184).

[57] Mr. Lehmann pointed out that there are choices regarding residential parking. Some owners wish to have an integral garage, others a garage in the rear yard, and still others a carport. As mentioned, the largest number of small residential lots (7.6 m or

less) is located in the former City. His sketches demonstrate, he stated, that small lots can accommodate parking spaces within the building as well as provide adequate living accommodation. This is especially true when considering an increase in maximum heights for these areas. Parking behind the front main wall can also be accommodated in the former municipalities such as East York, where the maximum height will not change.

[58] In his opinion, an “as-of-right” permission to locate a parking space in the front yard as the Appellants suggest, would have a significant impact on the character of many City neighborhoods. This would conflict with the OP, and undermine the permit system for front yard parking. Therefore there should be no change to the parking space location requirements.

Lehmann’s Conclusions

[59] The City’s proposed amendments to the regulations have addressed most of the Appellants' concerns related to low-rise residential buildings, including those on narrow lots. They set a reasonable and equitable performance level for all residential developments by revising regulations that have resulted in many variance requests. Such variances would no longer be required. The revisions provide more flexibility for house design, while still achieving OP policies to uphold the character of the neighbourhood.

Conformity with the Official Plan and Provincial Policy Documents

[60] All of the proposed amendments are appropriate, good planning and conform with and uphold the policies of the OP, Mr. Lehmann testified. They are also consistent with the policies of the former Provincial Policy Statement 2014 (the “PPS”) and its 2020 update, and conform with and uphold the policies of the Growth Plan for the Greater Golden Horseshoe 2019 (“Growth Plan”). He gave detailed explanations for both.

[61] The text of the proposed City amendments is, as mentioned, found in Attachment "B" – "Proposed Revisions to By-law 569-2013 by Issue", to his Witness Statement (Exhibit 132). All respond to the issues requested to be reviewed by the Tribunal in its 2018 Order.

[62] In Mr. Lehmann's Reply Witness Statement (Exhibit 132C), he refutes the arguments of the Appellants' witnesses generally by emphasising that the OP upholds the **existing** physical character of a neighbourhood (reinforced by the policies in OPA 320 – see Decision below). Suggested higher height and other limits as the Appellants desire for design purposes would not provide such reinforcement in all neighbourhoods.

Dwayne Tapp's Evidence

[63] The City's evidence in support of the proposed amendments was also provided by Mr. Tapp, as in the former hearing phase. Mr. Tapp has had lengthy experience with the City' zoning by-laws, both as senior examiner with the Toronto Building Department and staff advisor on COA applications. He was a Senior Planner on the Zoning By-law project team that drafted By-law No. 569-2013, providing the zoning examiner's perspective. Since 2012 he has been a manager of Customer Service and Plan Review.

[64] Mr. Tapp relied on Mr. Lehmann's outline and explanation of the proposed alterations to the By-law in response to the Tribunal's directions for reconsideration. For roof heights in North York, he concurred that where the maximum height for sloped-roofed houses had been 8.8 m, the limit was appropriately increased by 1.2 m (to 10 m). This adequately addressed the measurement change from the midpoint of the roof to the roof peak. For the former City, the proposal to amend heights by 1 m is also appropriate. The maximum residential height of 11 m in the former City of York By-law No. 1-83 was generally higher than in the other former by-laws. Based on the staff review of building permits and minor variance requests, there is no need to adjust the maximum height for residential buildings there.

[65] The maximum MWH amendments proposed for narrow lots (see Attachment “B” to Mr. Lehmann’s Witness Statement) allow for a reduction in the percentage of front and rear walls that is required to comply with the maximum MWHs for these lots. Mr. Tapp opined that this revision would provide greater design flexibility for these lots. It should also result in fewer applications to the COA for relief from the maximum MWHs.

[66] It is also his opinion that the proposed amendments for flat roof houses will result in a MWH permission that is similar to that of a pitched roof house, which is the policy direction. The wording is clear, and is easy for a zoning examiner to both interpret and communicate to others.

[67] The rules for the width of dormers have been difficult for City zoning examiners to interpret. The proposed amendments will clarify these, since the examiner can better differentiate between a dormer and a window within the main wall.

[68] Respecting the height of the first floor and the definitions of basement and first floor, Mr. Tapp concurred with Mr. Lehmann that the revised definitions provide clarity. They ensure that more of the height of the basement remains below established grade.

Joint Appellants’ Key Recommendations

[69] Mr. Kanter summarised the main concerns that the JA had with the proposed regulations. The principle behind most of the Appellants’ desired changes is that the By-law should comply with the OP, but still permit “appropriate development”. Development should not be unnecessarily restricted so that a reasonable design requires minor variances. The Tribunal had approved this principle in para. 203 of the 2018 Decision. The JA recommended principles and revisions are, in summary:

1. Height – The Tribunal found that the acceptable principle is that owners should be “compensated” for changes in the method of measuring height, resulting in shorter buildings than allowed previously.
2. Integral garages – suitable living space should be allowed, together with an as-of-right integral garage.
3. Main wall heights – The JA argue for 8.3 m above grade, while the City proposes only 7 m.
4. Flat roof houses – the permissible height should be 9.5 m above grade, or 1.8 m less than the permitted maximum in all R zones, versus the City’s 7.2 m or 2.5 m less than maximum. These heights would be closer to those of sloped roof houses, and a greater height permission would reduce required variances. The City’s restriction to the height of eaves of pitched roof homes prefers one style over another, and without authorization.
5. Dormer – “face” should be added to the definition.
6. Definition of “Basement” – return to the earlier definition (Toronto, York) of “portion of a building with a floor at least 0.9 m below grade”, for ease of calculation. The City’s proposed mid-point between floor and bottom of ceiling joists, if lower than established grade, would make it more difficult to construct a “Standard House” without requiring variances.
7. Parking – the Appellants support any required “parking space” to be located a front yard for lots 12 m or less, if it can be on private property. This would permit a lower overall dwelling height and more living space, as there would be no need for an integral garage. The City does not permit a front yard space as-of-right, again increasing the likelihood of variances for the standard house.

