Presentation of Dr. Hadi Salmasian (Appellant) at the LPAT hearing of October 3, 2018

We should begin by examining the knowledge of the city planner of s. 160 of the Zoning Bylaw.

The structure of my appeal is as follows. I will present

(a) A general overview of my appeal,

(b) A brief description of the issues that are raised in my submissions and my legal arguments,

(c) The evidence for the arguments and witness testimonials.

Preliminary matter. The City of Ottawa has not given notice in advance of today's hearing of its legal grounds for a motion requesting party status. Therefore I fail to see valid legal grounds whereby the City would acquire such status in this hearing, and I oppose that the City would be granted full party status, even though I welcome its intervention on the constitutional questions.

In my appeal, in addition to what I will say today, I rely on the entirety of my submissions to the Local Planning Appeals Tribunal (henceforth, the LPAT), including the submissions dated August 31, 2018, and the supplementary submissions on September 24, 2018.

Overview. To the best of my knowledge, this is the first constitutional challenge of the *Planning Act.* Ontario is the only province in Canada whose bylaw-variance provision in its planning act sets a jurisdictional threshold as "minor variance", without defining "minor" and without providing the established criteria of undue harm from compliance with the bylaw and absence of injury to neighbouring properties.

As a result of the vagueness that comes with not defining "minor", market forces have free reign. The variance provision has become a planning instrument in-effect without democratic oversight, and the impacts on established neighbourhoods are devastating, in Ottawa at least.

Applications for changes to building types not allowed by the bylaw are virtually always approved, where no reasonable person would consider the changes in building type to be "minor" derogation from the bylaw.

Before I outline my legal arguments, let me explain in plain language the nature of the loophole that this minor variance application represents:

The neighbourhood is zoned "R3P". From Table 160A of section 160 of Bylaw 2008-250, it follows that the lot at 7 Chestnut Street — having a width of 10.98 m and an area of 318.5 m2 — does not allow a triplex. Period. Only the building types "detached", "duplex", and "linked-detached" are permitted on a lot of these dimensions. This is explicitly the directive of the written bylaw, and is therefore its intent. By variance to 12 m and 360 m2, the explicit bylaw constraint on building type is circumvented to allow a triplex. Virtually all the lots in the neighbourhood are the same size and there should be no triplexes. That is the nature of this application.

The evidence will support the four legal issues in this appeal, which are the following:

Issue A: Is s. 45(1) of the *Planning Act* unconstitutional because it violates equality before and under the law?

In the simplest possible terms, I submit that s. 45(1) violates equality because it allows the Applicant to cause harm (nuisance) to a neighbour by violating a democratically enacted by-law that everyone else must follow and that is intended to protect the said neighbour, while not statutorily limiting the variance magnitude or impact, and while not requiring that the said harm (nuisance) be avoided, considered, minimized, or balanced. This is outlined in Paragraphs 70-83 of my submissions of August 31, 2018, and Paragraphs 10-21 of my supplemental submissions of September 24, 2018.

Issue B: Is section 45(1) of the Planning Act unconstitutionally vague and therefore of no force or effect?

I submit that section 45(1) is unconstitutionally vague, in that it does not establish sufficiently clear and knowable boundaries for the domain of jurisdiction of the Committee to authorize variances from the provisions of the by-laws in effect (in this case the Interim Control Bylaw 2017-245 and the Zoning Bylaw 2008-250). The power to override a democratically enacted bylaw is a power of judicial character. Therefore the power must be presumed to be delimited and requires clear words in the enabling statute.

The Supreme Court in *Canadian Pacific Airlines vs. Canadian Airlines Pilots* [1993] put it this way:

> In light of the judicial nature of the power, an extension of the power so that it would be exercisable in an administrative context would be an exceptional enlargement of its application. The power cannot be envisaged to be so broad in the absence of clear wording to that effect.

Full reference and live-link at para.35 of my Supplementary Submissions of Sep.24, 2018.

The condition that a variance be “minor” is a jurisdictional threshold, not a discretionary factor or “test”. It is not uncommon for the Committee or the Board to incorrectly treat this jurisdictional question as a matter of discretion.

In addition, the Official Plan's explicit definition of “minor variance” is incorrect, misleading, and fails to address that a “minor variance” is a jurisdictional threshold that must respect the defining constraints established by appellate courts.

These arguments are outlined in Paragraphs 84-102 of my submissions of August 31, 2018, and Paragraphs 28-36 of my supplemental submissions of September 24, 2018.

Issue C: If section 45(1) of the Act is constitutional, do the Committee and LPAT have the jurisdiction to hear the applications?

I submit that even if the tribunal deems section 45(1) of the Act constitutional (which I deny), then the Committee and the LPAT do not have the jurisdiction to hear the application, because the requested violation from the by-law cannot be deemed minor.

In the absence of a statutory definition, the term “minor variance” must be interpreted by examination of the relevant jurisprudence. The jurisdiction to authorize variance from by-law provisions is limited to “minor” variances, which is a true jurisdictional question. The historical jurisprudence of allowing minor variances is to admit the difficulty of imposing codified bylaw conditions on the complexities of real land-use circumstances. The uninterrupted and established overarching jurisprudence of zoning variances is correctly summarized by Professor of Law Reynolds as:

“A variance permits a property owner to depart from the literal requirements of the zoning law as it applies to his or her land. The basic requirement for the grant of such a variance is usually said to be a showing of "unnecessary hardship" if the law is literally applied, and the commonly accepted components of such hardship are: (1) that the property cannot earn a reasonable return if used as zoned, (2) that this problem arises from unique circumstances peculiar to the property, not from general conditions in the neighborhood, and (3) that the use allowed by the variance will not alter the essential character of the neighborhood. It has frequently been emphasized by courts and commentators that the power to award variances should be exercised sparingly [...]. The variance has often been referred to as a "safety valve" that relieves the pressure created when a particular application of a zoning law has consequences that are harsher than needed to achieve the desired planning for the community.”

Osborne M. Jr. Reynolds, “The Unique Circumstances Rule in Zoning Variances – An Aid in Achieving Greater Prudence and Less Leniency”, The Urban Lawyer, 1999, vol. 31, pp. 127-148; at pp. 127-128 and 129. [BOA]

The Appellant submits that the variances approved by the Committee circumvent the explicit bylaw limits of building type to permit a triplex where no triplex would otherwise be allowed and that such a variance is incompatible with any definition adduced from applicable case law and jurisprudence. Therefore, there is no statutory jurisdiction to approve the application.

These arguments are outlined in Paragraphs 103-113 of my submissions of August 31, 2018, and Paragraphs37-39 of my supplemental submissions of September 24, 2018.

Issue D: If the Committee and LPAT have jurisdiction, should the applications be approved?

In the alternative, if the Committee and LPAT have jurisdiction to hear the applications (which is denied), then the applications should not be approved because the variance from section 160 of Zoning Bylaw 2008-250 are not desirable for the appropriate development or use of the land, building or structure, nor is the general intent and purpose of the by-law or of the Official Plan maintained. In fact, the explicit bylaw limits on building type are violated, and it is inconceivable that it was not the intent of the bylaw to impose these spelled-out limits on building type for a given lot size. Building type is not a mere change in a linear dimension or surface area. Rather it is a different species of building that can and here does deteriorate the neighbourhood.

These arguments are outlined in Paragraphs 114-115 of my submissions of August 31, 2018, and more arguments and grounds for this issue will be given in presenting the evidence.