Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, September 14, 2018

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

Appellant(s): CHARLOTTE SHEASBY-COLEMAN

Applicant: EKP DESIGNS INC

Property Address/Description: 15 STANLEY AVE

Committee of Adjustment Case File Number: 17 251936 WET 06 CO, 17 251938 WET 06 MV, 17 251943 WET 06 MV

TLAB Case File Number: **18 126898 S53 06 TLAB**

Hearing date: Tuesday, September 04, 2018

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
EKP Designs Inc	Applicant	
Sara Nunes	Owner	
Charlotte Sheasby-Coleman	Appellant	
Georgette Nunes	Party	Russell Cheeseman
Theodore Cieciura	Expert Witness	
David Godley	Witness/Participant	
Michael Smith	Witness	
Max Dida	Witness	
Nancy Ditchfield	Participant	

Name	Role	Representative
Erika Aucoin	Participant	
Craig Goodman	Participant	
Jim Farrell	Participant	
Laura Pong	Participant	
Louise Vella	Participant	
Ulrich Fekl	Participant	
Rosalie Wang	Participant	
Douglas Dron	Participant	
Aiden Coleman	Participant	
Barbara Radecki	Participant	
Marion Jenson	Participant	
Raoul Coleman	Participant	

INTRODUCTION

This appeal results from a decision of the City of Toronto (City) Committee of Adjustment (COA) approving severance and variance applications in respect of 15 Stanley Avenue (subject property). The matters before the COA included minor variance applications under By-law 569-2013 (new zoning); however, the variance matters were not appealed and the Applicant's position appeared to be that the approved variances are 'final and binding'. Clearly, only the severance appeal is before the Toronto Local Appeal Body (TLAB).

The appeal Hearing consisted of testimony from eight individuals. Theodore Cieciura, a Registered Professional Planner, the only attendee qualified to give expert land use planning opinion evidence, gave evidence on behalf of the Applicant. The Appellant, Charlotte Sheasby-Coleman and several Participants (Craig Goodman; David Godley; Nancy Ditchfield; Barbara Radecki and Aiden Coleman) gave oral evidence in opposition to the severance. Dr. Max Dida, Supervisor, Urban Forestry and the only attendee qualified to give expert arboriculture evidence, was called by the Appellant under summons to speak to issues identified by the City's Urban Forestry Division.

Filings in this matter were extensive from all interests.

BACKGROUND

This single consent matter comes before the TLAB as part of a larger storey related to Stanley Avenue. The Appellant, this Member understands, is also an appellant in a separate proceeding applicable to an adjacent property at 11 Stanley Avenue wherein both severance and variance appeals are before the TLAB in a Hearing scheduled to be heard on September 14, 2018. Ms. Sheasby-Coleman, the Appellant, is the owner and resident at 9 Stanley Avenue, adjacent to 11 Stanley Avenue. As a result of a previous Motion for consolidation, my colleague, Member Gopikrishna, agreed with Mr. Cheeseman, counsel to both applicant owners, that the appeals on 11 and 15 Stanley Avenue should remain for separate consideration and not be consolidated.

As it happens, the site at 17 Stanley Avenue is also actively under construction as an extensive renovation, without a severance component.

Taken together, the opponents on this appeal suggested that the combined applications reflect significant change to the physical character of the associated short stretch of some 18 dwellings on Stanley Avenue, between Albert Avenue and Buckingham Street.

I indicated that I had viewed the subject properties and surrounding area and had generally reviewed the extensive filings, but that matters felt significant needed to be brought to my attention for the purposes of the evidence and record.

MATTERS IN ISSUE

In its simplest expression, the matters in issue at this Hearing relate to the merits of the consent requested for lot division of the subject property.

Parsed more expressly, much of the evidence focused on Official Plan conformity, primarily in respect of the application of the criteria in section 51(24) of the Planning Act related to applicable ‘Neighbourhood’s’ Official Plan policy considerations, including policies relating to urban forestry.