Joint Appellants' Evidence

[70] The evidence of the JA was provided by Messrs. Pfeffer, Hunt and Swinton, as well as by Mr. Goldberg. They utilized examples of properties that had required many variances, or that would pose design problems under the City's proposals. These will not be analysed in this Decision because the Tribunal agrees with the City's summation of their relevance and import (see Conclusions below).

James Pfeffer's Evidence

[71] Mr. Pfeffer is an architect and infill development expert. The JA recommendations are found in a table at p. 585 of Exhibit 139B, a "Comparison Table" of the Appellants' proposed changes to the City's amendments. Their recommendations are based on the Tribunal's declared principle that there should be the ability to build as-of-right a dwelling of a reasonable size, without the need to seek minor variances.

[72] Mr. Pfeffer reviewed the heights in the areas proposed. In his opinion, the height change to the roof peak would not be compensated for by the total height permitted. There would be loss of design potential. Height variances would still be needed. The JA believe the difference amounts to 1.8 m, and that the City's proposed 1 m increase would not suffice. It would be an effective reduction in the permitted height, which is inconsistent with the OP and the Tribunal direction.

[73] In addition, the proposed limitation of the roof slope in R zones would reduce the pitch formerly permitted, thus altering existing neighbourhoods. Previously the permitted roof pitch would accommodate another storey. This is now lost. A 3:6 pitch or a 45-degree angle should be allowed.

[74] Respecting the maximum height of specified pairs of main walls, the JA points to the previous measurements which could accommodate building mass in a gable under

a pitched roof, or in an upper storey. This is no longer permitted if walls are above the maximum MWH. This constitutes in their view controlling the building style and not construction. Previously, two storeys were permitted above a garage, as were windows on the sides of houses, which are common. This protects the streetscape, yet allows massing in the middle portion, with a side gable. The JA prefer a dormer exemption of 50% of a roof for lots above 12.1 m. If not, variances would be required in future. Even greater projections should be permitted depending on lot size.

[75] The JA would replace the 7.5 m suggested by the City for the height of pairs of main walls by a measurement of 8.3 m. This limit should apply to the sides, or the front and back pairs, but not to both. He stated that "building value" could not be constructed if walls are so controlled. The legacy by-laws by contrast had no storey limit, nor restriction on flat roofs.

First Floor and Basement Definitions

[76] The JA accept the City's proposal for first floor, but object to the definition of basement. This dispute is about what is counted as GFA and a storey, for height calculations. It arose because at-grade integral garages became common following prohibition of reverse slope drives in some former municipalities, thus eliminating garages at the lower or basement level. The resulting first floor garage contributed to GFA, and became a storey, reducing living space. This also affected the possibility of retaining a mutual drive, as many are too narrow and dwellings too long. Thus variances have been required to delete the By-law requirement for a parking space.

[77] Mr. Pfeffer reviewed the previous provisions, concluding that a basement with a floor 0.9 or 1 m below grade resulted in a house type typical of Toronto neighbourhoods. It is a "practical point" for a basement, he testified. The basement floor should be below ground, but only 0.9 m, so that it does not become a "first floor" or a storey. A shallow basement of 2 m in height cannot be occupied under the Building Code. He opined that the City's amendment would result in the basement being

counted as GFA or a storey. The JA prefers a definition of only 0.9 m or more below grade as better preserving existing neighbourhoods. He illustrated by diagram at p. 510 of Exhibit 139B that under the City's wording, the lowest floor shown is not a "basement" (as would be commonly understood), and would thus be included in the GFA of the building. This rewrite of the definition would be more restrictive than the previous one sent back for reconsideration by the Tribunal, in his opinion.

Flat Roof Dwellings

[78] The JA would accept the City's wording of Regulation 10.20.40.10 (4) for flat or shallow roof dwellings, but believe that height limits on flat roofs are redundant because of the limits on MWHs. Mr. Pfeffer stated: "as a minimum, the flat roof height should function with...two floors above a garage." (Exhibit 139B, p. 490). The JA propose an increase in the front and rear MWH of a flat roof building to 9.5 m. This would control the height of the flat roof. As well, a setback or step back of 1.4 m for walls higher than 9.5 m is appropriate, to ensure an appropriate mass within the same envelope as a pitched roof structure with gable. Mr. Pfeffer finds this acceptable from a Building Code perspective.

[79] Respecting the City's addition to the exterior "side" of dormers: while the other language is acceptable, the JA prefers the "walls" of a dormer rather than "exterior sides", so as to clearly include all three exterior faces.

Front Yard Parking Space

[80] Parking for lots of 12 m frontage or less is proposed to be in a front yard, or a side yard abutting a street, if there is no parking space behind the front main wall.

