TORONTO

Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, July 02, 2019

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

Property Address/Description: 70 THIRTY SIXTH ST

Committee of Adjustment Case File Number: 17 178263 WET 06 CO, 17 178270 WET 06 MV, 17 178271 WET 06 MV

TLAB Case File Number: **17 278198 S53 06 TLAB, 17 278201 S45 06 TLAB, 17 278202 S45 06 TLAB**

Hearing dates: July 26, Dec. 7, 12, 2018, May 27, 28, 31, June 19, 2019

DECISION DELIVERED BY T. Yao

APPEARANCES

Name	Role	Representative
1930211 Ontario Inc (Lori Li, Andrew Bilicki)	Owner	Russell Cheeseman
T.J. Cieciura	Expert Witness	
City of Toronto	Party	Sarah Amini
Max Dida	Expert Witness	
David Godley	Participant	
Ben Puzic	Participant	
Long Branch Neighbourhood Association	Participant	Christine Mercado, Judy Whitmer-Gibson
Donna Donald	Participant	

Alexander Donald	Participant
Kathy Puzic	Participant
Barry Kemp	Participant
Sheila Carmichael	Participant
Fraser Carmichael	Participant

DECISION AND ORDER

1930211 Ontario Inc (the "owner") wishes to demolish the current residence at 70 Thirty Sixth, sever the lot and build two new homes. It needs the following variances.

Table 1. Variances sought for Part 1 of 70 Thirty Sixth St. (Similar variances for Part 2)			
		Required	Proposed Part 1 (Part 2)
Variances from Zoning By-law 569-2013 and Etobicoke Code (1993-108)			
1	Minimum lot frontage	12 m or 40 feet	7.62 m or 25 feet
2	Minimum lot area	370 m^2	306.5 m^2
3	Max. Floor space index	0.35 times area of lot required	0.67 times area of lot
4	Min. side yard setback	1.2 m City-wide; there is a complicated interrelationship with Etobicoke Code	0.9 m for the outer side yards; 0.6 m for the inner side yards;
5	Eaves side yard setback	0.3 m	0.2 m from north side lot line
6	Permitted first floor height	1.2 m above est. grade	2.87 m above est. grade
7	Height of exterior main walls	7.0 m	7.11 m

The application was denied at the Committee of Adjustment on December 17, 2017; the owner appealed and thus this application comes before the TLAB.

MATTERS IN ISSUE

A severance must meet the applicable *Planning Act* tests which would include:

- adherence to higher level Provincial Policies;
- matters of provincial interest as referred to in section 2 of the *Planning Act;*
- the size of the lots; and
- Official Plan conformity.

Specific matters of provincial interest in s. 2 would include the location of urban growth and promotion of development supportive of public transit. The minor variances are analysed by a different test, namely that the variances must be measured with respect to **all** four tests under s. 45(1) of the *Planning Act*:whether the variances individually and cumulatively:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- are desirable for the appropriate development or use of the land; and
- are minor.

The *Planning Act* asks the decision maker to consider whether the severance "conforms" to the Official Plan, whereas for variances, the "general intent" of the Official Plan must be maintained. For both, I must determine whether the frontages of 7.61 m (25 feet) together with the proposed built form meet the policies in Chapters 3 and 4 of the Official Plan:

> Physical changes to our established Neighbourhoods must be **sensitive, gradual and generally "fit**" the existing physical character.

and

> 4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular:
> . . .
> b) **size** and configuration of lots;
> c) heights, **massing, scale** and dwelling type of nearby residential properties;
> f) prevailing patterns of **side yard setbacks** and landscaped open space (my bold)

There are further Official Plan policies in 3.4 Natural Environment, which I will also address in the section titled "Tree Canopy".

EVIDENCE

I heard from T. J. Cieciura, the owner's planner, and Max Dida, the City's arborist, whom I qualified as able to give opinion evidence in their respective fields. I heard also from David Godley, Ben Puzic, Alexander Donald, Sheila and Fraser Carmichael, and Christine Mercado, all residents of Long Branch, called by Long Branch Neighbourhood Association.

ANALYSIS, FINDINGS, REASONS

I am not granting the severance or the variances. The first part of these reasons considers the physical character tests and the second the protection of the natural environment policies in the Official Plan. The success of the Long Branch Residents Association (LBNA) lies in the fact that they understood that both are interrelated. I find I do not need to consider OPA 320 nor the Long Branch Character Guidelines in applying the tests. If I did, the outcome would be the same.

Zoning requirements

No 70 Thirty-Sixth is located in an RD (f12.0, a370, d0.35) zone. It permits only one dwelling type: “detached house,” and the small letters in the brackets refer to frontage, area and density limits. The 12 m minimum frontage corresponds to 39.4 feet. The side yard setback is based on a sliding scale, depending on the frontage **requirement**, which in this case is 12 m, for which the side yard setback is 1.2 m. The owner proposes 0.9 m for the outer side yards and 0.6 m for the interior side yards.

Mr. Cieciura alleged his client’s 0.6 m setbacks do maintain the intent of the zoning, since in his opinion, the by-law permits 0.6 m side yards where the required minimum frontage is 7.62 m. He added there were many sideyards of 0.4 m or less in the vicinity. I disagree with his conclusion. Every word in the By-law has meaning; if the By-law intended to say “actual” frontage of 7.62 m, it would have said so. There are small side yards, it is true, but frequently these occur on one side of the lot and are accompanied by a pattern of an opposite more spacious sideyard, where there is often a garage.

Choice of Study Area

The starting point is to delineate the “neighbourhood” in the words of s. 4.1.5, which is not necessarily one that corresponds to the RD zone just mentioned but could, in certain circumstances. On the map on the next page (left side) is Mr. Cieciura’s (the owner’s planner) map, which does correspond to the RD zone and comprises 362 lots. LBNA’s map (right) comprises the eastern half of Mr. Cieciura’s area, minus the Lake Promenade lots and the chunk of land south of Park Boulevard, 128 lots in all. I agree with the deletion of lots south of Lake Promenade; they have direct shoreline access, which makes them different from other lots in either neighbourhood. In the end, I felt both study areas could yield information and I looked at both to apply the tests.

Both areas exclude the RM (Residential Multiple) zone area immediately east of upper Thirty Sixth in order to maintain an apples-to-apples comparison, even though a person would likely walk at least one block east. RM zones permit apartments and duplexes, but also detached houses. If a detached house is in an RM zone, its frontage requirement is the same 12 m as under RD; the hypothetical walker will find stretches of Thirty Fifth with much the same feel as Thirty Sixth. While I accept that planners find an adjacent but differently zoned area difficult to handle analytically, LBNA used its wide

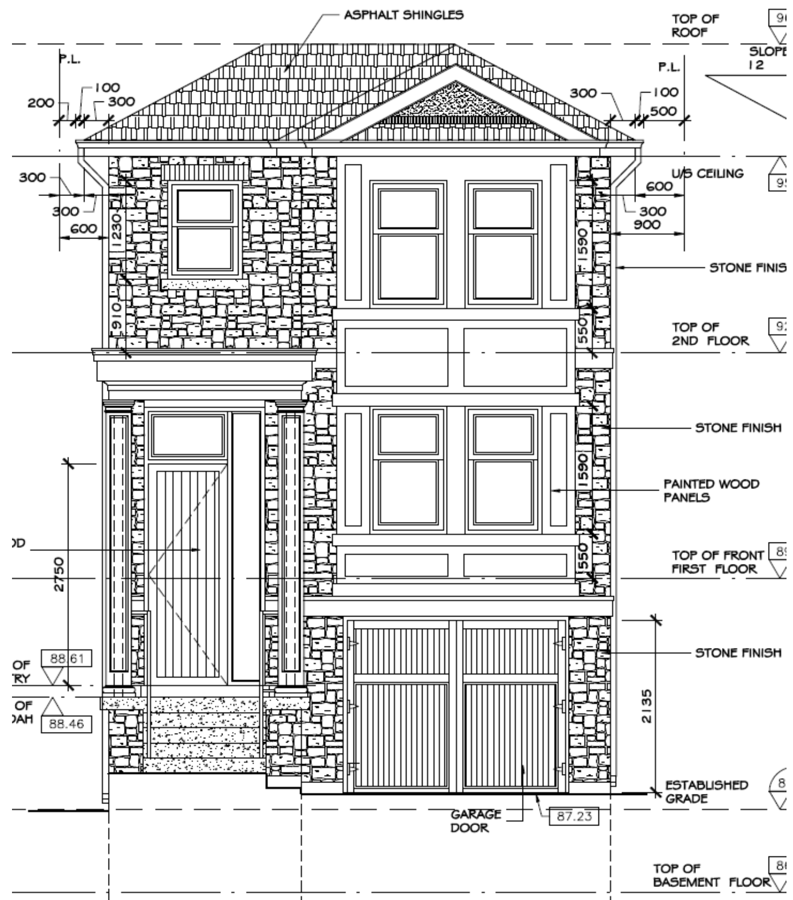
knowledge of all of Long Branch to inform a nuanced view of neighbourhood character; for example, with respect to the issues concerning trees.

The preamble words in the Healthy Neighbourhoods section of the Official Plan state:

> The diversity of Toronto's neighbourhoods, in terms of scale, amenities, local culture, retail services and demographic make-up, offers options within communities to match every stage of life. Our neighbourhoods are where we **connect with people** to develop a common sense of community. (my bold)

I find the LBNA study area was chosen with an eye towards how people connect. Ms. Mercado said it is likely that a resident of 70 Thirty Sixth would walk south to the Lake and enjoy Lake Ontario vistas on the way. They would certainly walk north to Lakeshore. It is less likely they would walk three or four blocks east or west unless it was to get to Marie Curtis Park or Colonel Samuel Smith Park, both outside the study areas. Even if our walker walked up and down Thirty Ninth, which is in Mr. Cieciura's study area but not LBNA's, I think it would be unlikely that they would retain a mental image of Thirty Ninth to compare it to Thirty Sixth's physical character.

Trees are mentioned in the Official Plan and ought to be considered where they occur.[1] LBNA produced four panoramic photographs of Thirty Sixth ("Lot Analysis Historical – Resulting Character") with views similar to how a walker would experience the neighbourhood character and in each, the streets are heavily shaded by trees with summer foliage.



Mr. Cieciura's bottom line is that there are 106 out of 362 lots that are below the by-law minimum. He did not attempt to summarize the character in a narrative.

On all the evidence, which includes photos and oral testimony, I find that the physical character of the neighbourhood is a well-treed, walkable neighbourhood, with Lake views as an amenity, generally a mixture of one and a half and two storey type homes with attached and detached garages and with a rhythm of wide spaces between the homes[2]. Mr. Godley's view was that the proposal was the opposite of the physical character of nearby houses. For example, nearby houses' massing was "small" and that of the proposal "large," the nearby scale "horizontal" and the proposal's is "vertical" and so on. I agree and

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[1] When we think of our neighbourhoods we think of more than our homes. Our t**rees,** parks, schools, libraries, community centres, child care centres, places of worship and local stores are all important parts of our daily lives. (my bold) 2.3.1 preamble to Healthy Neighbourhoods criteria.

[2] This is similar to the character as found by OMB Member J.E. Sniezek in refusing severances at 20 James, just around the corner from the subject application. Although the decisions is eight years ago, the character has remained similar. "When looking at the character, the Board looks at the height and massing of the surrounding lots – that is a **mixture of one storey bungalow, one and a half storey detached homes and two storey homes with lower sloped roofs. The yards are generous at or exceeding the present by-law standards**. (my bold). . .the proposed consents and minor variances are not in keeping with the general character of the area and do not represent good planning. The by-law standards for yards and parking are minimal and given the pattern of yards and heights now in existence they should be varied in exceptional circumstances." [There seems to be an "only" missing in the last sentence.] (*Nick Mano*, July 29, 2011, PL110241).

whichever study area is chosen, I find the relevant neighbourhood contains very few (less than ten perhaps) of the type of **built form** proposed.

The proposed built form

I will call the design (elevation on previous page) “the proposed design”, a term that is without the negative connotations given by some residents. It proposes two stories over an integral garage and necessarily duplicates this design for two lots side by side. LBNA asserts that this “presents” as three stories, and I agree.

The proposed design shows five risers to the front door level, stairs inside leading to the main floor kitchen and living/ dining areas, with one storey above; i.e. traditional basement, first floor, second floor.

Nonetheless, I find this presents as three storeys because of a combination of a desire for an integral garage, a one-level main floor, narrow lot width, and the prohibition of reverse slope garages.

> Mr. Cieciura: The City has prohibited reverse sloping driveways . . .and that’s more of an engineering and works standard, so since the reverse sloping driveways have been prohibited, the only option, on any lot that is in the City of Toronto that is roughly under thirty feet, so, twenty five to thirty foot range, is to put space in a garage because the garage has to result in a positive slope to the road. So, that’s what I said.
>
> Ms. Amini I would suggest that’s not the only option. It’s the only option if you want to have a full first floor.to maximize on GFA. The first floor would share its space with the garage and then you wouldn’t need this variance. It’s not necessary; it’s “desired by your client”.
>
> Mr. Cieciura: Well, that would generate other variances, because now you don’t have a first floor at the front of the building, you also don’t conform with Official Plan policies that say, I forget the exact words, that say something about relationship to the street,

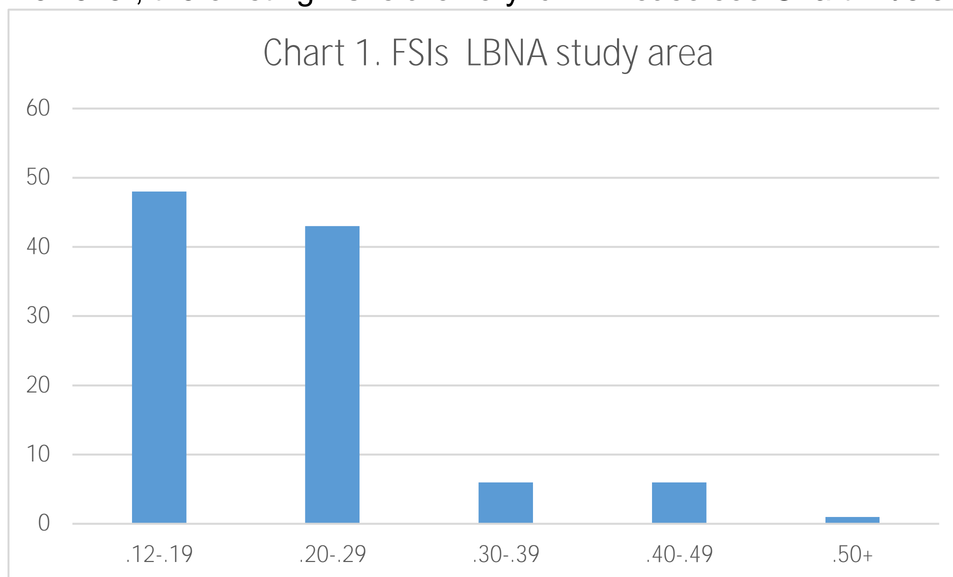
There is no explicit discussion in the Official Plan about the interaction between these issues: narrow lots, integral garages and reverse slope driveways. But it is the owner who seeks to sever the lot; an as-of-right application does not call for the application of these tests. Once the *Planning Act* severance tests are invoked, I am entitled and required to evaluate these compromises.

Furthermore, Mr. Cieciura seemed to take the position that one or two floors above an integral garage is a matter of taste so long as the height limit was complied with. I do not agree. Disaggregating and isolating each of the variables: height, FSI, and lot frontage, overlooks the reality that the development comes as a package of all these elements. Thus the decision maker is required to consider all the parameters enumerated in those words following “physical character” in 4.1.5:

> “**including in particular**. . . b) size and configuration of lots; c) heights, massing and scale”.. . .

Compartmentalizing these various parameters also minimizes what cannot be assessed numerically, such as massing and scale. The plans show two houses each 9.5 m high, 16.4 m long, sufficient front and rear yard setbacks, adequate driveway width, adequate number of parking spaces and 0.9 m from the neighbours. Except for the last number, no variance is sought, so Mr. Cieciura posits that any comment about impacts is beyond criticism. This overlooks the premise that for the project to work, one needs a severance, which is a benefit that involves consideration of the whole proposal and subjects the owner to independent assessment of their combined impact.

Since this is an established neighbourhood, the proposed physical changes must be “sensitive” and “fit in” (Official Plan, page 3 of this decision). If the design is to fit in, presumably the neighbourhood should contain other exemplars with similar FSIs. However, the existing FSI’s are very low. Please see Chart 1 below.



Most properties fall under an FSI of 0.39 (0.35 permitted[3]). Mr. Puzic, who lives diagonally opposite the subject, has a 50 by 136-foot lot, where a he expanded a 1600 square foot house to 2394 square feet. I calculate his FSI at roughly 0.352. The proposed design will create two 2,220 square foot homes on what was a 50 by 132 feet lot, which results in an FSI of 0.67.

Detailed list or severances in the last ten years

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[3] LBNA’s data, consisting of 102 properties on Thirty Sixth and Thirty Seventh, updated by reference to recent CofA decisions. The James properties are not included; this would produce another four addresses with 0.50+ FSIs.

I now examine whether there are other examples with the same FSI, lot area and massing, i.e. two floor over integral garage designs[4]. Working from Mr. Cieciura's list of 57 decisions plus available OMB decisions, I counted ten severance applications; eight granted applications, one before the Courts and one refusal. Only two parent lots have already built houses with the proposed design. They are 40 and 52 Thirty Eighth. The possible third severed pair is 76 Thirty Ninth. A fourth possibility is 40 Thirty Seventh. This list was only presented in raw form by Mr. Cieciura, who did not further analyze them. They are listed in reverse chronological order:

1. 2018 9 Thirty Eighth[5] consent granted; nothing built yet

On May 15, 2018, a TLAB member granted a severance to ATA Architects. However, TLAB Chair Lord allowed a request for review under TLAB Rule 31. The matter is now before the Courts, so the eventual built form is not known.

2. 2018 38 Thirty Sixth[6] refused at COA and TLAB

On March 19, 2018, TLAB Chair Lord confirmed the Committee of Adjustment refusal. The owner was Julien Nema.

3. 2017 40 Thirty Seventh[7] consent granted; nothing built yet

On October 24, 2017, OMB Member J. Duncan granted a severance to Daniel Fabrizi, over opposition by the City. It is unknown to me why nothing has been built at the time of this decision. (July 2019).

4. 2016 30 Thirty Sixth consent granted; nothing built yet

This severance was granted by OMB Member Krzeczunowicz[8] and is final and binding. However, Mr. Krzeczunowicz refused to grant any FSI increase (0.67 sought). Ms. Gibson has advised that the current owner, 2425456 Ontario Limited (a different number company from the subject owner) has recently been denied an FSI increase at the Committee of Adjustment. The result is that the eventual built form is uncertain, despite the 25-foot frontages.

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[4] I am not the only decision maker to pay attention to an integral garage as built form issue. For example, in granting the severance at 20 James, and in effect overruling Mr. Sniezek, OMB Member R. Rossi (*Gino Forucci*, Feb. 26, 2015, PL141217) distinguished his decision. He wrote, "the 2010 application [Member Sniezek's case] sought to split the subject property into two parts and build **two integral garages** at a much different level of built form and with greater massing and scale.[my bold] The proposed floor space index of .66 times the area of the lot was greater than what the Applicant proposes to build today. [0.54]."

[5] Cieciura spreadsheet, lines 114-116

[6] Cieciura spreadsheet, lines 118-120

[7] Cieciura spreadsheet, lines 27-29

[8] The issue date is missing in my copy but Mr. Krzeczunowicz states that the hearing was November 2016.

5.	2016	48-50 Thirty Sixth	consent granted	will not be like the proposed design.

This property is a non-standard case not on 25-foot lots; please see discussion next page.

6.	2015	40A, B Thirty Eighth[9]	consent granted	**same design as proposed and on 7.62 m lots**[10]
7.	2014	20 James[11]	consent granted[12]	no integral garage
8.	2013	50,52 Thirty Eighth[13]	consent granted	**same design as proposed and on 7.62 m lots**[14]
9.	2013	76 Thirty Ninth[15]	consent granted[16]	**what was built is unknown to me**
10.	2012	4-6 James [17]	consent granted[18]	no integral garage

Mr. Cieciura's photos were filed without a great deal of commentary and did not purport to exhaustively document every built form similar to the proposed design. Besides 40A-B and 50-52 Thirty Eighth, there is evidence of a severance at 61A-B James, with below grade garages (likely predating the spreadsheet), and at 57-59 Thirty Eighth[19] (not sure of frontage but two one storey over integral garage). These are not like the proposed design. There are also other new houses whose development history is less obvious:

7-7A (Photo 46) frontage not certain, **with one house similar to proposed**, and

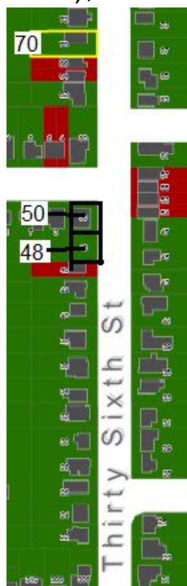
79-81 Thirty Eighth (Photo 45), ditto on frontage, one one-storey over integral garage.

These last two are not "similar architecture pairs" and may represent infill on a "double lot". So, there are ten granted severances, eight for which we have a documented decision, and two or three severed parent lots that we are inferring from the photos. Of

[9] Cieciura spreadsheet, lines 27-29
[10] Cieciura Photo 41
[11] Cieciura spreadsheet, lines 37-39
[12] This is the consent was granted by OMB Member R. Rossi. Mr. Cieciura documents the 2010 refusal by the Committee of Adjustment , the affirmation of the refusal by OMB Member J.E. Sniezek, a second refusal by the Committee of Adjustment in 2014, which was overturned by Mr. Rossi.
[13] Cieciura spreadsheet, lines 55-57
[14] Cieciura Photo 42
[15] Cieciura spreadsheet, lines 52-54
[16] No photo; the numbers jump from 33 Thirty Ninth to 86 Thirty Ninth.
[17] Cieciura spreadsheet, lines 74-76
[18] Consent granted by OMB Member C. Hefferon, PL120293
[19] Cieciura Photo 43

those I count seven houses with the proposed design (bolded addresses, giving the benefit of doubt to 76 Thirty Ninth) and let us double that to give the benefit of doubt. This is 14 out of 362 lots. To me, this is a small number; too few to establish a physical character to be respected and reinforced.

A cross examination of Mr. Cieciura by Ms. Gibson (the LBNA Vice Chair) reinforced this. On Thirty Sixth and Thirty Seventh Streets, there are no built form of the type proposed by 1930211 Ontario Inc. This includes 50 Thirty Sixth (the nonstandard case), 30 Thirty Sixth (Krzeczunowicz) and 40 Thirty Seventh (Duncan).

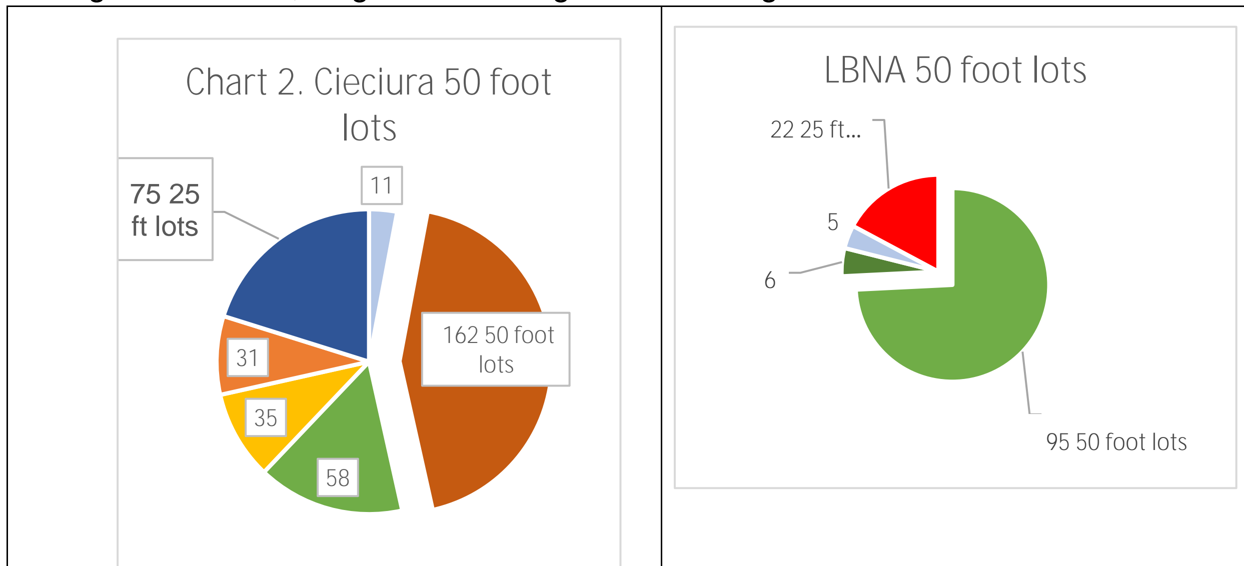


50 Thirty Sixth (the nonstandard case)

This is a 2016 severance of the southeast corner lot at Thirty Sixth and James. The original house was a bungalow (belonging to the Ziolek family) which fronted on James with a rear yard flanking Thirty Sixth. The rear yard was severed off to create a new lot fronting on Thirty Sixth (No. 48 in diagram on left). The heavy black lines and lot numbers are added by me to Mr. Ciecura's map. The salient information from the COA decision is:

50 Thirty Sixth	331 m^2 19.05 m frontage
48 Thirty Sixth	304 m^2 17.53 m frontage. (12 m required)

Both lots needed a lot area variance, but not a lot frontage variance. I do not feel this severance helps1930211 Ontario Inc. The severance maintained the pattern of wide frontages along James and Thirty Sixth, as the new lot's frontage is even more than the subject property's. Upon registration of the R Plan, the Zioleks placed a chain link fence around the severed property advertising it as a building lot, and no attempt was made to landscape the grounds. This unkempt lot was a development that was destabilizing in the sense mentioned by Mr. Cheeseman in closing submissions; "blight" or "running down the neighbourhood".



Mr. Cieciura's frontage and lot area maps

Mr. Cieciura created maps showing the distribution of frontages and lot areas. This is a neighbourhood with regular depths, so the information is basically the same whether the frontage or area is the variable. For example, the smallest range for the lot area is from zero m^2 to 306 m^2, which corresponds to frontages from zero to 25 feet. The next range is from 306 to 370 $m^{2,}$ where the larger lot area (370 m^2) corresponds to a 30-foot frontage. Mr. Cieciura said that, by squinting his eyes (to discern the big patterns), the maps resembled "a quilt". He created useful pie charts for frontages and areas to show this diversity.

In the charts on the previous page I compare the counts of 0-25-foot, 25-30-foot ranges, etc., in the two study areas. Mr. Cieciura's chart is on the left. For LBNA's area, I counted the lots on page 4 and made a similar chart. Both contain one small error: #40 Thirty Seventh is shown as a 50-foot lot but should be two 25-foot lots. (This is OMB Member Duncan's decision.) I corrected only LBNA's numbers because Mr. Cieciura's numbers are so large the change would be lost in the rounding. The general conclusions are clear, nonetheless. In Mr. Cieciura's chart, 47% of the lots are 50 feet or over (11+162 = 173 out of 362 lots) and the equivalent number for LBNA is 74%. In both study areas, I find that the proportion of 50 or 50+ foot lots forms a significant component of the character of the neighbourhood ("size and configuration of lots").

I find as well that the intermediate sizes are not important for a stability analysis, i.e., whether more severances may occur so as to change the physical character of the neighbourhood. An intermediate sized lot is too small to produce two viable lots and will remain that size, unless acquired to create assemblies. Finally, lumping newly created 25 foot lots with historical ones overlooks the zoning provision that the historical undersized lots are "legally existing", an issue I will now examine.

From the list on page 9, in LBNA's study area, there are five severances creating **ten**[20] new lots, out of 22 total. This leaves 12 historical 25-foot lots. For Mr. Cieciura's study area, I find five more parent lots or **20** new 25-foot lots[21] out of 75 in total. This suggests 75 minus 20 = 55 historical lots.

Mr. Cieciura focused on the "over-and-under" versions of the variously coloured "quilt" on his maps. That is, he collapsed all the ranges, so that only two colours appear, to better focus on the question of whether the lots were over or under 12 m:

> This [frontage] map has two colours on it --:green and red. The green lots comply; red do not. So, it's a fairly straightforward breakdown, the only caveat I will add to this is [10 "null" results were discarded]. But of the other lots, for which there was data available

[20] 30 and 50 Thirty Sixth; 40 Thirty Seventh; 4 and 20 James

[21] Those five in the previous footnote, plus 40A, 40B, 50,52 and 57-59 Thirty Eighth, 76 Thirty Ninth, and 61A-B James

> [372[22] minus 10 = 362 lots], 106 of them did not comply with the zoning by-law requirement for area. **They could be severed lots, or they could be lots of record; that's not the purpose of this map** it was just to show compliance and non-compliance. So green you can see there were several on the same block; there are several in the study area. . . .So, all of these red lots do not comply with the minimum. So, in my opinion, the development is in keeping with the development that is happening in the study area. They are in keeping with the lots that are already in the neighbourhood, it will keep within the existing physical character of the neighborhood, so my opinion is that the variances will maintain the purpose and intent of the zoning by-law.

So, if I can summarize his reasoning:

An assortment of built forms plus 106 undersized lots out of 362	Leads to this planning conclusion	Maintaining the character of the neighbourhood.

Before I apply the test, I wish to examine the physical character contribution of historical 25-foot lots.

Historical lots

Mr. Cieciura rightly distinguished between historical and newly created undersized lots and made no attempt to conflate the two. Even if a lot is 25 feet, it does not come by this frontage randomly. Lot sizes are a conscious decision by the subdivider, along with decisions by subsequent landowners to create a neighbourhood for living. Except for severances created in the 21st century, those lots were developed with low FSIs (please see Chart 1 on page 8).

On the next page is a montage created from Mr. Cieciura's photos of 64 to 74 Thirty Sixth. (I make no attempt to portray this as representative of actual heights or side yards "in reality", as Mr. Cieciura's camera didn't take pictures from a consistent vantage point). The subject is the centre white house with a garage with the star. The montage **hints** at the street's rhythm of massing and scale. The passer-by does not know (and probably does not care) that #s 64 and 66 are 7.6 m wide, and 70, 72 and 74 are 15.24 m, nor that the by-law minimum is 12 m. She or he simply registers that there is a pleasing streetscape with variety and repetition. The Official Plan speaks to these pleasing streetscapes. suggesting that even though they predate the zoning by-law, they are prized:

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[22] Mr. Cieciura subtractied10 from 372 to produce a universe of 362 lots for which there is data. However I believe however he calculated his pie chart on 372-property universe instead of 362. Nothing turns n this.

> Whether it's a bustling shopping street lined by vibrant shop windows and sidewalk cafes, an **intimate, residential, tree-lined street,** or a public plaza in the central business district – everywhere you look there is evidence that the place has been designed[23].

Application of the test

The planning criteria are to be read as a whole or cumulatively; they ask us to look at the physical character, **including** massing, scale, and side yards; not just to count undersized frontages. I did not see any analysis from Mr. Cieciura combining frontage and these other parameters. When a planner counts only the low frontage lots, ignoring massing and scale, the Official Plan is not being read as a document where "all sections must be read together."[24]

The "reinforce" policy is a more difficult test than "respect." I have already indicated how the creating of 48 Thirty Sixth created a new 19 m frontage and reinforced the generally existing pattern of 50-foot lots, albeit with the loss of some of the open space character of the neighbourhood.

The test is whether the physical change will be **sensitive, gradual and generally "fit**" the existing physical character. From the two or three or even four exemplar pairs of the integral garage design, the large number of historical 25-foot lots (LBNA 12 out of 22 =55%; Mr. Cieciura 55 out of 75 =73%) and the lack of analysis into the word "sensitive," I find the owner has failed to address these words sufficiently. I find as well that the area contains a significant proportion of 50-foot lots, especially in the eastern part of Mr. Ciecura's study area, for which a severance would be destabilizing to the lot fabric. Mr. Cieciura's evidence is that the proposed development is "in keeping" with the neighbourhood. Without quibbling over whether he used the

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[23] Official Plan, 3.1.1 The Public Realm
[24] 1.4 How to Read the Plan The Plan is an integrated document. For any individual part to be properly understood, the Plan must be read as a whole (

exact words in the Plan, I find it is not sensitive, but driven by the owner's perception of what the market prefers, is not gradual, nor do I consider that it "fits in." I find the proposed design is an abrupt change in character, particularly not respecting side yards and lot size characteristics.

. I will now look at LBNA's argument that the number of severance applications by itself is destabilizing. I will reject this argument. There are indeed an increasing number of severance applications. But LBNA's argument would mean that the owner's application is defeated even before the tests were applied.

Numbers of applications for additions are flat; severances are on the upswing

This is a further examination of Mr. Cieciura's 57 item spreadsheet (COA only), broken down by additions and teardowns. Teardowns include non-severances (one new house) and severances (two new houses). The tables reinforce the finding that only severance applications combine FSI, frontage and lot area variances.

Only one address in Table 2 (Additions) sought this combination. This was 90 Thirty Sixth's owner, who sought a frontage variance for an **existing** 25-foot lot. This variance was not really an exercise of the decision maker's discretion; but just an affirmation of an existing legal nonconforming frontage.

Table 2 contains additions, and Table 3, teardowns. In Table 3, addresses without severance are in regular font; severances in bold.

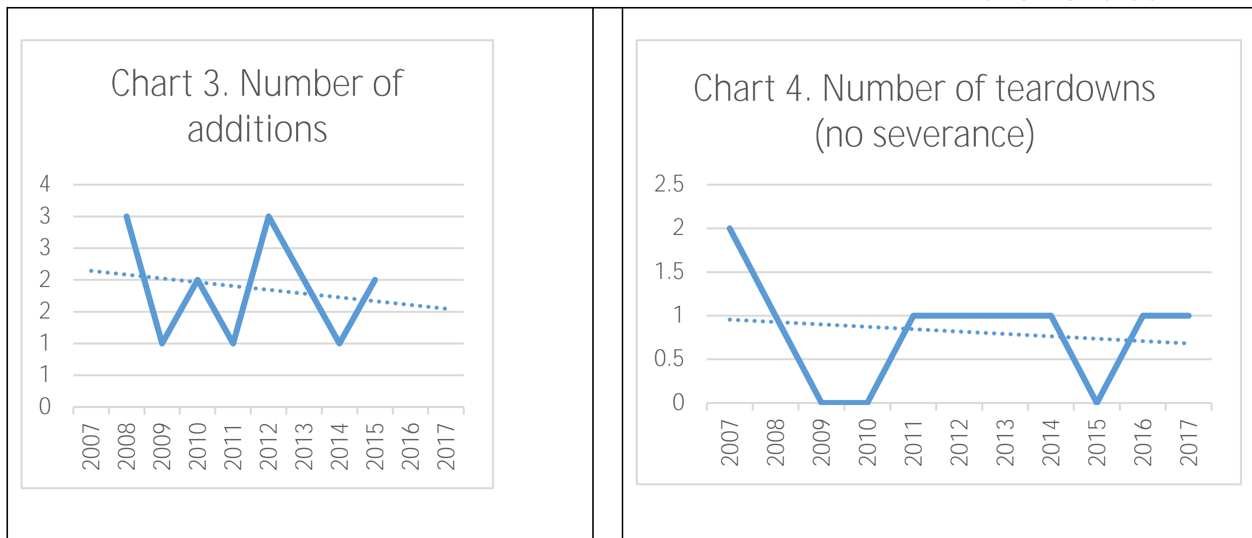
Table 2. FSI increases granted for additions			
2008	35 Thirty Seventh St (0.36); 38 Thirty Fifth St (0.45); 53 Thirty Ninth St (no FSI increase sought);	2014	**90 Thirty Sixth St (existing 9.14 m lot (0.46);[25]**
2009	1 Villa Rd (0.37);	2015	67 James St (0.42); 45 Park Blvd (0.57)
2010	63 Thirty Sixth St (no FSI increase sought); 75 Thirty Seventh St (0.4)	2016	72 Thirty Eighth St (.047);
2011	36 Thirty Seventh St (0.41);	2017	none
2012	31 James St (0.598); 56 Thirty Ninth St; (rear addition to fourplex, no FSI increase sought); 70 Thirty Eighth St. (0.53)	2018	70 Thirty Eighth St (0.53)

[25] The only FSI request that was also accompanied by a frontage variance and no severance was sought

Table 2. FSI increases granted for additions		
2013	53 Thirty Sixth St (48); 45 Thirty Sixth St (no FSI increase sought);	

Table 3. FSI increases granted to teardowns. Regular font indicates no severance sought. Bold indicates severance.			
2007	63 Thirty Eighth (0.37) 359 Lake Promenade (0.65)[26]	2013	7A Thirty Ninth[27] (0.61); **52 Thirty Eighth approval by COA (0.68); 76 Thirty Ninth approval by COA (0.55)**
2008	57 Thirty Eighth (0.52)	2014	78 Thirty Seventh (0.50); **20 James COA refusal (0.53. 0.54)**
2009	none	2015	**40 Thirty Eighth approval by COA (0.86);**
2010	**20 James COA refusal (0.66)**	2016	29 Thirty Eighth (0.61); **30 Thirty Sixth (0.35, approval by Krzeczunowicz of severance only); 9 Thirty Eighth approval by COA (0.56)**, **4 James approval by Hefferon (0.54)**
2011	16 Thirty Seventh (0.46); **4 James COA refusal (0.54);**	2017	35 Thirty Eighth (0.63); **40 Thirty Seventh approval by Duncan (0.66)**
2012	7A Thirty Ninth (0.58);	2018	**15 Thirty Eighth withdrawal by Kenfield Holdings; 9 Thirty Sixth (Div. Ct.); 32 Thirty Sixth abandonment by Culmone (0.63), 38 Thirty Sixth (0.62, refusal by Lord), plus 3 cases pending at TLAB and one at the COA.** I treat this as 4 for 2018 and 4 for 2019.

[26] I consider this address out of the study area.
[27] It seems as if the owner of 7A Thirty Ninth wen to the COA in successive years, first for a 0.58 FSI then for 0.61



I summarize Tables 2 and 3 visually in the charts on the previous page. They show additions and non-severance teardowns are flat or falling. In Chart 5 (page 18), severances are rising.

But before I look at that chart, I want to give the reader more information about current severance applications with information taken from the TLAB website.

TLAB abandoned applications

15 Thirty Eighth Kenfield Holdings instructed its lawyer to withdraw its appeal, so the merits were never considered at a full hearing. Only the severance was appealed; although Kenfield sought an FSI variance of 0.69 at the Committee of Adjustment. The TLAB Member was Mr. D. Lombardi.

32 Thirty Sixth Culmone & Associates, the agent for owner Jessica Ieraci, sent a letter that it would not attend the scheduled hearing. Ms. Ieraci had obtained a severance at the Committee of Adjustment, which the City of Toronto appealed. Mr. Donald (a witness at this hearing) was also a party there, as he lives next door. The hearing became an unopposed “motion for judgement”; that is, the City’s appeal from the Committee of Adjustment decision succeeded. The TLAB member was Mr. S. Makuch.

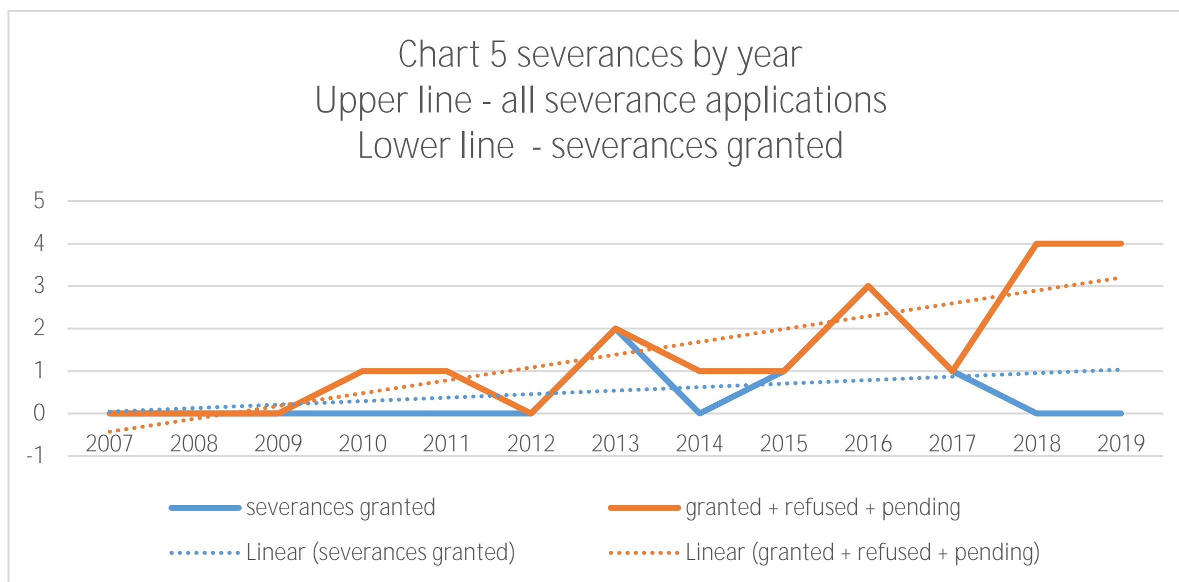
Pending at the TLAB

27 Thirty Ninth – Owner Artan Selmani and Xheladin Richiti. This case is subject to a Procedural Order by TLAB Chair Lord.

74 Thirty Eighth. Owner Matthew Gismondi. This case is subject to a procedural Order by TLAB Member J. Tassiopolis.

80 Thirty Ninth. Owner Hamed Ismailzadeh. This case is subject to subject to a procedural Order by TLAB Member S. Makuch and is set for a nine-day hearing.

In addition to the above cases, Mr. Donald testified that he had attended five hearings on Thirty Sixth within a few houses from his: 9 Thirty Sixth (Divisional Court); 11 (I am not sure of the result), 30 (OMB Member Mr. Krzeczunowicz, page 9) , 32 (Culmone withdrawal), 38 (Nema, refusal by Chair Lord), as well as 70, which is still at the Committee of Adjustment stage. Ms. Gibson stated there were 12 applications that LBNA had attended.



In Chart 5, the word "linear" signifies a dotted linear trend line and both lines are rising. Mr. Cheeseman's position is that a landowner may always apply for anything and I agree. Developers have rights, too.

I note the information analyzed in this section reinforces the previous conclusion that only severance applications require the simultaneous consideration of frontage, area and FSI performance standards, as well as the s. 53 (severance) tests. Additions and one-lot teardowns do not. Even if the number of severance applications is rising, the resulting change to the lotting fabric after historical lots are factored out, does not in my estimation sufficiently change the physical character of the neighbourhood.

To conclude, I cannot make the finding that LBNA invites me to make — that the increasing number of severances applications is by itself destabilizing.

Ms. Carmichael's evidence

Ms. Carmichael (72 Thirty Sixth) testified that there would be a new wall 7.11 m high, 0.9 m away from her property line and overhanging her house by about 7 m (23 feet). In addition, there would be a new rear porch whose floor elevation Ms.

Carmichael calculates will be 2.22 m high (7.3 feet). The plans say that it will be 6.2 feet above **established grade** (measured at the front), but as the finished grade slopes slightly downwards to the rear, both may be correct. In any case, the top of the rear porch floor will be higher than the existing fence between the two properties of 1.85 m (6 feet). And this is, in my estimation, a pretty high rear porch, sufficient to cause privacy concerns. It is a direct result of the compromises Mr. Cieciura discussed and the owner's desire not to put in interior steps to lead down to the rear porch.

I agree with Ms. Carmichael's assertion that all these impacts constitute unacceptable adverse impacts to her property. Mr. Cieciura's position was that these dimensions were within zoning standards, and apparently there is no limit on rear porch height. Again, this overlooks the fact that the "as of right" dimensions are part of a package of severance and variances. If there was no severance and the same built form was proposed (I am ignoring the FSI here), then Ms. Carmichael could not complain, but that is not the case before me. The variances, taken cumulatively, fail all the tests in s. 45 of the *Planning Act.*

Tree canopy

After discussing the importance of the urban forest to the City's character, the Official Plan states the urban forest should not be "compromised" by development pressures[28]. If a principle is not to be "compromised," I am to give it ample weight. The key policies are in 3.4.1.(d):

> To support strong communities, a competitive economy and a high quality of life, public and private city-building activities and changes to the built environment,. . . will be environmentally friendly, based on:
>
> . . .
>
> d) preserving and enhancing the urban forest by:
>
> i. providing suitable growing environments for trees;
>
> ii. increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees; and
>
> iii. regulating the injury and destruction of trees;

Strong communities are those where people want to live. Mr. Puzic stated he looked for two years to be able to buy in Long Branch. Ms. Mercado said that hers was her third house and represents a community that she desired but could not afford when she was

[28] City-building and development pressures, however, can create **a difficult environment in which to sustain the urban forest canopy**. We must not only protect the existing urban forest, but also enhance it, especially by planting native trees and trees that increase canopy coverage and diversity. **Protecting Toronto's natural environment and urban forest should not be compromised by growth, insensitivity to the needs of the environment, or neglect.**

starting out. Mr. Godley said that the proliferation of look-alike houses on severed lots flattened the "diversity" of Toronto neighbourhoods, a word in the Healthy Neighbourhoods section quoted on page 5.

The owner, 1930211 Ontario Inc, takes the position that the Official Plan is satisfied if it agrees to abide by the permit system created by the Tree By-law 813. This By-law divides trees into two categories:

City trees, Article II; and
Private Tree Protection, Article III.

The subject property has a City and a private tree, the first, a 33 cm in diameter healthy city owned maple tree", the private tree a Norway maple. City staff inspected the City tree prior to the Committee of Adjustment hearing and advised that construction would cause the City tree injury or removal. I am inferring that this would happen because of the placement of the driveway, the location of the foundations, compression of the roots by the tracking of heavy equipment or a combination of these factors. Dr. Dida (the City's arborist witness) went on to say:

> This tree is healthy and in good condition structurally and botanically. This tree is a valuable part of the Urban Forest and should be retained.

Dr Dida then cited the three criteria in 3.4.1 (d) (already quoted). He concluded that Urban Forestry **objected** to the requested variances and recommended that the COA application be deferred because his department lacked information to create "an acceptable tree protection plan" in the absence of "sufficient detailed information on the proposed construction." If the Committee of Adjustment were to approve the variances [and severance], he said the approval should be subject to the condition that the necessary permits be obtained. He wrote a similar letter with respect to the private tree.

However, there is an important difference in the two letters. Both are polite and invite cooperation. However, Letter 1 is an "iron fist in a velvet glove". While suggesting a cooperative approach, ultimately Council, as owner of a City tree, could refuse to issue a permit. The owner would then be left with planning approvals, but no way to implement them until the tree becomes diseased or dies of natural causes. Letter 2 states that if the owner obtains planning approvals, Urban Forestry says it will probably require the owner to pay cash in lieu [29], which 1930211 Ontario Inc is more than willing to do. So, if I were to approve this severance, this hearing will become a permit issue between the owner and Urban Forestry. I assume it will be only at that point that an arborist will be retained to inquire into whether the construction of a driveway will cause City tree injury or removal.

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[29]If the Committee approves the requested variances, Urban Forest requests that the applicant "shall submit an application to injure or remove trees."

There is the danger of a “two silos” decision making, and the loss of the only opportunity to consider the development in comprehensive fashion. Ms. Amini (the City’s lawyer) pointed out that when an owner appeals the refusal to issue a permit for a private tree, Council or Urban Forestry can issue the permit when the tree is specifically identified on plans approved by a planning authority (Council, the OMB or the TLAB). She stated that the assumption is that those approval granting bodies have considered the planning and arborist implications of the development together. The plans show one 0.60 m[30] private tree is contained within the footprint of one house which must be removed but are silent as to the fate of the City tree. Mr. Cieciura said the owner was willing to discuss permeable paving and modifications to the placement of the driveway.

1930211 Ontario Inc declined to hire an arborist and Dr. Dida; the City’s arborist, stated that he could not speak about either tree without an arborist report prepared in consultation with the contractor for the construction. There is a great deal more tree evidence from LBNA, which it is not necessary to recount in view of the findings made with respect to the physical character test.

In 15 Stanley[31] (where the owner similarly declined to hire an arborist) and 38 Thirty Sixth (where an arborist was retained and found 2 trees had to be removed and 2 subject to injury), Chair Lord found that the “the loss of healthy mature trees is not supportive of 3.4 d) of the Official Plan.” I agree.

Long Branch Neighbourhood Association, which has a committee whose mandate tracks the wording of the Official Plan (Tree Canopy Preservation and Enhancement”) and has given away 300 trees for planting on private lands, has documented the imperfections of the tree protection regime in the Tree By-law. On at least two properties (75 Twenty Fifth, picture following, and 56 Twenty Seventh), despite the Tree Protection Zone, construction has stressed trees in the Tree Protection Zone. Before and after pictures show healthy trees before development and either stumps or nothing afterward.

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[30] Dr Dida’s November 27, 2017 letter refers to “one **36** cm healthy Norway maple tree located at the rear of the subject site”.

[31] These two TLAB decisions by TLAB Chair Lord that explain the applicability of policies in s. 3.4 The Natural Environment

Healthy city owned protected magnolia tree. Spring 2018

Oct 5, 2018 – Protected Tree removed without a permit or permission

This concern is echoed by Councillor Mark Grimes in a report to the Etobicoke Community Council in February 2018:

> Trees that are protected by Tree Protection Zones (TPZ) during the construction of these homes, often succumb to their injuries and are ultimately removed, diminishing the tree canopy of Long Branch even further.

Mr. Cieciura failed to produce any evidence of compliance with OP 3.4.1 d): except compliance with the Tree By-law.

> Ms. Amini And you didn't tell your client to hire an expert in arboriculture or forestry?
>
> Mr. Cieciura: As a planner, its's not my role to tell my client to do anything. I review the application in front of me in the context of the policies that are here, and the policies also apply to other processes in the City and I know they have to get a tree permit no matter what they do on this property. Whether they [do or] don't do, a consent, whether they just build one house on the property. Still have to get a permit to injure or destroy private trees. And there's one tree in question that I did point out in front of the house, that's a City owned tree. So, there's not any right to touch it without going through another City process. That's how I feel these policies are implemented by the City of Toronto in every development whether it's got *Planning Act*, minor variances, or consents; every development must go through that process.

In effect, Mr. Cieciura ignores Dr. Dida's objection and seizes upon the words following "if they were to be approved."

I find this is a private City-building activity, causing change to the built environment. I find that an additional driveway will be built, and the soft landscaped area will be reduced from what exists and there is no professional evidence how this will

impact the City tree. I find that a suitable growing environment for trees will not be enhanced, nor will there be an increase in an existing canopy. I find that the Tree By-law 813 is supportive of strong communities etc., but cash in lieu is not by itself completely sufficient **in this case and considering all the circumstances.** Finally, I acknowledge that in other fact situations, other decision makers could well find that the policies in 3.1.4 d) are counter-balanced by other considerations in the Official Plan, for example, a response to the need to provide affordable or accessible housing. I am not saying in every case that the destruction of mature trees will stop planning authorizations. It is a balancing of factors related to community planning.

Conclusion

The severance application does not conform to the Official Plan nor do the variances maintain the general intent and purpose of the Official Plan and zoning bylaw. Accordingly, the appeals are dismissed, the consent is not granted, and the variances are not authorized.

X

Ted Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao