April 8, 2026 - Revision

Committee of Adjustment
101 Centrepointe Drive
Ottawa, Ontario
K2G 5K7

Dear Committee Members,

RE: Application for Minor Variance and Permission
77 Glen Avenue
PT LT 16, BLK G, PL 115 , N/S GLEN AV, AS IN N624805 ; OTTAWA/NEPEAN
City of Ottawa
Owner: THARRIS, KRISTOPHER PHILLIP HARROP; THARRIS, CARSON ELLIOT TUNIS;

HP Urban Inc and The Stirling Group have been retained by the Property Owner to assist with a Minor Variance and Permission application for the property located at 77 Glen Avenue, described as PT LT 16, BLK G, PL 115 , N/S GLEN AV, AS IN N624805 ; OTTAWA/NEPEAN. The property is rectangular in shape and resides within Capital Ward, Ward 17. The property owner is proposing to rebuild their garage which burnt down in a fire within the existing footprint and add a coach house on top of the garage. A minor variance application is required to amend the permitted height of a building containing a coach house. A Permission application is also required to expand a legally non-conforming use to allow the setback of the existing garage which was destroyed by fire (.27m from the property line) to be used in the development of a second storey dwelling unit over the reconstructed garage.

The subject property is located within the Inner Urban Transect and is identified as Neighbourhood with an Evolving Neighbourhood Overlay on Schedule B2 of the Official Plan. The subject property is zoned Residential Third Density, subzone Q, exception 1475 (R3Q [1475]) in the City of Ottawa Zoning By-Law.

To proceed with the development as proposed, a Minor Variance application is required to amend the following sections.

Proposed Variance

- **Section 133 Subsection 8,b,ii**
    - Additional Dwelling Units and coach Houses (Section 133)
    - (8) The maximum permitted height of a building containing a coach house:

- (a) in the AG, EP, ME, MR, RC, RG, RH, RI, RR, RU, V1, V2, V3 and VM Zones, is the lesser of:
    - (i) the height of the principal dwelling; or
    - (ii) 4.5 metres.
    - (iii) despite (ii), where the building containing a coach house also includes a garage containing a parking space established in accordance with Part 4 of this by-law, the building may have a maximum height of 6.1 metres. (By-law 2017-231)
- (b) in any other zone, is the lesser of:
    - (i) the height of the principal dwelling; or
    - (ii) 3.6 metres (variance to 6.28m), except for a coach house with a flat roof, which has a maximum building height of 3.2 metres; (By-law 2017-231)
- (c) Section 64 - Permitted Projections Above the Height Limit does not apply to a building containing a coach house, except with respect to:
    - (i) chimneys
    - (ii) flagpoles
    - (iii) ornamental domes, skylights or cupolas, provided that the cumulative horizontal area occupied by such features does not exceed 20% of the footprint of the coach house

- **Section 133 Subsection 9,c,ii**
    - Required setbacks from lot lines for a coach house are as follows:
        - (A) from the front lot line, the minimum setback must be equal to or greater than the minimum required front yard setback for the principal dwelling.
        - (B) from the corner side lot line, the minimum setback must be equal to or greater than the minimum required corner side yard setback for the principal dwelling.
        - (C) from the interior side lot line,
            - (i) Within Areas A, B, and C on Schedule 1, where the interior side lot line abuts a travelled lane or where no entrance or window faces the interior side lot line, the maximum permitted setback is 1 metre (By-law 2017-231)

- (ii) in all other cases, the minimum required setback is 4 metres (variance to 2.55m)

A Permission application is also required to expand a legally non-conforming use to allow the setback of the existing garage which was destroyed by fire (.27m from the property line) to be used in the development of a second storey dwelling unit over the reconstructed garage.

Attached with this letter are copies of the following documents:

- Committee of Adjustment Application requesting a minor variance for Section 133 subsection 8, b, ii, Subsection 9, c, ii and a Permission Application
- Site Plan and Elevations
- Topographic Survey
- Approved reconstruction Plans for the Garage and an approved building permit
- An opinion piece by Gowling WLG regarding Legal Nonconforming Rights

SITE LOCATION

The subject property is a rectangular shaped lot located on Glen Avenue between Leonard Avenue and Grosvenor Avenue. The lot is approximately 307.1 m² and currently contains a two and a half story detached dwelling.

Figure 1 shows an aerial view of the subject property outlined in Orange. As shown in the aerial image, the surrounding land uses are predominantly residential.

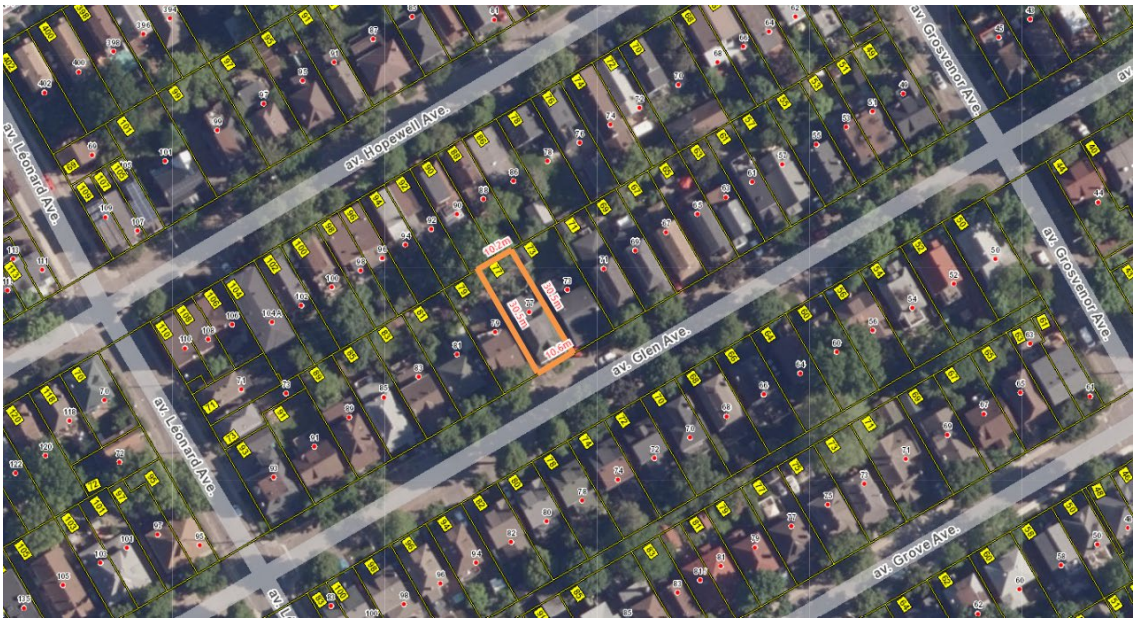


Figure 1 – Aerial view of the subject property, 77 Glen Avenue

PROVINCIAL POLICY STATEMENT, 2024

The Provincial Planning Statement was issued under section 3 of the Planning Act and came into effect October 20, 2024. It replaces the Provincial Policy Statement that came into effect on May 1, 2020. The PPS sets the policy foundation for regulating the development and use of land province-wide, helping achieve the provincial goal of meeting the needs of a fast-growing province while enhancing the quality of life for all Ontarians.

Section 2.2 notes that "Planning authorities shall provide for an appropriate range and mix of housing options and densities to meet projected needs of current and future residents of the regional market by:

- c) promoting densities for new housing which efficiently use land, resources, infrastructure and public service facilities, and support the use of active transportation; and
    - *The proposed development efficiently uses land, existing resources and infrastructure. The Owner intends to build an additional dwelling unit, by way of a Coach House, on top of a newly built garage. This property is well positioned within the City for residents to use active transportation modes; the property is located in close proximity to Major Corridors in Bank Street and Bronson Avenue and a Minor Corridor in Sunnyside Avenue.*
- d) requiring transit-supportive development and prioritizing intensification, including potential air rights development, in proximity to transit, including corridors and stations.
    - *As noted, the proposed development would see the introduction of a rental unit on a lot where a single residential dwelling is located. The subject property is in close proximity to transit and both minor / major Corridors.*

Section 3.1 speaks to General Policies for Infrastructure and Public Service Facilities and Policy 2. a) notes "the use of existing infrastructure and public service facilities should be optimized"

- *The proposed development would utilize existing services along Glen Avenue that have the capacity to serve this development.*

Section 4.1 discussed Natural Heritage and Policy 1. Says "Natural features and areas shall be protected for the long term.

- *The subject property does not have any Natural Features on site.*

As demonstrated above, the proposed development and subsequent minor variance application aligns with the Provincial Policy Statement (2024).

CITY OF OTTAWA OFFICIAL PLAN, 2022

The Official Plan sets forth broad policies that will help govern growth and change in Ottawa, as well as specific policies dependent upon land use designations. Schedule B2 – Inner Urban Transect – of the Official Plan identifies the land designation for the subject property as Neighbourhood.

The City of Ottawa's Growth Management Framework is set out in Section 3 of the Official Plan. It focuses on the goal of providing sufficient development opportunities to increase sustainable transportation mode shares and use of existing and planned infrastructure, while reducing greenhouse gas emissions.

The intent of the City's Growth Management Framework is:

- To provide an appropriate range and mix of housing that considered the geographic distribution of new dwelling types and/or sizes to 2046;
- To prioritize the location of residential growth to areas with existing municipal infrastructure, including piped services, rapid transit, neighbourhood facilities and a diversity of commercial services;
- To reduce greenhouse gas emissions in the development and building sectors and in the transportation network; and,
- To establish a growth management framework that maintains a greater amount of population and employment inside the Greenbelt than outside the Greenbelt.

The proposed minor variance application at Glen Avenue, would allow for the inclusion of a rental unit on a property, byway of a Coach House, where one had not existed before. This meets the following Growth Management Framework policies among others:

- **Policy 3 in Section 3.2** states that the vast majority of residential intensification shall focus within 15-minute neighbourhoods, which are comprised of Hubs, Corridors, and adjacent Neighbourhoods.
    - *The subject property is designated Neighbourhood and is within walking distance to both Minor and Major Corridors.*
- **Policy 4 in Section 3.2** states that intensification is permitted in all designations where development is permitted taking into account whether the site has municipal water and sewer services.
    - *The subject property has municipal water and sewer services along Glen Avenue*
- **Policy 8 in Section 3.2** states that intensification should occur in a variety of dwelling unit floor space sizes to provide housing choices.

- *The proposed development seeks to develop a garage and add a Coach House on top of the garage which would include a 534 square foot, 1 bedroom rental unit*

As defined in the Official Plan… "*Neighbourhoods are contiguous urban areas that constitute the heart of communities. It is the intent of this Plan that they, along with hubs and corridors, permit a mix of building forms and densities."*

Section 6.3.1 of the Plan speaks to the function of Neighbourhoods and Policy 4) notes that "the Zoning By-law and approvals under the Planning Act shall allow a range of residential and nonresidential built forms within the Neighbourhood designation", including: b) "Housing options with the predominant new building form being missing middle housing, which meet the intent of Subsection 6.3.2, Policy 1);"

Section 6.3.2 1) further notes that "The Zoning By-law and approvals under the Planning Act will allow innovative buildings forms, including in the missing middle housing category, in order to strengthen, guide towards or seed conditions for 15- minute neighbourhoods. Innovative building forms include, but are not limited to:… development of a single lot or a consolidation of lots to produce missing middle housing;"

- *As noted on the cover page, if approved, this applications would allow for the creation of a rental unit on a single lot where one detached dwelling exists all while meeting most of the provisions of the R3Q Zoning and Section 133 relating to Coach Houses.*

Section 4.2.1 of the City of Ottawa's Official Plan is titled "Enable greater flexibility and an adequate supply and diversity of housing options throughout the city". Subsection 3 states "…Accessory Dwelling units as provided for by the Planning Act, including coach houses and secondary dwelling units in the main building, are recognized as key components of the affordable housing stock and shall be protected for long-term residential purposes. The Zoning By-law shall permit these uses on residential lots with one principal dwelling unit in all areas of the City and shall establish criteria to govern appropriate integration of these units with the main dwelling and surrounding context."

- *The proposed coach house is on a residential lot where one principal dwelling unit exists*

Section 4.2.1.3 further states… "Furthermore, the following criteria and limitations apply:

- A) On any lot on which the Zoning By-law permits a coach house, a secondary dwelling unit is also permitted within the principal dwelling;
  - *No secondary dwelling exists within the principal dwelling although we note this is permitted*
- B) A coach house shall be smaller than the primary home and the Zoning By-law shall set forth the appropriate maximum permitted size;

- *The proposed coach house is smaller than the primary home and how the proposed development conforms to the by-law is discussed on subsequent pages of this letter*

- C) The size, floor area, function and occupancy of a dwelling unit in a coach house in the urban area is not intended to exceed that of a typical two-bedroom apartment;
  - *The proposed dwelling unit within the coach house is a 1 bedroom unit*
- D) A coach house may not be severed from the lot accommodating the primary dwelling;
  - *Noted and there is no intent to sever to coach house from the primary dwelling*
- E) Applications for Minor Variance / Permissions with respect to coach houses shall have regard for all applicable policies of this Plan, as well as the following considerations:
  - i) The proponent can demonstrate that the privacy of the adjoining properties is maintained;
    - *discussed in the Community Context section below*
  - ii) The siting and scale of the coach house does not negatively impact abutting properties; and
    - *discussed in the Community Context section below*
  - iii) Distinctive trees and plantings are preserved on the subject property.
    - *All trees are maintained*
- F) The Zoning By-law shall limit the coach house to a height of one storey for lots in the urban area. An application to allow a height of up to two storeys through a minor variance may be considered where the considerations noted in Subsection 4.2.1, Policy 3 e) above can be satisfied.
  - *The Community Context section below demonstrates compliance with 4.2.1 Policy 3 e)*

As demonstrated above, the proposed development and subsequent minor variance applications comply with and are supported by the policies found within the City of Ottawa Official Plan (2022).

CITY OF OTTAWA ZONING BY-LAW, 2020-288

The Zoning By-Law sets forth specific policies that will help govern growth and change in Ottawa dependent upon specific land designations. As noted on Page 1, the subject site is zoned Residential Third Density, subzone Q (R3Q).

Section 133 of the by-law is titled **"Additional Dwelling Units and Coach Houses"**

Section 133, 1. A) states "Subject to subsections (2) through (19), a coach house and/or additional dwelling units are permitted on a lot containing a detached dwelling, linked-detached dwelling, semi-detached dwelling, townhouse dwelling or duplex dwelling".

- As noted, the subject property contains a detached dwelling.

Section 133, 2 states “An additional dwelling unit or coach house must be located on the same lot, or portion of a lot as its associated principal dwelling unit, whether or not that parcel is severed.”

- The proposed coach house is proposed on the same lot as the principal dwelling unit

Section 133 3. A) states “Where permitted, in no case may the sum of all principal dwelling units, additional dwelling units, and coach houses located on a lot, or portion of a lot associated with the principal dwelling unit where the lot is not severed, exceed three units.”

- The sum of the units on the subject site would be two if the variance is approved to allow a Coach House to be built

Section 133 3. B) states “(b) Despite (a), no more than one unit is permitted as a coach house.”

- Only one coach house is proposed

Section 133 6. A) states “A coach house must be located:(a) in the rear yard for lots less than 0.4 hectares in area (By-law 2017-231) (By-law 2017-322)”

- The proposed coach house is in the rear yard

Section 133 8. B) states “The maximum permitted height of a building containing a coach house: (b) in any other zone, is the lesser of: (i) the height of the principal dwelling; or (ii) 3.6 metres, except for a coach house with a flat roof, which has a maximum building height of 3.2 metres; (By-law 2017-231)”

- The maximum permitted height for the proposed coach house is 3.6 meters according to this section of the by-law and the request is to vary this provision to 6.28 meters

Section 133 9. states “Required setbacks from lot lines for a coach house are as follows: (a) from the front lot line, the minimum setback must be equal to or greater than the minimum required front yard setback for the principal dwelling.