Stephen Hunt's Evidence

[81] Additional evidence for the JA was given by Mr. Hunt, an architectural technologist of Hunt Design Associates Inc. He has had a great deal of experience in urban design of residential communities. He was qualified as an expert in urban design and architecture. He referred to the failure of discussions with the City on the issues left to be resolved in the 2018 Tribunal Decision. He expressed the goal of the JA as ensuring that the extent of development permitted by former by-laws is maintained, so that livable, viable homes can be built as-of-right.

[82] He agreed with the testimony of Messrs. Swinton and Pfeffer on the issue of height limits. Since the former roof height from eaves to top of ridge line was 3.6 to 3.8 m, a common style, the JA-proposed 1.8 m addition in overall height provides a reasonably proportioned and acceptable roof. This is higher than that the proposed increase of 1 m would permit. Similarly, a greater MWH could accommodate reasonably sized bedrooms, without sloping walls, preferred by homeowners.

[83] A higher height for flat roof homes is needed to accommodate an 8-feet garage height. Otherwise the design is not possible, as clients want an integral garage. Respecting flat roofs for lot frontages of 12 m or less, he noted and agreed with the Tribunal's concerns for acceptable designs (see paras. 99 and 100 of the 2018 Decision), and would adopt the recommended changes in the JA Comparison Table.

[84] Respecting the first floor and basement definitions, the City's proposal would require a basement to be included as either GFA or a storey, as set out by previous witnesses. This is an undesirable result.

[85] In Tab 17B of Exhibit 139B, he provided drawings illustrating his arguments. Mr. Hunt introduced a drawing showing a typical four-bedroom dwelling, termed during the Hearing a "sample floor plan", at p. 533. This showed a garage and an open space at the basement level, and both a dining and family room on the first floor, and two- and

one-half baths. At p. 535, he illustrated the JA's proposal for a basement with floor 0.9 m below grade, concluding that this is a reasonable definition and height. The City's diagram at p. 324 which shows a backsplit is not the usual or common built form.

Peter Swinton's Evidence

[86] Next in the group of witnesses for the JA was Mr. Swinton, a semi-retired architect and planner who had worked for the City for five years, as well as having other public and private sector clients. He has been involved in acting for Conservatory Group since 2009, and provided expert evidence in the 2017 Hearing.

[87] He testified that the City has not considered all areas where the point of measurement for height has changed to roof peak, and where height was increased to compensate for the change. In his view sufficient additional height has not been provided to maintain the same effective height (as other JA witnesses had stated.) His argument is set out in paras. 14-17 of his Witness Statement (Exhibit 139B, Tab 18, p. 543).

[88] He concludes that for North York, it is not clear how much of the proposed 1.2 m increase was meant to raise heights to the level of other by-laws, how much was meant to offset the measure from the centre line of road, and how much was to compensate for the change in measurement from mid-point to peak. The increase of 1.2 m there in his view was not intended merely to compensate for the change in measurement to the peak. That would also have triggered the need to compensate in Toronto, York, and Etobicoke (for other than singles). This did not occur. In fact, for one zoning category in North York the maximum height was increased, yet the height limit in storeys was reduced from three storeys to two, where it remains. Heights in North York should be increased by one additional metre, beyond 1.2 m (a total of 2.2 m as stated by Mr. Goldberg, below). This increase would bring the height in line with the 1.8 m being sought by the JA for Toronto, York and in Etobicoke for other than singles.

[89] The City responded to the Board's direction for further study by increasing the height limit in the former City by only 1 m, he emphasised. Measuring to the peak, this increase would only allow for a roof height of 2 m. This would lower the eave, thereby reducing the main wall height and the usable space within the house. The JA witnesses showed that roof heights are generally more than 2 m. The City's increase would therefore result in the flatter roofs referred to in paras. 69 – 78 of the 2018 Decision. In his opinion, this increase is insufficient to meet the intent of the earlier City By-law No. 438-86, thus not reinforcing the existing physical character of neighbourhoods as the OP requires. Mr. Swinton's recommendations were set out at p. 549 of his Witness Statement, principally to increase overall heights for **all** residential zones by 1.8 m. He states that all RM2 zones in North York should be altered to permit three storeys rather than two.

[90] Mr. Swinton discounts the City's variance study as irrelevant, since in his experience applicants for variances reduce their designs to require as few as possible.

[91] He recommends (as do other JA witnesses) that the definition of "basement" be: "Basement means the portion of a building with a floor which is at least 0.9 metres below established grade." His rationale is that overall height is controlled by the By-law, so that the height of an as-of-right building is therefore capped, regardless of what happens below. He testified that to maintain the intent of the 2018 Decision the first floor and basement definitions must be revised to ensure that a **"reasonable basement"** can be constructed **below a first floor**. This must be without incurring the GFA or storey height penalty mentioned in the Decision.

[92] Providing this amendment is made, the JA would accept the City's definition of "First Floor" (see Mr. Lehmann above).