Throughout, almost every witness, including the Applicant's planner, spoke to issues of built form, urban design and dwelling types, some using photography. While instructive, little adherence was given to avoiding focusing the evidence on those aspects germane to the variance matters as they were not before the TLAB, not having been appealed in this circumstance.

JURISDICTION

The TLAB is subject to the following express statutory policy and criteria on the severance appeal:

Provincial Policy – S. 3

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

Consent – S. 53

TLAB must be satisfied that a plan of subdivision is not necessary for the orderly development of the municipality pursuant to s. 53(1) of the Act and that the application for consent to sever meets the criteria set out in s. 51(24) of the Act. These criteria require that " regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

> (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2 of the Planning Act;
>
> (b) whether the proposed subdivision is premature or in the public interest;
>
> (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
>
> (d) the suitability of the land for the purposes for which it is to be subdivided;
>
> (d.1) if any affordable housing units are being proposed, the suitability of the proposed units for affordable housing;
>
> (e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;
>
> (f) the dimensions and shapes of the proposed lots;

(g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;

(h) conservation of natural resources and flood control;

(i) the adequacy of utilities and municipal services;

(j) the adequacy of school sites;

(k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;

(l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and

(m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2) of this Act or subsection 114 (2) of the City of Toronto Act, 2006. 1994, c. 23, s. 30; 2001, c. 32, s. 31 (2); 2006, c. 23, s. 22 (3, 4); 2016, c. 25, Sched. 4, s. 8 (2).

EVIDENCE

I wish to thank the persons participating for their civility and co-operation in assisting with the procedures necessary to permit the matter to be dealt with in the day allocated. This included interrupting testimony to allow persons with conflicts to meet their commitments. For those Participants that were unable to attend or stay, I gave assurances their pre-filed materials would be reviewed. However, I agreed with Mr. Cheeseman, counsel for the Applicant, that notes left with other Participant's to be 'read into the record' were to be excluded; the individual not being present to be sworn or questioned.

At the outset, Mr. Cheeseman, rose to challenge two matters:

1. Recent filings by the Participant, Michael Smith. Mr. Smith had been requested by Ms. Sheasby-Coleman to provide computer model graphics of the proposed development for the subject property, as well as for 11 and 9 Stanley Avenue. These graphics, although having been noted earlier in Mr. Smith's Participant's Statement as a 'work-in-progress', were not filed until August 31, 2018, the Friday of the long weekend preceding the sitting.

2. The participation of David Godley, Participant, who had filed no Participants' Statement as required by the TLAB Rules, but had supplied a Witness Statement in the nature of expert testimony from a professional planner. Mr. Cheeseman objected to: Mr. Godley's qualifications; the filing as being improper; and, Mr. Godley's ability to participate having no connection to the subject appeal as he was a resident of Long Branch, over one kilometre away.

I agreed that the documentary and graphics evidence tendered by Mr. Smith was not in accordance with the TLAB Rules, was too late and was potentially prejudicial. It was not appropriate or timely to grant an adjournment for Mr. Cheeseman to consider the necessity of retaining a consultant to examine and address the proposed evidence. The posted material was excluded from the evidence and Mr. Smith was excused from further participation in the Hearing.

On receiving assurance from Mr. Godley that he did not intend to be qualified by Ms. Sheasby-Coleman as an expert witness with professional planning credentials, the TLAB recognized Mr. Godley as a person knowledgeable in local matters. He was permitted to give opinion evidence as a lay citizen with such evidence to be a matter of weight to be determined by the tribunal. Despite extensive filings, Mr. Godley gave assurances that his evidence would be condensed and brief. I accepted his Witness Statement as equivalent to a Participant's Statement, as both were due on the same date and are of similar purpose.

Ronald Craig Goodman, an architect by trade, advised the TLAB of his objections to the severance. He noted that dividing the subject property's 15 m frontage in half had consequences: i). reducing the frontage so that it will be dominated by a garage door entrance; ii) elevating the building to respond to a positive slope driveway requirement; iii) elevating the built form yielding an elevated main floor and rear deck (2-3 m above grade), distinct from area character; iv) requiring grade changes that are detrimental to tree preservation, privacy and creating a new need for retaining walls, new to the area.