- The minimum front yard setback for the principal dwelling is 3m. The proposed coach house is setback 20m+ from the front yard

c) from the interior side lot line, (i) Within Areas A, B, and C on Schedule 1, where the interior side lot line abuts a travelled lane or where no entrance or window faces the interior side lot line, the maximum permitted setback is 1 metre (By-law 2017-231)

- The proposed coach house is setback 0.27m from the western interior lot line (existing non-conforming)

c) for interior side lot line, (ii) in all other cases, the minimum required setback is 4 metres (variance to 2.55m)

- The proposed coach house is setback 2.55m from the eastern interior lot line (existing setback of original garage) variance required.

d) from the rear lot line,(i) where the rear lot line abuts a travelled lane or where no entrance or window faces the rear lot line, the maximum permitted setback is 1 metre

- The proposed coach house is setback 0.27m from the rear lot line

g) A coach house must be a distance of at least 1.2 m away from any other building located on the same lot.

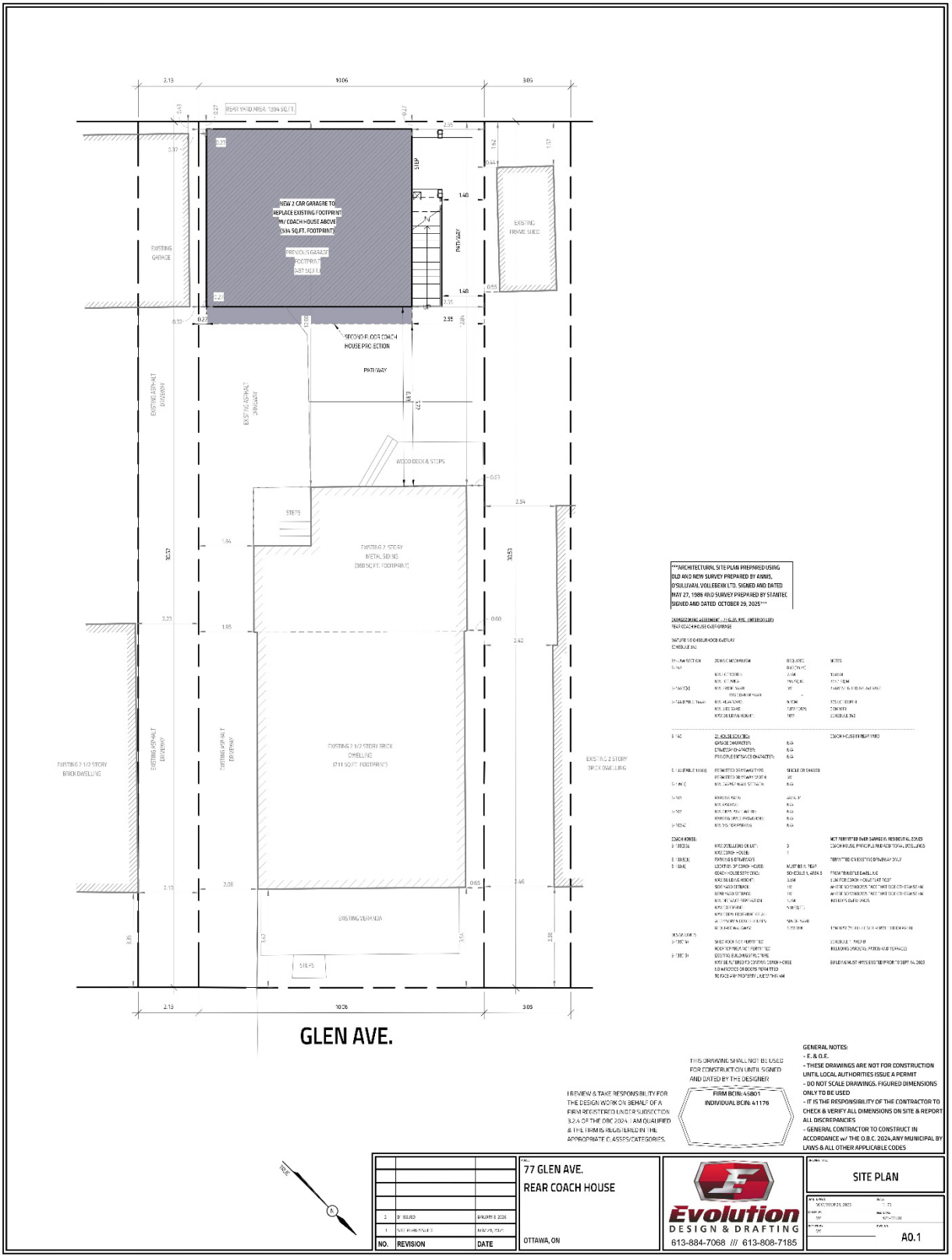
- The proposed coach house is located 12.88m away from the principal dwelling

Section 133, subsection 11 states "(11) The total footprint of a building containing a coach house plus all accessory buildings and structures in a yard may not exceed: (b) in any other zone, 50 per cent of the area of the yard in which they are located."

- The rear yard area for the subject lot is 1394 square feet and the proposed garage containing a coach house on top is 534 square feet. This represents 38% of the rear yard

To evaluate the requested variances, in context of the four tests of a minor variance as described in Section 45 of the Planning Act, a review of the site plan is required. The evaluation should show how the new building differs from the existing in context of the surrounding environment and streetscape and should demonstrate that the new construction will not have any adverse impacts.

The proposed Site Plan is shown below as Figure 2 and included with this submission package.


NEW 2 CAR GARAGE TO REPLACE EXISTING FOOTPRINT W/ COACH HOUSE ABOVE (534 SQ.FT. FOOTPRINT)
PREVIOUS GARAGE FOOTPRINT 687 SQ.FT.
EXISTING GARAGE
EXISTING FRAME SHED
PATIOWAY
SECOND FLOOR COACH HOUSE PROJECTION
EXISTING ASPHALT DRIVEWAY
WOOD DECK & STEPS
STEPS
EXISTING 2 STORY METAL SIDING DWELLING FOOTPRINT
EXISTING 2 1/2 STORY BRICK DWELLING FOOTPRINT
EXISTING 2 1/2 STORY BRICK DWELLING
EXISTING 2 STORY BRICK DWELLING
EXISTING VERANDA
GLEN AVE.
ARCHITECTURAL SITE PLAN PREPARED USING OLD AND NEW SURVEY PREPARED BY ANNIS, O'SULLIVAN, VOLLEBEKK LTD. SIGNED AND DATED MAY 27, 1986 AND SURVEY PREPARED BY STANTEC SIGNED AND DATED OCTOBER 29, 2025
THIS DRAWING SHALL NOT BE USED FOR CONSTRUCTION UNTIL SIGNED AND DATED BY THE DESIGNER
FIRM BCIN: 45801
INDIVIDUAL BCIN: 41176
I REVIEW & TAKE RESPONSIBILITY FOR THE DESIGN WORK ON BEHALF OF A FIRM REGISTERED UNDER SUBSECTION 3.2.4 OF THE OBC 2024. I AM QUALIFIED & THE FIRM IS REGISTERED IN THE APPROPRIATE CLASSES/CATEGORIES.
GENERAL NOTES:
- E. & O.E.
- THESE DRAWINGS ARE NOT FOR CONSTRUCTION UNTIL LOCAL AUTHORITIES ISSUE A PERMIT
- DO NOT SCALE DRAWINGS. FIGURED DIMENSIONS ONLY TO BE USED
- IT IS THE RESPONSIBILITY OF THE CONTRACTOR TO CHECK & VERIFY ALL DIMENSIONS ON SITE & REPORT ALL DISCREPANCIES
- GENERAL CONTRACTOR TO CONSTRUCT IN ACCORDANCE w/ THE O.B.C. 2024. ANY MUNICIPAL BY LAWS & ALL OTHER APPLICABLE CODES
NO. REVISION DATE
77 GLEN AVE.
REAR COACH HOUSE
OTTAWA, ON
Evolution DESIGN & DRAFTING
613-884-7068 /// 613-808-7185
SITE PLAN
A0.1

COMMUNITY CONTEXT and DISCUSSION

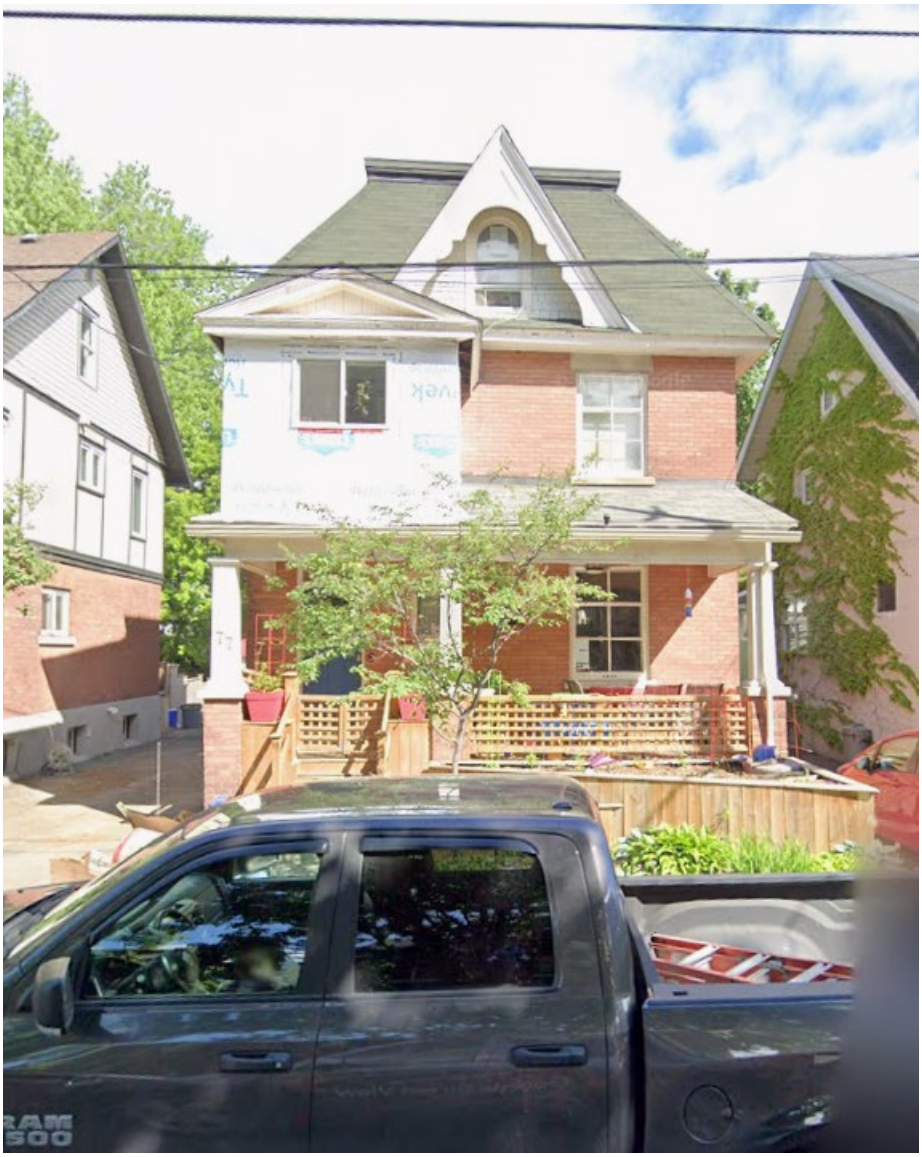


Figure 3 – view of the subject property from Glen Avenue

Capital Ward has numerous examples of accessory buildings in rear yard with apparent coach houses on top. The property located at 173 Cameron Avenue is a corner lot with frontage along Léonard Avenue. Below is a photo from Léonard Avenue looking East at 173 Cameron Avenue. Noted is an accessory building that is certainly greater than 3m in height. A standard garage opening is at least 2.4m and it's clear that the accessory building and use on top are higher than the permitted 3.6m.

Figure 4 – 173 Cameron Avenue observed from Léonard Avenue.

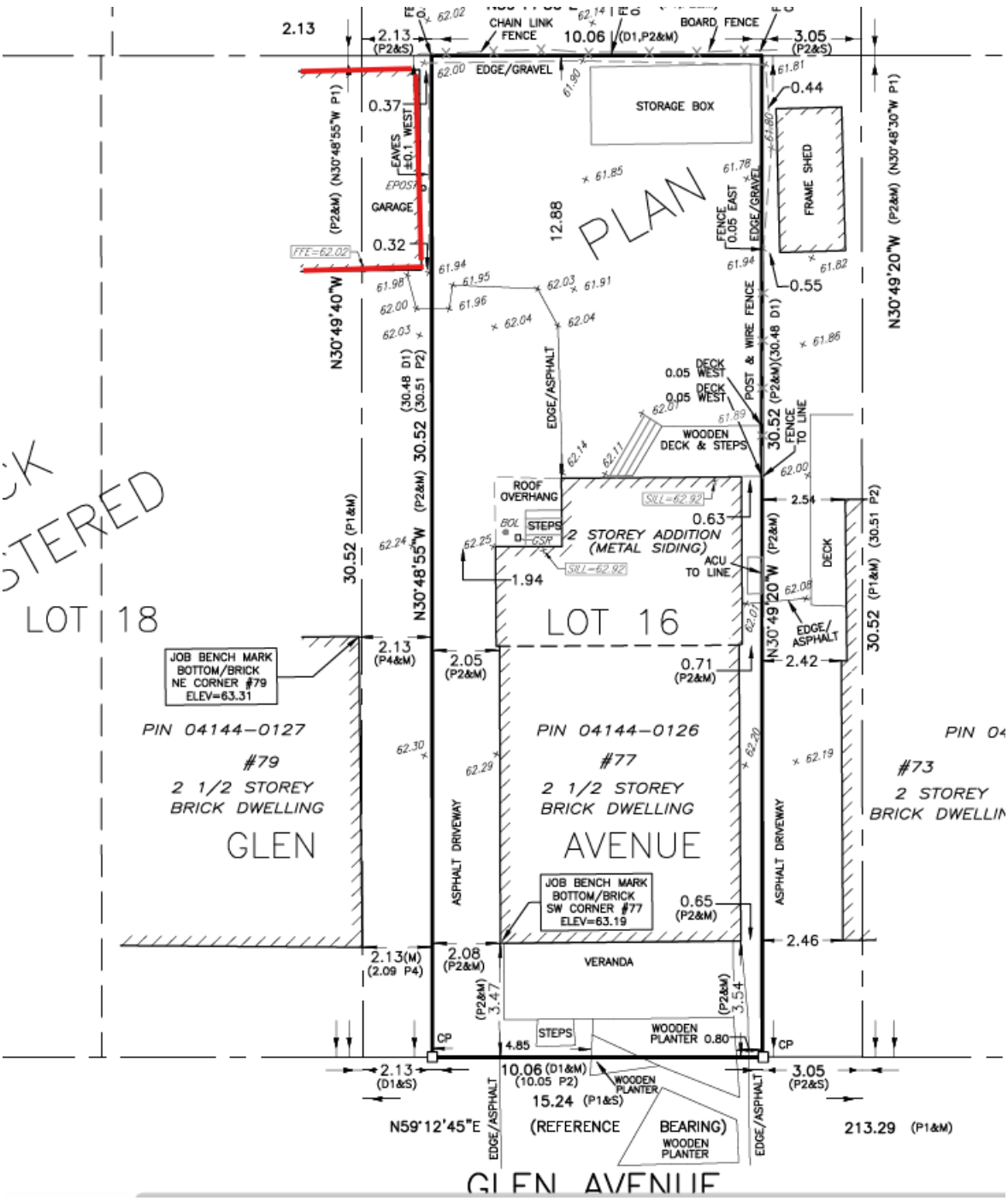
Shown above is 167 Fifth Avenue which has an accessory building in the rear yard that is observed to be larger than the 3.6m permitted height.

Shown below is 336 Sunnyside Avenue with a significant rear yard accessory building.

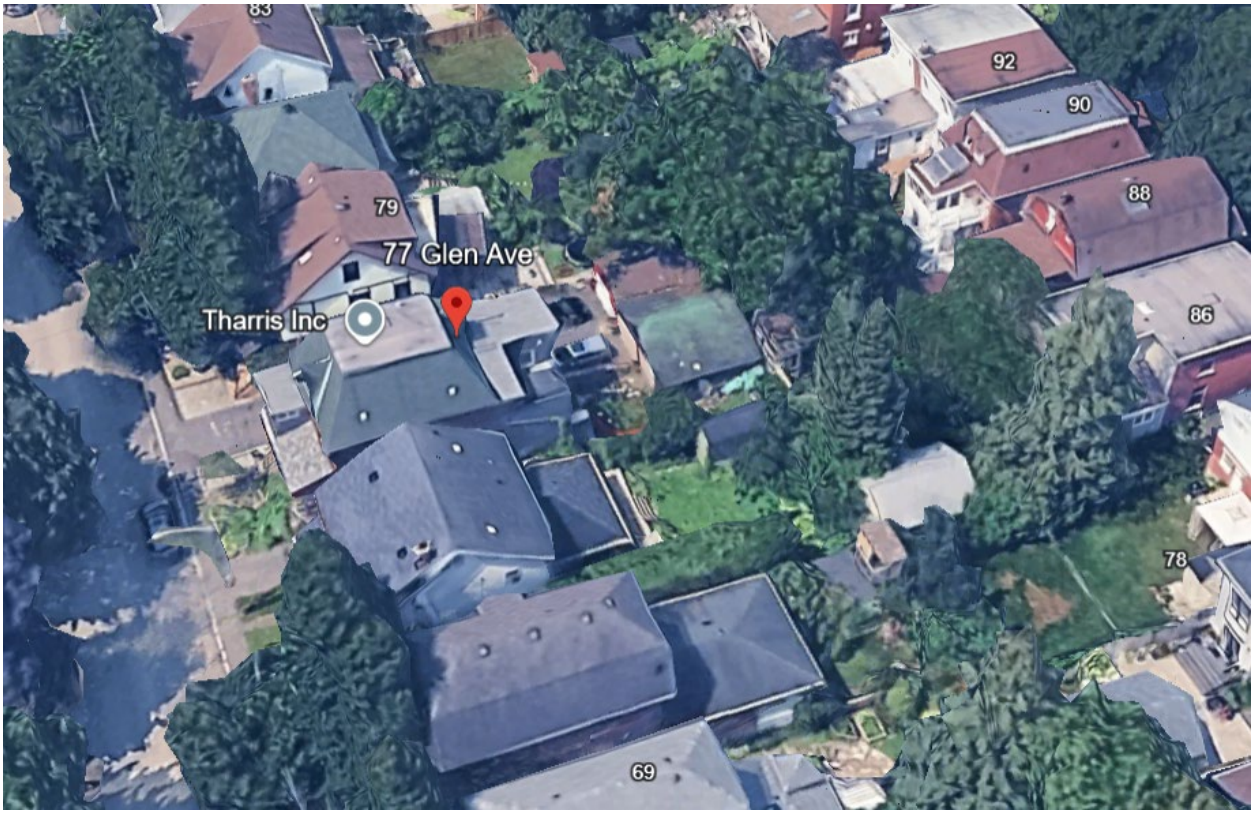
The City of Ottawa Official Plan, Section 4.2.1 explores the notion that applications for minor variance / permissions with respect to coach houses could be considered provided that “the proponent can demonstrate that the privacy of the adjoining properties is maintained” and “the siting and scale of the coach house does not negatively impact abutting properties”.

The proposed coach house at 77 Glen Avenue is located at the northwest corner of the property and as such, a review of the western neighbouring property is required at 79 Glen Avenue. Shown below is an aerial view of the properties at 77 and 79 Glen Avenue from 2015. Visible on 77 Glen Avenue is the original garage that is proposed to be rebuilt – this garage is outlined in red. The existing garage at 79 Glen Avenue is outlined in blue and it’s noted the very close proximity to the lot line shared with 77 Glen Avenue. This is important as it demonstrates

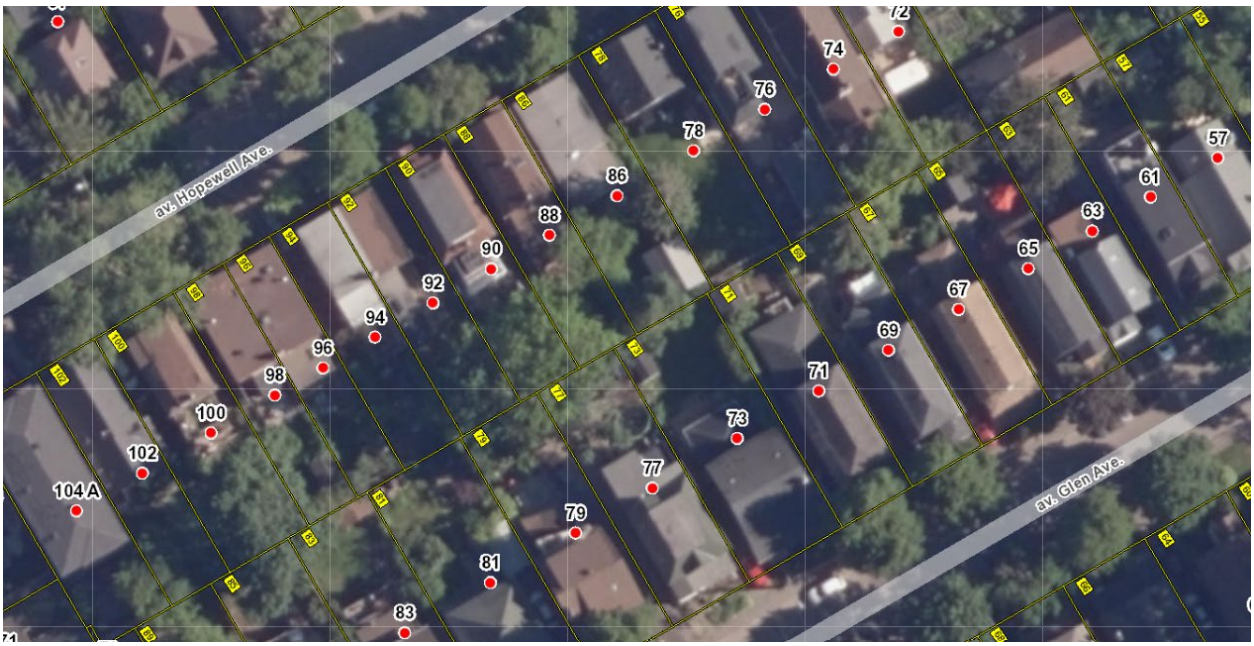
that the proposed garage and coach house will have no impact on the privacy of this adjoining property as a garage is situated there today acting as a screen. This existing garage at 79 Glen Avenue is also visible on the topographic survey provided of 77 Glen Avenue and shown below. For the purpose of visibility, the existing garage at 79 Glen Avenue has been highlighted in red to show the proximity to 77 Glen Avenue. It is also important to note that the owner of 79 Glen Avenue has submitted a letter of support for this proposed development.


PLAN
LOT 18
LOT 16
2 STOREY ADDITION (METAL SIDING)
GARAGE
STORAGE BOX
FRAME SHED
WOODEN DECK & STEPS
ROOF OVERHANG
STEPS
DECK
VERANDA
WOODEN PLANTER 0.80
WOODEN PLANTER
ASPHALT DRIVEWAY
EDGE/ASPHALT
EDGE/GRAVEL
CHAIN LINK FENCE
BOARD FENCE
POST & WIRE FENCE
FENCE TO LINE
ACU TO LINE
JOB BENCH MARK BOTTOM/BRICK NE CORNER #79 ELEV=63.31
JOB BENCH MARK BOTTOM/BRICK SW CORNER #77 ELEV=63.19
PIN 04144-0127
#79
2 1/2 STOREY BRICK DWELLING
PIN 04144-0126
#77
2 1/2 STOREY BRICK DWELLING
#73
2 STOREY BRICK DWELLI
GLEN AVENUE
N30°49'40"W
N30°48'55"W
N30°49'20"W
N59°12'45"E
(REFERENCE BEARING)
10.06 (D1,P2&M)
15.24 (P1&S)
213.29 (P1&M)
12.88
30.52 (P2&M)
30.52 (P1&M)
30.52 (30.51 P2)
2.13
3.05 (P2&S)
0.37
0.32
0.44
0.55
0.63
0.71 (P2&M)
0.65 (P2&M)
1.94
2.54
2.42
2.46
2.05 (P2&M)
2.08 (P2&M)
2.13(M) (2.09 P4)
2.13 (P4&M)
2.13 (D1&S)
10.06 (D1&M) (10.05 P2)
4.85
CP
FFE=62.02
SILL=62.92
EAVES ±0.1 WEST
EP0S
FENCE 0.05 EAST
DECK 0.05 WEST
DECK 0.05 WEST
BOL
GSR

The rear yard neighbour, 90 Hopewell Avenue is well screened from the subject property due to trees. Below is an image taken from Google Earth illustrating 77 Glen Avenue, the previous garage in the rear yard of the subject property – with a green roof – and the distinct tree located behind that garage, screening 90 Hopewell Avenue.