[93] Respecting parking location on lots of 12 m or less, the By-law requires provision of a parking space, and that it be located behind the front wall. Thus it also requires a front driveway on every lot not serviced by a rear lane or a flanking street. Even though

Regulation 10.5.80.10 (4) allows a car to park on a driveway, 10.5.80.10 (3) does not allow that driveway to serve as the required “parking space”. Therefore the required parking space behind the front wall ends up being in a garage. The JA would not merely seek more parking by challenging the requirement for a parking space, nor dispute the City’s concerns over depressed garages, or the landscaping requirements for front yards. Practically, since cars are parked on driveways in any event, the JA seeks to make “front yard parking” another option. People then have a choice whether to have a garage or not. It is their opinion that the parking and height provisions should allow the flexibility to permit both options as-of-right.

[94] For main wall heights, Mr. Swinton supported the JA recommendation to increase these to 8.3 m (not just 7 m), or 2.5 m lower than the maximum height, whichever is greater. This does not affect the overall height in areas where height was previously measured to the peak. For example, in a 9 m height zone in Scarborough, the overall maximum of 9 m would remain. There the maximum MWH of 8.3 m would be introduced where none existed. He pointed out that (the JA-desired) two storeys above a garage would not fit within the 9 m maximum peak height.

[95] He opined that imposition of MWH restrictions across the City is not merely a “translation of the underlying zoning” but would be applying the strictest protocol across the entire City. The Tribunal ruled that such a MWH limitation is appropriate along with height restrictions to the top of the roof. However, the MWH should not be overly restrictive, he opined, so as to require further variances.

[96] Respecting flat roofs dwellings, Mr. Swinton testified that the City’s revisions to Regulation 10.20.40.10 (4) will not allow the construction of a flat-roofed two-storey house with a front integral garage on a lot less than 12 m wide, if the overall height limit is less than 11 m. For a sloped roof house and a lower height limit, the upper portion (above head height) of the second floor can be incorporated into the roof slope, while allowing a viable floor plate. This option would not be available for a future flat roof design. Thus he objected to the City’s proposed limitation of flat roof houses to the

maximum height of the main wall of sloped roof houses. This is not in keeping with the intent of the underlying zoning, he stated, and is in effect a reduction in height.

[97] The JA witnesses illustrated, he emphasised, that flat roof homes with roof heights higher than the eave line of sloped roof houses can comfortably fit within areas of predominantly sloped roof houses, and still reinforce the existing physical character of neighbourhoods. Thus the flat roof height limit should be raised, from the proposed higher of 7.2 m above established grade or 2.5 m less than the permitted maximum height, to a 9.5 m minimum height above established grade. **This could accommodate two full storeys above a garage**, or a height that generally equates to a sloped roof in the same area.

[98] Mr. Swinton would extend this regulation to R, RS and RM zones as well as to the RD zones.

[99] He concluded that the proposals in the JA recommendations column in the Comparison Table reflect the underlying intent of zoning by-laws of the former municipalities, and therefore comply with the sections of the OP referred to in the 2018 Decision.

Michael Goldberg's Evidence

[100] Mr. Goldberg also provided opinions on the City's proposed amendments.

[101] He was qualified and had testified as an expert in land use planning in the previous sub-phase. He adopted the opinions of Messrs. Swinton, Hunt and Pfeffer in order to avoid duplication of evidence, then gave his own opinions on some of the issues. He too referred to the "Comparison Table" of the Appellants' proposed changes, which are based on the principle of typical as-of-right dwellings of a reasonable size, not requiring minor variances.

[102] Respecting maximum height, he concurred that it should be the same as permitted previously. Thus it should be raised by 1.8 m and not 1 m, in Toronto, York, Etobicoke (except for single detached) and North York. This would compensate for the measure of established grade in North York as well as the measurement change to the top of roof. In North York, the added height should be 0.4 m added for the established grade, and 1.8 m for the change to midpoint, equalling a 2.2 m increase in total. As well, the RM2 zone should be restored to permit three storeys rather than two, closer to what was previously possible. Roof heights could therefore be greater than 2 m, as is typical of the former by-laws.

[103] Maximum MWHs, which are new standards, would limit wall heights in the RD zone to 7 m above established grade, or 2.5 m less than the maximum height for the area, if that height is higher than the minimum MWH. The JA prefer this MWH limitation to be 8.3 m, as this would reflect a roof height up to 3.6 m, allowing typical roof designs as well as second-storey windows (as seen in Mr. Hunt's visuals.) This would allow new and replacement dwellings of a more contemporary standard, without requiring variances.

[104] Flat roof proposals appear to Mr. Goldberg to conflict with OP policies, being effectively lower for certain frontages than the prior measurement to the midpoint. He said the former design Guidelines go the opposite way. To address this, as well as the apparent prohibition of a third storey, the JA prefers that where a front or rear main wall is above the higher of 9.5 m or 2.5 m less than the permitted maximum, additional height for a flat roof is acceptable. This would permit roof heights for flat roofs beyond that of the eaves of nearby pitched roofs, as was available in the past by-laws. This should be available in all residential zones. He objected to the City's proposals for various height limits (para. 29, Exhibit 139B, Tab 19).

[105] This suggestion should be combined, as others testified, with a 1.4 m setback from the main walls below, to permit third floor dormers within the roof. He said that this would resemble the massing or angular plane of a 60-degree pitched roof. This would

not lower the previous height permissions, nor deny design possibilities for flat roof homes. He supported the height of a flat roof at the midpoint of neighbouring peaked roofs, as found in many areas of Toronto.