In questioning, he agreed he was not an appellant, but had appeared before the COA. He acknowledged that the variances had been approved and that grading and drainage matters are subject to review at the building permit review stage. However, he maintained that the consequences of the severance 'runs against the grounds of good planning principles' for the reasons described.

Mr. Theodore Cieciura was called by the Applicant. He provided thorough and focused land use planning evidence on the severance issue in the matters he addressed. This included:

1. The proposed lots would be 7.62 m x 40.23 m and 306 sq m, on a by-law base requirement of 10.5 m frontage and minimum lot area of 325 sq m.

2. Stanley Avenue is a 'small street' with a 'jog', consisting of some 14 single detached dwellings fronting onto Stanley Avenue;

3. The severance would fit in the Study Area he examined, taking into account the following:

    a. Photographs depicting varied architecture, unit types, side and rear yard setbacks, parking solutions;

    b. Of 464 lots in the Study Area, only 13.4% (62 lots) are of the same size or larger than the subject property;

    c. Of 464 lots in the study Area, some 26.3% (122 lots) are equal to or smaller than those proposed;

    d. Of 211 eligible lots, 68.4% do not comply with required frontage requirements under applicable zoning;

    e. Some 36% of eligible lots do not comply with by-law specified minimum lot area requirements.

    He felt this information was supportive of his opinion that the physical character of the lots proposed is well represented in the Study Area.

4. The consent application was consistent with the Provincial Policy Statement and in conformity with the Growth Plan both in respect of intensification and diversity of housing support, (but failed to reference any other subject matter of provincial interest, including environmental protection).

5. Noted that the consent Application met or complied with all the applicable criteria of section 51(24), above listed, reserving out for special consideration section 51(24) c), official plan conformity. He observed on a 10 year review of consent applications (Exhibit 1, Tab 23), that there were a small number of consents having "roughly" the same type of relief as proposed. None of these

were in close proximity to the subject property, except the matter under appeal at 11 Stanley Avenue.

6. Identified Built Form and Neighbourhood policies; Chapters 2 and 4 of the Official Plan as most important and concluded that a detached dwelling on each lot would fit the criteria of those policies.

7. He suggested, that left alone, the construction of a single new detached dwelling would have no different an effect than the proposed construction of two dwellings allowed by the severance. No analysis was provided to describe, qualify or support this pronouncement. He felt, however, that the proposal on the subject property would 'respect and reinforce' the general character of the area and represent minor change.

8. Finally, he noted that the Community Planning Division of the City had 'no objections' to the proposed severance.

In questioning, Mr. Cieciura acknowledged he had never given evidence in opposition to a development application but had represented groups with 'different interests'. He was firmly of the view that the variances for the subject property are final and binding and would permit the severance as contemplated by the appeal. He agreed that Stanley Avenue was not within a 'strategic growth area', as contemplated by provincial policy or City definition but suggested that backing onto Lakeshore Boulevard properties made the subject property 'more available for intensification'. He agreed that there was no lot of 7.62 m frontage on this small section of Stanley Avenue.

Mr. Cieciura did not speak to any recommended conditions of approval. He repeated his evidence that change on this one lot met the 'sensitive, gradual and fit' tests of the Official Plan and that there would be no impact having a destabilizing effect. He reiterated that the lot frontage and size are already permitted by the variance approval.

The evidence of Dr. Dida from Urban Forestry was heard out of order on consent. He advised of three Urban Forestry Staff Reports prepared in advance of the COA decisions on both the severance and variance applications, one recommending conditions and the other two, Exhibits 2 and 3, addressing issues and recommendations related to on-site trees. In both cases, Urban Forestry sought the retention of the identified trees and that the associated variance applications be refused.

Exhibit 2 reports on the identification of a protected City owned tree in the front yard; Exhibit 3 reports on the identification of 3 protected privately owned trees in the rear yard.

In the case of Exhibit 2, Urban Forestry also recommended deferral of the applications for the submission of an assessment and review and would deny a permit, subject to appeal rights, if approved; the COA declined a deferral and approved the Application for severance and variance.