This same 'tree barrier' between 90 Hopewell and 77 Glen Avenue is visible in the below aerial photo from geoOttawa. There are no trees on the subject property, as shown on the topographic survey, and the proposed consruction of a garage and coach house will be built at grade and thus there is no concern for neighbouring tree roots. As such, the applicant can conform that Section 4.2.1, Policy 3, e) iii) "Distinctive trees and plantings are preserved on the subject property" is met.



Section 4.2.1 Policy 3 f) states “The Zoning By-law shall limit the coach house to a height of one storey for lots in the urban area. An application to allow a height of up to two storeys through a minor variance may be considered where the considerations noted in Subsection 4.2.1, Policy 3 e) above can be satisfied”.

As noted above, considerations have been given and taken into consideration related to 4.2.1 Policy 3 e). Given this, the application to allow a height of up to two storeys for a coach house through a minor variance is appropriate.

Permission Application

The owner is seeking permission to expand a legally non-conforming use to allow the setback of the existing garage which was destroyed by fire (.27m from the property line) to be used in the development of a second storey dwelling unit over the reconstructed garage.

Section 45(2) of the Planning Act permits the expansion of a legal non-conforming use. Section 45(2) of the Planning Act states:

- "In addition to its powers under subsection (1), the committee, upon any such application,
- (a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,
    - (i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or
    - (ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee; or
- (b) where the uses of land, buildings or structures permitted in the by-law are defined in general terms, may permit the use of any land, building or structure for any purpose that, in the opinion of the committee, conforms with the uses permitted in the by-law. R.S.O. 1990, c. P.13, s. 45 (2)."

There are no tests set out in the Planning Act for applications under Section 45(2). However, in Fraser v. Rideau Lakes (Township) (Gowlings Summary Attached) LPAT confirmed several important findings and confirmed the tests to determine the appropriateness of the expansion of a nonconforming right.
LPAT in Fraser confirmed that a permission application must be evaluated on the basis of:

- whether the application is desirable for appropriate development of the subject property; and
- whether the application will result in undue adverse impacts on the surrounding properties and neighbourhood.

Further, as the analysis in the Gowlings Review indicates:

- “Furthermore, the Tribunal found that any purported undue adverse impacts of an expansion must be demonstrated by objective evidence, and such evidence must be capable of overriding a property owner's right to reasonable evolution of their nonconforming/noncomplying building, as recognized in Saint Romuald. Moreover, planning instruments cannot impose criteria for expansion so rigorous that they in effect prohibit any expansion or evolution of nonconforming/noncomplying rights:
    - to the extent that a planning instrument, including an Official Plan, seeks to impose criteria for expansion of nonconforming uses that are so stringent as to not allow for the type of balancing required by Saint-Romuald, those instruments are ultra vires and should be given no force and effect.

In summary, when evaluating this request, the Committee shall consider 2 tests confirmed by the Fraser decision:

1. whether the application is desirable for appropriate development of the subject property; and
2. whether the application will result in undue adverse impacts on the surrounding properties and neighbourhood.

In applying the tests the Committee should rely on overwhelming objective evidence to substantiate adverse impacts.

Analysis

Coach house development is a permitted use in the R4 zone and has been established in many forms through the neighbourhood. What is unique about this proposal is the coach house sits above a long-established garage.

The view from Glen Street as shown in this photo demonstrates that the garage will be almost invisible from the street with no impact on the streetscape.

Appropriateness within a neighbourly context is also shown in the photo below as the proposed new apartment sits on the existing garage. The proposed apartment will have no windows on either the rear or side thus creating no overlook issues with the abutting garage. The old garage that burnt down is shown in Brown while the neighbours garage is red.

It is also important for the Committee to note that the neighbour with the red garage has provided a letter indicating full support for the proposed development.

The City of Ottawa, in pursuit of a compact urban development and the goal of a 15 minute neighbourhood has indicated that coach houses are and will be a part of the City's growth management plan as demonstrated by the Official Plan and therefore in the context of the Official Plan this application is desirable for the appropriate development of the garage at 77 Glen.

In conclusion, the proposed expansion of the nonconforming right is appropriate to site and enjoys support from the neighbour and there is no evidence of undue impacts. Examples below illustrate similar buildings to that proposed existing in the neighbourhood today.

173 Cameron

336 Sunnyside

FOUR TESTS

Based on the rationale provided, the proposed variance meets the four tests of a minor variance as described in Section 45 of the Planning Act.

1. The variance is minor.

The requested variance is minor in nature. The variance, as demonstrated, has no impact on adjacent properties. In the case of the side yard setback represents the historic setback of the garage.

2. The variance is desirable for the appropriate development or use of the property.

The requested variance is appropriate so that a new garage, containing a coach house on top can be built.

3. The general intent and purpose of the Zoning By-law is maintained.

Section 133 of the Zoning By-law states that “coach house and/or additional dwelling units are permitted on a lot containing a detached dwelling, linked-detached dwelling, semi-detached dwelling, townhouse dwelling or duplex dwelling”. As noted, the subject property contains a detached dwelling.

4. The general intent and purpose of the Official Plan is maintained.

The subject site is designated Neighbourhood and contains one principal dwelling unit. Per Section 4.2.1 of the Official Plan, the construction of a coach house on this type of lot is consistent with the strategic direction of the Official Plan.

CONCLUSION

The lot fabric, location, scale of the proposed construction and the ability to meet all other performance standards of Section 133 related to coach houses demonstrates that the proposed minor variance is appropriate desirable and will have no effect on adjacent properties. The approval of the minor variance will allow the proposed construction to take place in a manner consistent with the Official Plan.

As a result, it is our opinion that the requested minor variance and permission represents good planning and urban development.

Sincerely,

Peter Hume *Alison Clarke*

Peter Hume
HP Urban Inc.

Alison Clarke
The Stirling Group

GOWLING WLG

THE LEGAL NONCONFORMING RIGHTS TRILOGY IN ONTARIO

25 minute read

14 May 2021

Articles

The concept of legal nonconforming rights (also known as "acquired rights" or "grandfathering") has undergone a great deal of evolution and clarification in recent years. The municipal group at Gowling WLG is proud to have participated in a number of the cases that have solidified property owners' rights.

Legal nonconforming rights are one of the most powerful protections afforded to landowners under land use planning law. The concept provides that, simply put, zoning by-laws cannot apply retroactively. If a use of land, a building, or a structure was legal on Monday, a zoning by-law passed that day cannot render it illegal by Tuesday.

The concept is codified in s. 34(9) of the Planning Act, which explicitly provides that a zoning by-law cannot prohibit the use of land, a building, or a structure that was lawfully commenced on the date the by-law was passed. Under the common law, the protections for legally nonconforming rights are even stronger. A series of decisions dating back to the 1950s, including from the Supreme Court, have established that owners also have a right to evolve or reasonably expand or intensify a legally nonconforming use, provided that the evolution, expansion or intensification does not cause undue adverse impacts on the surrounding neighbourhood or area.

For clarification, "legally" and "lawfully" has nothing to do with building permits. It is simply a measurement of whether the use was allowed by zoning bylaws. Indeed, if a structure

predates zoning bylaws on the property, then it is permitted to continue.

Despite their importance to landowners, the full scope of legal nonconforming rights are often not well understood, either by the property owners that benefit from them, their lawyers, land-use planners, or the municipal decision-makers that must respect them. Legal nonconforming rights are also a frequent source of tension between landowners and municipalities. Too often, municipal decision-makers intentionally seek to curtail property owners' legally nonconforming rights, viewing those rights as mere impediments to municipal policy, rather than important and established legal protections. It is a truism that "planners like to plan".

However a trilogy of cases successfully argued by Gowling WLG Ottawa's Municipal Group have clarified the state of the law in Ontario regarding legal nonconforming rights in Ontario. This series of cases commenced in 2009 with the Ontario Municipal Board's ("OMB") decision in Re TDL Group Corp.,[1] which was subsequently upheld by the Ontario Divisional Court.[2] In 2018, the OMB relied on TDL in Brougham v. South Frontenac,[3] which further expanded the protections for legally nonconforming uses. Finally, in 2020, the Local Planning Appeal Tribunal ("LPAT", the successor to the OMB) completed the Trilogy with its decision in Fraser v. Rideau Lakes.[4]

Together, these cases have clarified and expanded clarified and expanded the protections and flexibility for property owners with legally non-conforming rights, including by rendering zoning bylaws and Official Plans ultra vires when they purported to limit or eliminate those rights.

The Supreme Court's formulation of nonconforming rights – *Central Jewish Institute and Saint Romuald*

Two Supreme Court of Canada decisions, separated by more than 50 years, form the basis of our Trilogy of cases. In the first, Central Jewish Institute,[5] the Supreme Court established that because the protection of legally nonconforming rights attaches to a building, a nonconforming use of only part of a building can later be expanded to the entire building, as of right. For example, a legally nonconforming restaurant that occupies only the first floor of a building can expand to the second floor, even after the enactment of a zoning by-law purporting to prohibit the use in that location.

In the second decision, Saint-Romuald,[6] the Supreme Court confirmed that under the common law, property owners have a right not only to continue a legally nonconforming use, but also to reasonable flexibility in that use, including evolution, intensification, or expansion. Writing for the majority, Justice Binnie outlined seven principles to delineate limitations on the owner's acquired rights:

1. The nature of the legally nonconforming use is defined as the activities actually carried out at the site prior to the new by-law restrictions.
2. Where the current use is a mere intensification of the pre-existing activity, as opposed to a difference in kind, it will rarely be open to objection.
3. New activities that expand beyond the pre-existing uses may not be protected under the non-conforming use.
4. When activities that are ancillary or closely related to the pre-existing use are added, the Court must balance the landowner's interest against the community interest, taking into account: a) the degree to which the pre-existing use clashes with surrounding uses; b) the degree of remoteness of the new activity to the pre-existing use; and c) the aggravated neighbourhood effects of the new activity.
5. Neighbourhood effects must be established by evidence.
6. The characterization of the acquired right must be appropriately tailored to as to allow for reasonable evolution of prior activities.
7. The definition of the acquired right will always have a subjective element, but should be grounded in the objective analysis outlined above.[7]

In short, this decision established that legally nonconforming rights can expand, evolve, or intensify, provided that the change does not result in undue adverse impacts to the surrounding neighbourhood. Yet, despite this clear direction, actually compelling municipalities to recognize this right to flexibility and evolution is often not so simple.

Each of the Trilogy cases has applied Saint-Romuald in the context of Ontario land use planning law. In so doing, these cases have clarified and expanded the protections afforded to nonconforming uses under the common law, and have invalidated planning instruments that sought to curtail property owners' rights to reasonable flexibility and evolution of their nonconforming uses.

Case #1: *Re TDL Group*

In 2008, the City of Ottawa enacted a new City-wide Comprehensive Zoning By-law (the "CZBL"). In an effort to phase out legally nonconforming uses across the City, s. 3 of the CZBL purported to extinguish nonconforming rights where a legally nonconforming or noncomplying [8] building was damaged, demolished or removed voluntarily, or where an involuntarily damaged building was not repaired or re-occupied within 2 years. The appellant challenged this provision on the basis that it was contrary to s. 34(9) of the Planning Act and ultra vires.

The OMB agreed with the appellant, ruling that s. 34(9) of the Planning Act clearly prohibits a

municipality from passing a by-law to prevent a legally nonconforming use. The Board held that:

> The cases cited by the Appellant, especially the decisions of the Supreme Court of Canada, Toronto (City) v. Central Jewish Institute and Saint-Romuald (Ville) c. Olivier affirm the right of a landowner to continue with a legal non-conforming use. In fact, the Supreme Court of Canada decisions stand for the proposition that such a use may be expanded within the confines of the building, may be "intensified" as part of the pre-existing activity, and finally, of particular relevance to the case at hand, may see "renewal and change" (Saint-Romuald (Ville) c. Olivier)[9]

The Board emphasized that, when determining whether non-conforming and non-complying rights survive, the intention of the landowner is paramount. As a result, voluntary repair or replacement of elements of the non-conforming or non-complying building does not automatically extinguish non-conforming rights:

> With the respect to "continuity of use", the Board finds that the intention of the landowner is significant. The Appellant would not lose its right to its legal non-conforming use during a closure for a voluntary repair or even replacement of the building...
>
> .there is nothing in section 34(9)(a) of the Act that provides that a right to a legal non-conforming use is lost if renovations or repairs are voluntary or within the control of the owner.[10]

In short, the Board found that property owners have an absolute right to voluntarily demolish all or part of a legally nonconforming building or structure within the same building envelope, without losing that any acquired nonconforming rights, provided that they demonstrate an intention to continue the use. The OMB ruled that the offending provisions of the CZBL were ultra vires and unenforceable, and the Board's ruling was subsequently upheld by the Ontario Divisional Court, which found no error in the Board's reasoning and denied leave to appeal.[11]

The City of Ottawa seeking leave to appeal to the Divisional Court was an important element in this story. Since the OMB and LPAT are administrative tribunals, their decisions are merely persuasive in subsequent cases. The Divisional Court's confirmation of the decision in TDL took a persuasive decision and made it law across Ontario, a fact which became important in the new two cases of the Trilogy.

Case #2: *Brougham v. South Frontenac (Township)*

Brougham, the second case in the Trilogy, involved similar issues to those before the OMB in TDL. In 2016, the Township of South Frontenac amended its Comprehensive Zoning By-law

in an effort to phase out all structures located within the bylaw-required 30-metre shoreline setbacks. This setback was repeated in the Township's Official Plan. Interestingly, the 30 metre setback was, as it is across Ontario, based on an extremely dated study, which itself said that it needed to be updated every 5 years, and with respect to specific lakes' environmental sensitivity.

The Township's amendments provided that reconstruction of a building located within the 30 metre setback was prohibited where: more than 50% of the exterior load-bearing walls were voluntarily removed; or the structure was involuntarily destroyed, either partially or completely, and the property owner did not apply for a building permit to reconstruct within 1 year. Furthermore, the Township's amendments prohibited any expansion of the footprint of a legally nonconforming/noncomplying building.

Although the Township was aware of the TDL decision, it claimed that the protections in s. 34(9) of the Planning Act only applied to nonconforming uses (land, buildings or structures whose use was no longer permitted) as opposed noncomplying buildings (buildings or structures that no longer conformed to performance standards). The Township's position was that buildings located within the 30 metre setback were noncomplying, and therefore did not benefit from the protection of s.34(9) of the Planning Act.

On appeal, the OMB sided with the appellants and quashed the Township amendments in their entirety as ultra vires. To begin with, the Board agreed with the appellants that the term "noncomplying" is simply a term of art with no basis in the Planning Act and that there is no basis for distinguishing between "nonconforming" and "noncomplying" uses under the Act. Any legally established land, building or structure that no longer conforms with a zoning by-law is protected under s. 34(9) and the common law, regardless of whether the nonconformance is in terms of use or performance standards.[12] In short, the ostensibly "noncomplying"" structures located within the Township's 30 metre shoreline setback were equally protected under the Planning Act and the common law.

Having made this finding, the Board concluded that it was bound by the Divisional Court's ruling in TDL that concluding owners of legally nonconforming/noncomplying buildings and structures have an absolute right to demolish and reconstruct within the same building envelope, and that this right cannot be taken away, including through arbitrary time limits on that reconstruction. As such, the Township amendments were ultra vires insofar as they sought to curtail property owners' rights to demolish and reconstruct their buildings and structures within the 30-metre waterfront setback.[13]

Critically, the Board also agreed with the appellants that the case law surrounding nonconforming rights also supported a right to reasonable expansion or enlargement of a

legally nonconforming/noncomplying building. Such expansion may not occur as of right, and landowners must seek permission to expand a legally nonconforming/noncomplying building or structure (under s. 45(2)(a)(i) of the Planning Act, as distinct from a "minor variance" application under s.45(1)). However, the Board confirmed that municipalities may not enact planning instruments prohibiting such expansions, and that they must consider requests to expand or enlarge legally nonconforming/noncomplying uses under the framework set out by the Supreme Court in Saint-Romuald. [14]

Case #3: *Fraser v. Rideau Lakes (Township)*

Fraser, the final case in the Trilogy, represents precisely the type of request for enlargement of a legally nonconforming/ noncomplying building contemplated by the Board in South Frontenac. The applicant owned a legally nonconforming cottage located within the 30 metre waterfront setback mandated by the Township's zoning by-law. He proposed to demolish the existing cottage, and to replace it with a somewhat larger dwelling on essentially the same footprint, within much of the new square footage to be added on a second floor.

The language of the Planning Act makes it clear that property owners may apply to a Committee of Adjustment for permission to expand a legally nonconforming use under s. 45(2)(a)(i) of the Planning Act. Notwithstanding this clear language, the Township planning staff initially insisted that the applicant instead apply for a minor variance under s. 45(1). Even after conceding its initial error during the course of the LPAT hearing, the Township took the position that an application for permission to expand under s. 45(2)(a)(i) must still satisfy an analysis similar to the "four tests" required for a minor variance under s. 45(1).

In particular, the Township insisted that an application under s. 45(2)(a)(ii) must demonstrate conformity with the OP. In this case, the Township's OP stated that no development within 30 meters of the shoreline would be permitted unless compliance with the setback was not a reasonable possibility due to the nature of the individual property. Accordingly, and based on Township staff's recommendation, the Committee of Adjustment refused the application for permission under s. 45(2)(a)(ii), in large part due to lack of conformity with the OP.

On appeal, the LPAT first confirmed that contrary to the Township's initial position, an application under s. 45(2) is not subject to the "four tests." Rather, such applications must be evaluated on the basis of:

a. whether the application is desirable for appropriate development of the subject property; and
b. whether the application will result in undue adverse impacts on the surrounding properties and neighbourhood.[15]

Crucially, the Tribunal agreed with the applicant that there is no basis for considering the intent and purpose of the Official Plan when considering applying this test.[16] The Tribunal also agreed that in light of Saint Romuald and the previous cases in the Trilogy, this analysis was subject to a number of caveats and nuances.

To begin with, the Tribunal rejected the Township's contention that undue adverse impact should be considered for the entire structure, as opposed to only the proposed expansion. Instead, the Tribunal sided with the applicant in finding that since TDL and South Frontenac confirmed that there is an absolute right to demolish and rebuild a legally nonconforming/noncomplying structure within the same building envelope, then the s. 45(2) test only applies to the proposed expansion. Anything within the existing nonconforming/noncomplying envelope may be reconstructed as of right, and undue adverse impact must be determined only with respect to the proposed expansions to the existing nonconforming structure.[17]

Furthermore, the Tribunal found that any purported undue adverse impacts of an expansion must be demonstrated by objective evidence, and such evidence must be capable of overriding a property owner's right to reasonable evolution of their nonconforming/noncomplying building, as recognized in Saint Romuald. Moreover, planning instruments cannot impose criteria for expansion so rigorous that they in effect prohibit any expansion or evolution of nonconforming/noncomplying rights:

> to the extent that a planning instrument, including an Official Plan, seeks to impose criteria for expansion of nonconforming uses that are so stringent as to not allow for the type of balancing required by Saint-Romuald, those instruments are ultra vires and should be given no force and effect.[18]

In this case, the Township's OP did not permit this reasonable evolution, instead seeking to bar any expansion of legally nonconforming structures located within the 30 metre shoreline setback, unless development in an alternative location was impossible. The Tribunal agreed with the applicant that in light of TDL and South Frontenac, such policies were ultra vires. In any event, the applicant was not required to demonstrate conformity with the intent and purpose of the OP when applying for permission under s.45(2).

Finally, in a comment with implications beyond simply applications to reconstruct or expand legally nonconforming/noncomplying buildings, the Tribunal emphasized that: "there is no basis in law to justify refusing the Application simply because the possibility of a hypothetical alternative for development may exist."[19]

Conclusion

Taken together, TDL, South Frontenac and Fraser have applied the principles set out in Saint Romuald and other decisions to Ontario land use planning law, bringing much-needed clarity to an often murky area of law. These cases have established a number of concrete principles that constitute essential protections for property owners:

- There is no basis for distinguishing at law between nonconforming land, buildings or structures (where the use is no longer permitted) and noncomplying land, buildings or structures (where the performance standards are no longer met). Both are equally protected under s. 34(9) of the Planning Act and the common law;
- Property owners have an absolute right to demolish and rebuild legally nonconforming/noncomplying structures within the same building envelope. Any planning instrument that seeks to prohibit such a right is ultra vires;
- The right to rebuild a demolished or destroyed legally nonconforming/ noncomplying structure is not subject to a strict time limit, so long as the owner evidences an intention to continue the use. Any planning instrument that imposes a strict time limit (particularly a short one) is ultra vires;
- Property owners have a right to reasonable flexibility, evolution, and expansion of legally nonconforming/ noncomplying uses, land, building and structures, provided the evolution or expansion does not cause undue adverse impacts on the surrounding neighbourhood. The framework set out in Saint Romuald governs such evolution or expansion;
- Applications to reconstruct and expand a legally nonconforming/ noncomplying building should be evaluated under s.45(2) of the Planning Act as opposed to s.45(1);
- The test for an application for permission to expand under s.45(2) is: a) whether the application is desirable for appropriate development of the subject property; and b) whether the application will result in undue adverse impacts on the surrounding properties and neighbourhood;
- When applying the test under s.45(2), only the proposed expansion may be evaluated for undue adverse impacts;
- The intent and purpose of the official plan is not a relevant consideration when applying the test under s.45(2); and,
- In order to refuse the application the undue adverse impacts of the proposed expansion must be demonstrated by objective evidence, and must be sufficient to override the property owner's right to reasonable flexibility, evolution and expansion.

All of these principles significantly affect landowners' rights, and understanding of them vary from municipality to municipality. Typically, they are better understood in larger urban centers, and less so in more rural or cottage-oriented community. However, they are too often a source of consternation and misunderstanding for planners in both kinds of municipalities.

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[1] Re TDL Group Corp 63 OMBR 199 (2009) (OMB).
[2] Re TDL Group Corp [2009] O.J. No. 4816 (Ont Div Ct.)
[3] Brougham v. South Frontenac (Township) 2 OMBR (2d) 345 (2018).
[4] Fraser v. Rideau Lakes (Township) 2020 CarswellOnt 17264 (LPAT).
[5] Central Jewish Institute v. Toronto (City) [1948] SCR 101.
[6] Saint Romuald (City) v. Olivier [2001] 2 SCR 898.
[7] Saint Romuald at para 38.
[8] As will be discussed below the term "noncomplying" as opposed to nonconforming, is a land use planning term of art, with no basis in the Planning Act. Often, uses are referred to as "nonconforming," whereas buildings or structures that no longer conform to performance standards are referred to as "noncomplying." There is no basis for distinguishing the 2 terms, and both nonconforming and noncomplying buildings or structures are equally protected under the Planning Act and the common law.
[9] Re TDL Group Corp (OMB) at para 33.
[10] Re TDL Group Corp 63) (OMB) at paras 35-36.
[11] Re TDL Group Corp [2009] O.J. No. 4816 (Ont Div Ct.).
[12] Brougham at paras 82-83.
[13] Brougham at para 56.
[14] Brougham at paras 72-75 and 84.
[15] Fraser, supra at para 34.
[16] Fraser at paras 67-68.
[17] Fraser at para 42.
[18] Fraser at para 45.
[19] Fraser at para 61.

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