[106] The JA would continue the definition of “basement” as the portion of a building with a floor at least 0.9 m below established grade, as stated. Their objection to the City’s proposal set out by Mr. Lehmann is that under the By-law, the “first floor” is defined (by agreement and confirmed by the Tribunal) as the floor closest to established grade. Therefore even a basement floor “set at 0.9 below established grade and the first floor above set at 1.2 from established grade would result in the basement being the closest floor to established grade and therefore be determined to be the first floor” (Exhibit 139B, Tab 19, para. 37). It would also be “storey”. Thus even an underground basement would add another “storey” to the house, and be counted as GFA. It would also add construction costs for the required high ceiling heights. His solution would be to lower the floor elevation of the basement to the point where it is **further** away from established grade than the first floor above (para. 38).

[107] Respecting the regulation for location of a “parking space”, Mr. Goldberg challenged Mr. Lehman’s assertion that locating parking in the front yard will impact neighbourhood character, in conflict with the OP. Mr. Goldberg opined that there would be no such impact, should a purchaser choose not to place the required parking space behind the front wall. There would be only the removal of a garage door, and possibly a lowering of the structure if no garage is included. The JA’s recommendation would apply only to narrow lots of 12 m or less, and would allow parking on a driveway, where it is already permitted. The required “parking space’ should therefore be permitted within an existing driveway for smaller lots, as-of-right. Integral garages are often used now for storage instead. As well, no permit system would be required.

[108] His overall conclusion was that the City’s revisions would have the effect of producing lower buildings of reduced size compared to prior by-law permissions. Buildings of a reasonable size would require more, not fewer variances. Thus he

supports the JAs' Comparison Table of suggested Regulations (Exhibit 139B, Tab 20), all of which he is satisfied meet the Provincial policies and the OP.

Swansea Area Ratepayers Group's Evidence

[109] Mr. Mills provided expert planning evidence in this continuation as he had in the first sub-phase. His opinions on the issues presented above were as follows:

- Building height – The City's proposed 1 m increase applies to R and RD zones. Mr. Mills does not support this, preferring a lesser increase. An additional 1 m would permit an integral garage, as the City's illustrations show (Exhibit 131B, Tab 6). This allows an additional storey, prohibited for narrow frontages. These lot sizes comprise 60% of the former City's lots. This increase would constitute in his view a new building typology and would not comply with the OP direction to fit in and reinforce the existing built form of neighbourhoods. No increase is needed for lots over 10 m wide, as few variances are sought for such lot sizes elsewhere.

- Height of pairs of main walls – Mr. Mills objected to the City illustration of the percentage of main wall lengths that can contain gable projections. He substituted for what he called a cricket-gable, a more common "box gable" up to the maximum building height. His illustrations showed different gable widths for different frontages, and he supported the City's proposal for linking the percentage to lot width. He also agrees with the MWH at 7 m. However, he pointed out that a 1 m increase in total building height results in a similar increase in main wall height. This is a greater proportional increase in the MWH than to building height. The MWH should not rise in this way, and should not be measured as less than 2.5 m higher than the maximum building height. A lesser MWH would result in construction advantages, and greater OP compliance.

- Flat roof detached house – MWHs here should be the same as the eaves of sloped roofs, as the City proposes. He did however approve of the JA's proposed setback or step back as an additional control on massing.

- Width of Dormers – The City's recommendations would be acceptable if the height of main walls remains as at present. He believes a clearer distinction is needed between a gable and a dormer (which should be defined). They should be treated as one figure for deciding their length relative to the overall main wall length for front and rear walls, but a lesser figure for side main walls. A gable should be defined as an external wall above the height of the main wall, for clarity.

- Height of first floor and basement – Mr. Mills agreed with the City's recommendations.

- Parking – Exemptions from parking requirements for lots with 7.6 m frontage would solve many issues for Mr. Mills. He would also extend the exemption to 9 m lots, which would solve the "obstruction" of first floors close to grade by integral garages. The new exemption would also cure parking space uses and location issues. Only a minority of homes in the larger amalgamated City have access via laneways.

[110] He acknowledged in cross-examination that most replacement homes now require variances. He stressed that zoning regulations must be flexible, based on the variety of neighbourhoods.

FINDINGS AND DECISION

[111] To summarize the Tribunal's directions from the 2018 Decision:

The City was to review By-law standards for ALL LOTS for:

1. Heights of structures;
2. Height of main walls;
3. Definitions of "first "floor" and "basement".

For SMALLER LOTS of 12 m width or less, the standards for:

4. Flat roofs;
5. Height of first floor above established grade;
6. Width of dormers;
7. Parking spaces;
8. Definitions of "first floor" and "basement".

[112] These reviews, the Tribunal found, might lead to revisions in development standards for all properties, rather than just those with lesser frontages.

[113] Sub-phase 2 of Phase 2 of these Appeals required many hearing days, and the review of many interrelated regulations. As a general finding, the City's revised standards and more recent additions to them provide additional leeway for developments. They vary according to those permitted in the heritage by-laws, as is appropriate for each area. The Tribunal approves in general this methodology for development and imposition of the regulations. It meets the OP requirement to respect and reinforce the **existing physical character** of each geographic Neighbourhood (OP s. 4.1.5). Zoning regulations must also be compatible with the physical character of established residential neighbourhoods (OP s. 4.1.8).

[114] The Tribunal can understand the JA's desires to meet their clients' demands for larger residential structures. However, most of their suggested increases to the built form standards would be appropriate in the Tribunal's view **only** in the geographic areas where their examples are located. These examples were less than 30 in total, and they were located in more affluent neighbourhoods. The Tribunal therefore agrees with Mr. Szobel's submission that these do not represent an adequate study or sample, so that the Tribunal could find the increases appropriate for most areas as suggested, and especially for smaller lots.

[115] The City's systematic and comprehensive approach to its building permit and minor variance study supports the City's finding that less extreme increases in the standards are more appropriate. As-of-right structures must meet the OP directions and cannot be beyond their guidance. Less extreme increases than desired by the JA may well result in more variances, but neighbourhood conformity will be better assured.

[116] The City witnesses confirmed that compatibility and conformity to the OP means that the proposed zoning regulations must meet the following policies, among others:

- Section 2.3.1 – "Healthy Neighbourhoods" – some physical change will occur over time, but a cornerstone policy is to ensure that new development respects the existing physical character of the area, thus reinforcing the stability of the neighbourhood.

- Section 4.1 – "*Neighbourhoods*" – policies and development criteria are to ensure that physical changes to established neighbourhoods are sensitive, gradual and generally "fit" the existing physical character. Development will respect and reinforce the existing physical character of the neighbourhood. Of particular relevance for these Appeals, the height, massing, scale and dwelling type of nearby residential properties, and prevailing building type(s) must be respected. By Policy 4.1.5, no

changes will be made through rezoning, minor variance, consent or other action out of keeping with the physical character of a *Neighbourhood*.

- Policy 4.1.8 requires performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods*. This was the overriding principle for the City's review, it appears, and is in the Tribunal's view an appropriate one. The JA proposals would not comply with the OP provisions as well as those of the City.

Effect of Previous Tribunal Directions (Decision, March 1, 2018)

[117] Mr. Szobel submitted that the Tribunal should interpret the previous Tribunal Decision from a "strict constructionist" perspective. It was inappropriate, he argued, for the JA to "read up" or "read down" the conclusions in paras. 78 (compensation for potential reduced height), 84 (MWH) and 88 (width of dormers) so as to support increases in the standards to permit their view of a "reasonably sized house".

[118] It is not clear to this Panel whether the previous Panel accepted the premise that Mr. Hunt's illustration constituted a "reasonable" house for all areas of the City, and/or for all lot sizes. Was it two storeys above a garage, as the JA clearly desire, but only two storeys on narrower lots? Mr. Kanter's statement of the "principles" determined by the Tribunal did not appear specific, in the view of this Panel ("suitable living space while incorporating an integral garage with suitable living space"). The Decision did refer to a standard (typical) size **two** storey dwelling on a narrower lot, without variances. Mr. Kanter stated in his summation that a greater flat roof height is required in all zones, as this would allow an integral garage and two storeys above grade in a 9 m height zone, without variances. Mr. Hunt's example of three storeys (p. 533 of Exhibit 139B) appears to represent the "reasonable" house that the JA is seeking. It would require the increases proposed by the JA to many of the By-law provisions.

[119] If so, as Mr. Szobel argued, the JA presented no evidence as to the prevalence of this building type, or of the areas in which it is now present. Given this lack of study and relevant statistics, the Tribunal cannot find that this building format would meet the test of conformity with the OP requirement for neighbourhood compatibility. The JA examples were of fewer than 30 properties, and were in the more affluent neighbourhoods on mainly larger lots. The Tribunal has carefully studied these and the resulting variances, claimed to be excessive in number. However, these do not constitute adequate evidence for the Tribunal to accept the increases supported by the JA for as-of-right construction, especially on narrower lots, and City-wide.

[120] The Tribunal remains mindful of the previous Panel's directions in para. 38 of the Decision for no unnecessary restrictions on development such as those requiring additional variances. However, it cannot accept the JA's present claim that the regulations now proposed will result in "unnecessary" minor variances, or that two storeys above a garage is a "prevalent" building type in residential areas, without evidence beyond that proffered. It has studied the City proposals anew from this policy perspective, keeping in mind the previous Panel's direction in para. 55 of the Decision (that the By-law should permit only the types of dwellings that define the predominant physical character of Residential areas).

[121] This Panel does not accept that the Decision's "principles" meant that it authorized an as-of-right design of two storeys above an integral garage for all lot widths, and in all areas of the City. That this is the goal of the JA is clear from the illustration on p. 535 of Exhibit 139B, in which the desired three storeys are labeled "the Appellants' proposed definition of first floor and basement". The City's proposal is shown there only as a two-storey structure. The illustration there of the City's proposed definitions is also confusing, as it does not show any part of the midpoint to be below established grade, and shows a two-storey basement.

Heights

[122] The new method of measuring overall height (to the roof peak rather than the midpoint) facilitated the measurement itself, but could (as the Decision noted) effectively reduce the maximum permitted height of a structure in some areas. The JA support the previously permitted heights throughout the City, as "compensating" for the change in measurement to the roof peak. They argued that the City's proposed 1 m increase would not recognise the "usual" roof height of 3.6 m. A 1.8 m increase should be permitted instead in Toronto and York, and 2.2 m in North York. They stated that the City based its proposal for a 1 m increase on a 2 m pitched roof, as illustrated by a sketch by Mr. Lehmann (Exhibit 134). Mr. Swinton testified that since the height measure is now to the peak, a mere 1 m height addition would in fact lower the eave, reducing the main wall height and the usable space within the house. This would result in the flatter roofs referred to in paras. 69-78 of the Decision.

[123] The City addressed this by the proposed 1 m height increase. It is not clear to the Tribunal from the evidence why this is insufficient, even if resulting in a flatter roof. It notes that the proposed height limit is also illustrated in the City's Exhibit 131B, p. 319. The JA proposals for a 1.8 m increase are illustrated in Mr. Hunt's drawings in Exhibit 139B, p. 536-542. The Tribunal concludes that the larger structures resulting from these increases would not conform to the OP. They would be suitable only in the more affluent sections of the City, from which the JA examples were drawn.

[124] The City supported its proposal by Mr. Lehmann's evidence that the proposed increase of 1 m in height in the R and RD zones is indeed appropriate and sufficient, based on its variance study. For narrower lots 7.6 m or less in the former City, this increase will result in a roof peak similar to those surrounding it, thus in keeping with the character of those neighbourhoods as the OP requires.

[125] The City's evidence is preferred. It provided sufficient explanation for the choices, which better conform to the OP policies to respect and reinforce the existing

physical character of each geographic neighbourhood (including **prevailing** heights, massing, scale, density and dwelling type). The extent of the increases was reinforced by the staff variance study, and thus is supported by actual evidence. It would apply to significant portions of the City's neighbourhoods.

Definitions of "First Floor" and "Basement"

[126] The Parties appear to accept the definition of "first floor" as a non-parking area directly above a basement (if any) (Exhibit 131B, p. 388). However, the definition of "basement" was very much contested. The JA say that the previous Toronto and York definition of the basement floor 0.9 m below average grade is "easier to calculate" than the "midpoint" now suggested by the City. The Tribunal found the arguments confusing on this point, concluding that the City's definition is more accurate and makes more sense. The JA witnesses' solution would be to lower the floor elevation of the basement to the point where it is **further** away from established grade than the first floor above (see Mr. Goldberg's Witness Statement, para. 38). The City's proposed definition would do this.

[127] The Appellants illustrated this with comparisons at Exhibit 139B, p. 510, p. 535 and other pages. The only apparent conclusion for this Panel is that the source of this proposal is the desire to construct significantly larger dwellings without the need for variances. If a "basement", defined as the JA would have it, could extend farther out of the ground (and it would, on the City's evidence), it would **not count** as GFA, since basements are excluded from this limitation. Therefore the GFA of the dwelling above it could be larger. This would greatly increase the size of residential structures, possibly by a storey.

[128] The City proposal is best illustrated at Tab 6 of Exhibit 131B, p. 324. Under the revised definition, if the midpoint of the vertical dimension between the basement floor and the joists of any part of the building above it is located below established grade, this part of the building is a "basement". It is therefore excluded from GFA. It is also not

counted as a storey where the By-law limits the number of storeys. This revision assists in applying the rule to split-level or multiple-level buildings because, as Mr. Lehmann stated, portions of the building can be evaluated as a basement independent of the others (see Exhibit 131B, p. 324).

[129] The Tribunal would only add a word to the definition, to clarify that the measurement starts at the “lowest” floor of the “basement”. This would assist in understanding this By-law requirement for all building designs. It would then read:

> **Basement**
> means any part of a **building** where the elevation of the midpoint between the lowest floor and the bottom of the joists directly above it is lower than the elevation of:
>
> (A) **established grade** in the Residential Zone category and the Residential Apartment Zone category; and
>
> (B) in all other zone categories, the average elevation of the ground along the **front lot line**.
>
> (underlining added only for emphasis here)

Main wall heights

[130] In the Tribunal’s opinion, the JA’s height recommendations for main wall heights are excessive. They appear to result from the desire to achieve two storeys above a garage in most areas in the City.

[131] Mr. Lehmann explained that the effect of the height increase on the MWH, given the wording of the “higher of 7 m, or 2.5 m below the permitted maximum” (as one example), is that a structure of 10 m in height can have a 7.5 m MWH. That is, an increase in overall height to 10 m in the former City, which has most of the narrow lots, would automatically result in a permitted MWH of 7.5 m. This Panel is satisfied that this constitutes good planning, as maintaining the directions of the OP to preserve

neighbourhood character. The illustration of the height increase at p. 319 of the City's Exhibit 131B appears to permit an extra floor if the interior floor heights are shortened somewhat.

Flat Roofs

[132] Respecting flat roof heights, Mr. Goldberg argued for the height of a flat roof to be the same as the midpoint of neighbouring sloped roofs. But in the Tribunal's view, this would create the same problem that the City tried to remedy by the change in measurement to the roof peak. The City's preferred measure for the height of flat roof dwellings, that is, similar to that of the main wall height of pitched roof homes, is preferable. It would better comply with the OP. The maximum MWH for a flat roof building should thus be accepted as the higher of 7.2 m or 2.5 m below the maximum allowable building height for the area.

Parking space

[133] A "parking space" located in the front yard is enthusiastically supported by the JA. Mr. Goldberg stated that the present rules make no sense and cannot be enforced. Vehicle parking is presently permitted on a driveway in front of an integral garage, and also in a front yard if there is a secondary suite. Integral garages are frequently used for storage, he stated. The City does not enforce the existing parking space requirement, effectively permitting this storage instead. However, the Tribunal agrees with Mr. Lehmann that as-of-right permission for a parking space in a front yard would alter streetscapes. This could result in curb cuts and driveways, thus preventing permit parking on the street. It could also create difficulties for front yard landscaping, tree retention and control of runoff. This change would not conform with the OP requirement that by-laws conform to existing and/or planned OP policies, which aim to preserve existing neighbourhoods. The Tribunal notes Mr. Mills' suggested exemptions for smaller lots from the requirement to provide a parking space. It will not so order without evidence from the City.

General Conclusion

[134] The Tribunal supports the City's proposals in most instances. This appears to the Tribunal to satisfy most of SARG's objections as well.

[135] Despite their summation of the principles in the Phase 2 Decision, the JA appear to prefer a structure with an integral garage and two floors above, with a front yard parking space. This is a "standard home" in their view. These should not require additional variances. Thus they reject the City's lesser standards in favour of greater design scope.

[136] The Tribunal agrees with Mr. Szobel that the relatively few and geographically narrow examples in the JA's evidence do not justify their suggested increases across the City. In cross-examination, Mr. Hunt admitted that his practice has been mainly outside of the downtown area, and that he has never designed a home without a garage. His diagram at p. 534 appears to represent the "usual 4-bedroom home" cited by the JA witnesses. He had no data on homes on narrower lots with integral garages. He did concur that the proposed 1.4 m step back proposed for flat roof homes by the JA is appropriate, and would ensure compliance with the OP. The City did not appear to oppose this change to the regulations for flat roof homes. Therefore as mentioned, the Tribunal will approve it.

[137] However, the Tribunal accepts in general the more modest increases and alterations as set out in the City's evidence. Its variance study supports these, even if new designs potentially require additional variances. The examples of larger properties are too few in number and geography to support those proposed by the JA. There should not be as-of-right permission to construct much larger homes in most areas.

The *Clergy* Principle

[138] The Tribunal accepts that the OP version applicable to these Appeals is the present in-force OP as of the date of this Decision, that is, inclusive of OPA 320. The *Clergy* principle should have no application here, though Mr. Kanter claimed that it did in earlier correspondence. The Tribunal finds that Mr. Szobel's submission that *Clergy* should not be applied because this is a municipal enactment and not an "application", is sound.

[139] *Clergy* is a Tribunal policy, not reflected in legislation, that favours the planning regime in force when a development application is made. This is in fairness to the applicant, who should not face a later-enacted policy in an appeal. It has been confirmed recently by the Divisional Court in *Masters v. Claremont Development Corp.,* 2021 ONSC 3311 (Div. Ct.) as a procedural policy developed and applied by OLT and its predecessors. It is not a legal principle. Subsection 3(5) of the Act requires decisions to be consistent with provincial policy statements and conform with provincial policies in effect "as of the date of the decision." Any application to municipal enactments is not clear, but the *Clergy* principle has been created to fill in any gap. Mr. Kanter referred to the date of the Appeals in 2013 or 2014 in founding an argument in favour of *Clergy*'s application here, seemingly favouring the earlier versions of the By-law. Presuming that the date of passage of the By-law is the applicable date he is relying on, the later OPA 320 nonetheless must be given more weight, in the Tribunal's view. The OP's emphasis on neighbourhood conformity was made even more explicit in OPA 320.

[140] All amendments to the OP including OPA 320 must be considered to be part of the City's more current view of good planning. This effectively requires the latest OP versions to be applied here, unless there is sufficient reason to apply the *Clergy* principle. As the reviewing court said in *Clergy*, the Tribunal has the discretion, if the circumstances of the case warrant the application of another principle, to do so. For instance, it may choose in its procedural discretion to consider and apply more recent

policies and more modern standards that are consistent with a compelling public interest. More recent criteria were applied by the OMB in *James Dick Construction Ltd. v. Caledon (Town)*, 2003 CarswellOnt 6221 (OMB) and other decisions. Here, since zoning standards must conform to the OP policies, and the latest policies emphasize compatibility ("respect and reinforce the existing physical character of each geographic neighbourhood"'), the zoning standards proposed by the City are more acceptable than those of the Appellants.

ORDER

[141] The Tribunal approves in principle the proposed development standards submitted by the City for approval in this Sub-phase 2 of the Phase 2 Hearing, with the following amendments:

1. 10.10.40.10 (5), 10.20.40.10 (7), 10.40.40.10 (5), 10.80.40.10 (5) Width of Dormers in a Roof Above a Second Storey or Higher

In the___zone, on a detached house with two or more storeys, the walls of a dormer are not main walls if:

(A) the face of the dormer is in a roof directly above a part of a main wall that does not exceed the permitted maximum main wall height; and

(B) the total width of the faces of dormers in the roof described in (A) above is no greater than 40% of the width of the parts of the main walls that do not exceed the permitted maximum main wall height, measured at the level of uppermost storey below the roof.

2. Restrictions for a Detached House with a Flat or Shallow Roof

ADD to all applicable sections:

Any front or rear main wall located above the higher of 7.2 m or 2.5 m below the maximum allowable building height for the area, whichever is greater, shall be set back a minimum of 1.4 metres from the building face for the front and rear main walls.

[142] The Tribunal directs the City to prepare a final version of the amendments to be submitted for the final approval of the Tribunal.

"D. Colbourne"

D. COLBOURNE
VICE-CHAIR

"G. Burton"

G. BURTON
VICE-CHAIR