In both cases, he said, Urban Forestry continues to object and cited Official Plan support, Urban Forestry policy and by-law directives for its recommendations. In the event of an approval, he said that Urban Forestry had requested that the COA impose specific conditions consistent with the mandate of Urban Forestry and City Regulations.

The COA did provide conditions in its decision. Dr. Dida's evidence confirmed these recommendations for the identified trees that are in direct conflict with the construction proposed for the severed lots. He noted that no applications had been received by Urban Forestry and no plan existed to approach considerations of any possible work-around from the position of Urban Forestry taken before the COA.

In cross examination, Dr. Dida agreed that if the severances were approved, the exact same regulatory policies and regulations would be applied by Urban Forestry and Council, on appeal, as would be applied in the circumstance where no COA approvals were required - but where qualifying trees warranted protection. As well, in questions from Ms. Sheasby-Coleman, he agreed the identified trees were healthy and their continued presence would provide material environmental benefits for many years to come. Their replacement could take 40-50 years to reach the same maturity. He noted a City wide tree planting program and said that Mimico/Long Branch had a City-wide average for tree canopy coverage.

A series of residents and lay speakers addressed the TLAB in opposition to the severance appeal. Their evidence is briefly summarized below and is accompanied by findings. An extraordinary effort was made by Ms. Sheasby-Coleman, for which the TLAB is grateful, to bring together a wealth of material having direct and indirect bearing on this appeal. As well, on consent, a video prepared by Aiden Coleman, Participant, was viewed but not entered into evidence due to technology constraints at the TLAB. It showed adjacent streets as a tree lined, diverse and desirable neighbourhood mixing old and new building typology in a pleasing residential setting.

He spoke eloquently about protecting the unique character of the area, the desirability of preserving and protecting mature vegetation and the importance of retaining the low rise, detached dwelling character of the area. He expressed the opinion that the severance on the subject property cannot be isolated from that proposed next door and the construction at 17 Stanley Avenue. Collectively, he said, five large new houses have to be considered as a sum and, taken together, they would alter the aesthetics and set a precedent for the neighbourhood.

Mr. David Godley attended and expressed the thesis that density, in the City, is directed away from Neighbourhoods and that its consideration needs reference to three geographic components: the adjacent properties; the block; and the general area character, in decreasing levels of importance. In his view, Chapter 3 of the Official Plan lends support for this approach as a matter of urban design. It begins, he said, with what is seen, namely, what is visible to the site on the ground, as being most significant. He suggested that the status quo is the starting point in the application of City policy. Many of his references to Official Plan policies were tied to elements of proposed built form which, due to the limitations on what was appealed, are not referenced here. Mr. Godley did raise policies at 3.4.1 noting that the Official Plan has instituted policy protection for environmental features including the preservation and enhancement of trees and the urban forest of the City. He considered this, as well, as one of the 'restrictions on property' referenced in section 51(24) of the Planning Act. He also noted the direction in which Council was heading with Official Plan Amendment 320, applicable to the site, that the 'prevailing size and configuration of lots, including the location, design and elevation of driveways' was contravened by the Application.

Over Mr. Cheeseman's objection, I ruled that OPA 320 was a decision of Council that the TLAB was obliged to have regard for, but not as a determinative policy given its status on appeal. He suggested that Ontario Municipal Board jurisprudence repudiated any consideration be given that document. I disagreed, finding that the statutory direction was the more directory.

The witness also underscored the consideration raised by Ms. Sheasby-Coleman that with 62 lots in the Study Area identified by Mr. Cieciura as having a size consistent with the subject property, a severance of the subject property represented the potential for precedent.

Mr. Godley requested that weight be placed, by the TLAB, on his own lot and density analysis of adjacent properties. He described nearby residences as predominantly bungalows on 30-36 foot lot frontages exhibiting very low densities (22-26%) suggesting the proposed lot characteristics were inconsistent and would yield development that is not good planning or logical planning.

In questioning, he demonstrated unfamiliarity with the existing zoning, agreed that his density data was from Municipal Property Assessment Corporation records and that integral garages are permitted 'as-of-right'. Further, that as a matter of design, the aspect of architectural control exhibited in section 41 of the Planning Act was not relevant here as the City had not made the site or the area, as a site plan control or heritage conservation district or area.

Ms. Marion Jenson, a 36 year resident at 26 Stanley Avenue across the street from the proposal, spoke of the ambiance of the street, the value in its mature trees and the disruption, destruction and congestion represented by property development. She questioned the intent of the owners who, she said, have a pattern of development applications but not long term intended residency. She noted the subject property was rented out and the home of a kennel/dog school facility, not permitted by zoning. She wanted change to be gradual, sensitive and respectful.

Ms. Nancy Ditchfield, a resident since 1992 at 19 Stanley Avenue raised similar concerns and support for Official Plan policies supporting retention of area character and the urban forest represented by mature tree canopies. She acknowledged she might not be able to tell the difference between a 25' and a 30' lot frontage circumstance.

Ms. Barabara Rendecki, resident at 19 Central Street provided further support for retaining the area character represented by low density, low rise, detached housing. She emphasized the area character of an urban canopy, sensitive soils, and the susceptibility to injury of physical and environmental health by its disturbance. She asked that impacts of change be considered without a 'unilateral sign-off '.She had not heard the evidence of Dr. Dida but was aware of the City Tree Preservation By-law protocols.

The Appellant, Ms. Charlotte Sheasby-Coleman presented her own additional concerns and summations. She suggested that Mr. Cieciura's suggestion that new houses are more energy sufficient should be juxtaposed to what he did not mention: the loss of mature canopy, 60% of which in the City is located on private property; the costs in lost energy conservation by the removal of tree shade and its cooling effect.

She suggested the Mimico Secondary Plan provided for the intensification of Lakeshore Blvd., not the Neighbourhood in proximity to it, contrary to the support Mr. Cieciura gave to the proximity of the subject property to Lakeshore Boulevard. She said that large canopy trees are irreplaceable.

She pointed to the reality that development interests are able to outbid other purchasers in the marketplace for eligible properties for severance applications. As such, she was of the opinion that these properties are being removed from the market.

ANALYSIS, FINDINGS, REASONS

There are two prevailing facts urged upon me by counsel for the Applicant.

First, the appeal is in respect of the severance only of the subject property. Although there were accompanying variances to the original application, they were not appealed, are not before me and can play no role in the review and application of the evidence. I find that while it is very clear from the original application form that the requests for severance and resulting variances are tied together, for the purposes of this Hearing I am charged with an appeal only in respect of the consent to sever request, granted by the COA.

It is not necessary for me to make a finding as to the usefulness of the variances should the consent fail. That aspect can be left to a future time.

Second, I have supporting professional planning evidence to allow the severance from two sources: Mr. Cieciura on behalf of the Applicant via vive-voce evidence, and Toronto planning Staff, via Memorandum commentary to the COA. There was no qualified contrary planning evidence although several of the planning opinions rendered were challenged and countered effectively on various grounds, including a failure to canvass matters in issue.

In reviewing the evidence, pre-filed and above described, I find I am not able to grant a 'unilateral sign-off' even in the compelling circumstances presented by the above two circumstances of land use planning support.

The proposal is to sever a 15 m parcel into two rectangular blocks 7.62 m by 40.3 m for an area of 306 sq m, approximately. The Applicant's evidence, arguably, would have me test this parcel size against the approved minor variances which authorize their criteria. I am not prepared to be that focused; to do so might, again for arguments sake, render the severance appeal moot. That result would be contrary to the legislation that grants a right of appeal (with respect to the severance) and establishes the relevant considerations upon which that appeal must be addressed.

The decision to appeal only the consent aspect cannot now be second guessed; the Appellant stated she had no interest in the variances. Accepting that is the case, the implications are that much of the intended evidence and much of the actual evidence by all present touched equally upon the variances as the severance itself. For example, references were made to the proposed character of the buildings: height;

massing; scale; integral garage prevalence; streetscape; hard surfacing and the like. These are largely matters of built form and are as much the derivative of the variances as they are the product of a proposed reduced lot frontage.

I was, however, impressed with the quiet evidence of Mr. Goodman who made a direct effort to attribute a number of these elements to lot frontage and the resultant character of the lot.

Had that evidence been buttressed with professional planning opinion support, it might have deserved even more compelling weight.

I accept in large measure the evidence delivered by Mr. Cieciura who defined a Study Area of reasonable dimensions and examined a number of criteria within it. In terms of lot patterns, lot frontage and lot area, while the proposed lots are the smallest in the immediate stretch of Stanley Avenue, they fall within a size category that is reflective of lots comprising a significant percentage of the Study Area, in a widely dispersed pattern. Moreover, on the frontage criterion alone, there was no reliable evidence that that pattern was comprised solely of historical lots of record that preceded the by-law, though clearly severance activity in the past 10 years has been modest and located some distance from the subject property.

I find it would be unfair and inconsistent to determine the merit of the consent on the one criteria of lot size, or more specifically frontage, or both. To do so would deny the panoply of other considerations that must simultaneously be brought to bear on the merits or otherwise of the applications.

I find that a lot frontage reduction to 7.62 m from a by-law standard of 10.5 m, is not an automatic disqualifier from approval.

I also accept from Mr. Cieciura, his planning opinion analysis of all the relevant considerations dealt with in his evidence, including the recommendation that a plan of subdivision was not required, and that all aspects of the criteria, with three exceptions, in section 51 (24), above, of the Planning Act, are satisfactory addressed.

There was no contrary planning opinion and his evidence was otherwise thorough, complete and not shaken in respect of the matters he chose to address.

The three exceptions relate to his opinion (namely, the lack thereof) on the application of provincial policy, Official Plan conformity and restrictions on the subject property. These generally arise from one common theme: the protection of the environment and its contribution to the physical character of the area and in particular the Urban Forest, here inclusive of mature private and public trees placed in jeopardy as a consequence of lot division and proposed construction.

The COA had before it two Memoranda from the City's Urban Forestry Division, filed as Exhibits 2 and 3. A third Memorandum detailed requested conditions applicable, should both severance and variance approvals be granted.

I was informed that there were no conditions attendant the variance approvals granted by the COA. There are those attached to the COA consent approval.

Dr. Dida, under summons, spoke to the two Memoranda, Exhibits 2 and 3 which he had signed, following his Departments site inspection. They indicate, on inspection, that four qualifying trees, by size and species, were in danger of injury or removal as a result of the Applications.

Urban Forestry clearly recommended that the application approval not be permitted. It cited Official Plan policy that was contravened.

It also requested a deferral, for consultation and further study from the Applicant as to whether the impact on certain of the identified components of the urban forest could be addressed.

He described the origins of the Urban Forestry mandate, the study of 'Every Tree Counts', the benefits of old growth, healthy trees, canopy coverage across the City and the Official Plan goals referenced in the Memoranda, the mandate of Urban Forestry, Council objectives and the Trees By-law requirements and processes, including appeals, administered by his Department.

The COA did not defer consideration but rather approved the severance Application, with a forestry condition.

The Applicant did nothing between the COA disposition and the TLAB Hearing, to address the concerns expressed. No arborist was retained, no study or tree protection zone was established in accordance with City Standards, no landscaping plan or other analysis was advanced. No witness was called on behalf of the Applicant to address the Urban Forestry position that the identified trees and the impact on them was not in conformity with City Official Plan policies or could meet the standards, procedure, by-laws and Guidelines respecting the preservation and enhancement of the Urban Forest.

Dr. Dida was clear that his Departments opinion and position on the severance application has not changed. He acknowledged that there is no injury/removal application and no supporting material to adjudge actual impact, its consequences or the effectiveness of design or remedial measures.

Dr. Dida did agree that if the severance were approved, the Department would work with the Applicant to assess impact in accordance with the provisions of Chapter 813 of the Municipal Code. He also agreed that this is the same procedure that would be in place, if similar implications of development were found to occur with a project that required no Planning Act approvals.

I find that this latter aspect is the true ‘red herring’ referred to by Mr. Cheeseman, in argument. Namely, I find that it is irrelevant to me to weigh the evidence and argument that the process of consideration of tree impact is the same, whether or not a consent approval is required.

Rather, I have before me direct and undisputed evidence that four qualifying trees are impacted by the severance and the implications are not in conformity with the Official Plan. This too is expert testimony from a person qualified to provide opinion evidence as an arborist on a matter and discipline within his expertise.

It is deserving of equally great weight as the planning evidence that is asserted in argument to remain unrebutted.

In theory, it is open to an Applicant to make the judgement to defer consideration of the effect of its applications on the natural environment to a point where it knows its approvals are in hand. It can accept the risk that the planning approvals process may

challenge the efficacy of a 'wait and see' approach, and that waiting may serve perhaps to avoid the exposure, in cost and resources, that might accrue from a full investigation.

I find that in the City such an approach is 'penny wise and pound foolish'.

Both provincial policy documents, the PPS and the Growth Plan provide equal policy guidance and support on an 'environment first' and 'green infrastructure' approach to land use planning decisions. At the very least, they emphasize a parallel obligation to consider, among other matters of potential relevance, the environment. Moreover, the City Official Plan has significant policy support for environmental protection, green infrastructure and, more particularly to the issue at hand, tree preservation and enhancement.

If this were not enough, the Applicant was given direct, specific notice by way of three Memoranda that there was an Official Plan policy conformity issue raised with respect to the injury or removal of four qualifying on-site trees.

I find that the Applicant simply did not respond to this material or its implications, as above cited.

Indeed, and perhaps even more surprising, in the evidence I heard from Mr. Cieciura:

i) No mention was made as to consistency with the environmental policy considerations of the PPS;

ii) No mention was made of the 'green infrastructure' policies of the Growth Plan;

iii) No mention was made of the environmental policies of the Official Plan related to the urban forest;

iv) Only oblique reference was made to the application of criteria in section 4.1.5 to the component of area character attributable to trees, as above referenced – even when presented with that opportunity in the questioning of Ms. Sheasby-Coleman.

I have no opinion from him on Official Plan conformity, generally or otherwise, related to the urban forest, tree assessment, merits, and the environment.

To ensure I did not miss any of his oral testimony, I have reviewed Mr. Cieciura's Witness Statement. In summary, there is no reference to any environmental consideration.

This circumstance may have been the product of not being supplied any support evidence on the issue by a qualified professional; Mr. Cieciura's qualifications as a professional planner did not extend to arboriculture.

That said, I find it entirely inconceivable that the subject matter of provincial and local policy compliance with the environmental implications of the applications could have escaped the planners attention. Whether or not this element was inadvertently avoided, willfully ignored, or simply neglected is no answer to the duty that was acknowledged as incumbent upon the expert in the giving of evidence.

In my view, counsel's suggestion that it makes no difference whether the appropriate study is done now or later, because it is the same study, is hollow. If accepted, it could negate all aspects of provincial and Official Plan policy respecting the environment in the consideration of the land use planning merits of this application for consent. Such an approach would read out of the Official Plan an environmental assessment consideration of benefit. In this case, it would leave open the policy support for intensification when tribunals have said, time and again, that intensification does not trump matters such as environmental stewardship.

Had there been no issue of trees on the severed parcels, the point would not have been piqued. Had a study been done, the TLAB would have been in an evidentiary position to determine any continuing differences in opinions as to the land use planning merits in issue. Neither circumstance was present.

Moreover, Mr. Cieciura, did not raise any of the conditions imposed by the COA that were a component of its decision. He did not address the TLAB Practice Direction 2. He did not observe that he would be content with these protections, or recommend them.

Implicitly, it would appear the planner accepted the representations of counsel that it didn't matter as environmental and tree considerations would ultimately receive

consideration: namely, that Urban Forestry would fulfill its obligations under the Municipal Code and that process would suffice.

I find that if the City were content with the regulatory provisions of the Municipal Code respecting trees, there would be no need for the elaborate web of Official Plan policies that address provisions respecting the environment, including the protection, preservation and enhancement of trees.

I find that there is a responsibility on the Applicants, the TLAB and anyone who asserts compliance or non-conformity with those policies, to address the matter squarely on, with compelling evidence.

In this case, the Appellant was fully aware of the issue, prior to the COA, as a component of professional opinion evidence from an arboricultural perspective and as a component of non-professional evidence from the lay public, regarding the character of the area.

I reject the innuendo of a profit motive giving rise to insensitive applications. Rather, the TLAB accepts that the support for intensification is a significant provincial and local objective in locations “where appropriate”. However, an applicant for public approvals must be prepared to justify its application for intensification and its appropriateness. To fail to do so, not only places the application approvals process at risk, but can act to the disadvantage and inconvenience of all those who have an interest in the issues raised. It is the responsibilities of those seeking approval of any particular application do demonstrate, upon all relevant considerations, that the location selected is appropriate. In my view, in this case, that was not done.

I have considered whether this is simply a criterion of perfection that should not override the extensive planning assessment that has accompanied the Application on appeal. I do not believe that it is, for the reasons above expressed.

In the result, I am left with unanswered opinion evidence of Official Plan non-conformity in a subject area as compelling as the opinion evidence on the objectives and benefits of intensification.

In support of non-conformity with the Official Plan, I heard from several residents who expressed concern for the preservation of the physical character of their neighbourhood with direct reference to the roles that the feature of mature trees play in

its aesthetic amenity and functional benefits. While this is lay opinion evidence, it too goes to the appreciation of the integrity of the environmental policies and the application of character assessment prescribed by section 4.1.5 of the Official Plan. As stated, this aspect was not addressed by the Applicant. There was no reply evidence.

I find that, in this application, tree preservation and enhancement is an integral element of public policy and a significant component of the physical character of this area. On the evidence, the severance places these matters in considerable doubt on the subject property.

There is strong planning evidence supporting the severance. That evidence is challenged effectively by lay citizen evidence and there is strong environmental evidence of injury to the environment supported by lay citizen evidence regarding tree preservation and the importance of trees to the character of the area. However, if the severance is approved, it is acknowledged there are further procedures and protections that can be exercised, including appeals to Council should Urban Forestry maintain its position that the identified trees 'should be preserved', despite the impact of proposed/approved development.

Nevertheless, the substantive issue in this appeal is the severance and whether it can be supported on a full consideration. Being the first severance in the immediate neighbourhood in a recorded 10 year period to come forward for actual consideration, it is understandable that the request would attract attention. The spokespersons at this hearing did an admirable job of identifying the issues and causing its close examination. Had Ms. Sheasby-Coleman not summonsed Dr. Dida or had he not responded to confirm the assessment and position of Urban Forestry, the environmental issue might not have gained the notoriety that these reasons raise.

I find this is an appropriate circumstance to apply the precautionary principle.

I find, as well, that there are ancillary issues raised that are not determinative. At this point in time, the predominant character of adjacent and nearby residences is not, from a policy perspective, a determinant, as OPA 320 is not in force. Nor is the prospect that 62 lots in the Applicants Study Area might be candidates for future severances. There is insufficient evidence on those matters to carry this day.

In the same vein, I accept the fact that although the proposed lots are undersized in respect of zoning by-law frontage and achieved variance relief from the COA, this

alone is not a determining factor in either direction. That approval was undeniably a part of a combined consent/variance application. Similar sized lots of record are sprinkled throughout the study area in evidence, in substantial numbers. While City Staff neither appeared nor explained their rationale for 'no objection', it is apparent on the evidence that over time, significant numbers of smaller frontages have become or are representative of the physical character of the area. The issue of their age predating the advent of zoning controls was a matter not put in a planning perspective in the absence of opposing planning evidence.

I have read the cases submitted by the Appellant; these were not argued although some were mentioned in passing. I rely upon the evidence tendered in this hearing rather than following precedent; consistency is an important consideration.

DECISION AND ORDER

The appeal is allowed, the application for consent to sever is refused and the decision of the Committee of Adjustment is set aside.

X

Ian James Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord