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DECISION AND ORDER

Decision Issue Date Tuesday, October 03, 2017

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

Appellant(s): CITY OF TORONTO

Applicant: ARISTOTLE CHRISTOU

Counsel or Agent: AMBER STEWART (Applicant); NATHAN MUSCAT (City)

Property Address/Description: 263 GAMBLE AVE

Committee of Adjustment Case File Number: 16 271715 STE 29 CO, 16 271720 STE 29 MV, 16 271721 STE 29 MV

TLAB Case File Number: 17 160233 S45 29 TLAB, 17 160235 S45 29 TLAB, 17 160236 S53 29 TLAB

Hearing date: Monday, September 25, 2017

DECISION DELIVERED BY T. YAO

INTRODUCTION

This is an application to sever a 9.754 m (32 feet) lot into two equal sized lots and build two replacement residential buildings. A total of 24 variances are sought.

BACKGROUND

The lot is located on the south side of Gamble Avenue, which is the east-west street immediately north of Cosburn Avenue. The owners, the Stavropouloses, propose

to demolish the existing house and erect two semi-detached houses that will be three-storeys high. This block of Gamble Avenue contained one and a half to 2 storey single detached residences, but many original houses have been demolished and replaced. About half the houses in the immediate block-and-a-half radius have received minor variances. The block backs onto Cosburn Ave. which is composed of medium rise apartment buildings, a very different physical form.

On April 26, 2017, by a 3 to 2 majority, the Committee of Adjustment approved the severance and authorized 26 variances (13 per lot), on conditions. The City of Toronto appealed. Part of the Council's instructions in authorizing an appeal were to attempt to negotiate a settlement with the Stavropouloses. The negotiations have been successful in that the Stavropouloses have abandoned the original proposal and produced a revised list of variances. The City through its counsel supports this list and called no witnesses. No neighbour appeared in opposition.

This lot is more shallow and wider that most of the other lots in the neighbourhood.

Table 1. (forming part of this decision)		
	263 Gamble Ave	typical
frontage	9.754 m	8.23 m at no. 125 Gamble; 6.94 m at 129 Gamble
depth	30.5 m	46 m

One of the City's goals in its appeal was to ensure that the TLAB decision would not create a precedent that might destabilize the narrower, deeper lots in the rest of the neighbourhood. Recognizing the site's unique characteristics, the Stavropouloses agreed to remove integral garages to create more interior space for living purposes, and as a result, all height variances are eliminated and the floor space index variance has been reduced from 1.04 times the area of the lot to .96. However, the settlement creates a new variance for relief from front parking provisions for one lot, which is supportable because there is plenty of overnight permit parking in the area.

A second goal was to preserve a City-owned honey locust tree on the boulevard (i.e. strip between the street and the sidewalk) immediately in front of the westerly severed lot. The Acting Supervisor, Tree Protection and Plan Review for South Toronto, determined that there would be unacceptable injury to this tree if a driveway were built beneath the canopy. Tree protection is promoted in many sections of the Official Plan, the Tree By-law and the Climate Change, Clean Air and Sustainable Energy Action Plan. The Stavropouloses agreed to forgo a parking pad for this semi. There is no such constraint for the other semi, so the requirement for relief from front yard parking is sought for only one of the severed lots. To sum up, the semi facing a

City-owned tree will not have on-site parking and the other will have only a pad. Neither will have an integral garage.

MATTERS IN ISSUE

Should I give special consideration because of the successful settlement negotiations?– I conclude that I should, in the special circumstances of this case. I must still find that the variances meet the four *Planning Act* tests of being minor, desirable for the appropriate development of the land and of maintaining the intent and purpose of the Official Plan and zoning by-law. The severance must also meet the *Planning Act* tests relating to Official Plan conformity and the dimensions and shapes of the proposed lots and as otherwise enumerated in s. 51(24). In the result, I reviewed the circumstances of the settlement, which I found reasonable, and because of this, I found the proposal with the assistance of planning advice to meet the requisite tests.

EVIDENCE

Only Mr. McKay, the Stavropouloses' planner testified. I qualified him as an expert entitled to give opinion evidence in land use planning. Mr. Mckay confined himself to the Stavropouloses' revised design and offered no evidence or opinion in support of the original proposal approved at the Committee of Adjustment.

ANALYSIS, FINDINGS, REASONS

A negotiated settlement allows the parties to craft a custom-made solution, often one that cannot be reached in a contested hearing. It may result in one that best satisfies competing public and private interests. It is my opinion that a reasonable settlement has these characteristics:

- responsibly arrived at, for example, one that produces a public benefit;
- where one party to the settlement is a government body, such as the City of Toronto, and the settlement is not just between private parties; and
- where there is also evidence that the settlement meets the tests under the *Planning Act.*

My starting point is the case of *Stephen Alexander Cooper* (see endnote for citation), which is not a planning case, but one from the appeal branch of the tribunal system that metes out penalties for lawyer and paralegal professional misconduct. While clearly not from a planning tribunal, I find the reasoning persuasive, since it deals how another tribunal should react to a settlement between two parties, one private and one public. Both the TLAB and the tribunal in the *Cooper* case have a duty to have regard for the public interest (in the case of the Law Society Tribunal, to protect the

public and maintain confidence in the legal profession; in the case of the TLAB, to ensure that the intent and purpose of the official plan is maintained and that principles of good community planning are upheld.

The Law Society Tribunal was given a joint submission, based on an Agreed Statement of Facts signed by counsel for the Law Society and the lawyer. It accepted the Agreed Statement of Facts, but decided the lawyer should be prohibited from the practice of law for four months instead of the agreed upon "sentence" of two and a half months. The lawyer appealed, and the Appeal Tribunal held that the lower Tribunal ought to have accepted the shorter suspension. The Appeal Tribunal also set out general principles (reproduced in an endnote for convenience and not forming part of this decision).

I will now restate those principles, as to how they might apply to this case. The first principle, in my view, is that being faced with a settlement, the TLAB need not accept it. This is a conclusion from tribunal independence and the fundamental obligation of the TLAB to apply the statutory tests, which obligation is not displaced because of any agreement by the parties.

The second principle is that the TLAB should be "encouraged to accept settlements" because the parties wish us to do so and because the *Planning Act* and other legislation call on us to do so. Indeed, the TLAB Rules were drafted to encourage mediations and settlements almost as a first priority. I will elaborate on this below.

The third principle is that there should be a high threshold before the TLAB refuses to accept a settlement. The Appeal Tribunal in *Cooper* suggested that rejection should be done only if the settlement is "truly unreasonable or unconscionable". For example, in the TLAB context, this might be a settlement producing a "grossly inappropriate land use incompatibility" or "unacceptable adverse impact" or some other clear indication that a variance could not meet one or more of the statutory tests. In my view, were I to be at the point of making such a finding, in the absence of cross examination, fairness would require that I point this out before the parties have concluded their evidence, to allow them to adduce further evidence to address this concern.

In most cases, the only evidence before a TLAB panel will be in support of the settlement. If the panel is to depart from the settlement proposal, it must find evidence outside of what the witnesses tender or within the settlement terms themselves. This is not the usual expectation. In this case, there is no evidence opposed to the settlement.

DOCUMENTS SUPPORTIIVE OF THE RESOLUTION OF DISPUTES BY SETTLEMENT

Both Convocation[1] and the Ontario Legislature are rule making bodies giving guidance to quasi-judicial decision makers regulating in the public interest. The *Cooper* adjudicators were guided by an explicit Convocation policy direction encouraging them to accept a settlement except where the adjudicators conclude the settlement is outside a range that is reasonable in the circumstances. (par. 14). While there is no such explicit directive for the TLAB from the Ontario Legislature or City Council, I conclude, looking at the entirety of the legislative context, that there is a similar expectation: to relax the evidentiary burden for the seeker of the variances when the seeker has entered into a reasonable settlement.

The *Planning Act* supports resolution of planning disputes by discussion and informed co-operation:

> **1** The purposes of this Act are,
> . . .
> (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
> (e) to encourage co-operation and co-ordination among various interests;

Section 2 of the *Planning Act* states: in carrying out of its responsibilities, boards including the Municipal Board and the TLAB: "shall have regard to . . . the resolution of planning conflicts involving public and private interests."

The planning process is settlement oriented. The procedure in a minor variance application before the Committee of Adjustment is to advertise within a geographical radius. Those on the assessment roll may or may not choose to comment. In the event of an appeal, those neighbours and others identified by the Committee of Adjustment are circulated with the TLAB's Notice of Hearing (Form 1) and hearing date. A precondition to participants and parties to speak at the TLAB appeal hearing is that they file elections as status and written statements in timely fashion, setting out their positions. The entire process of the TLAB Rules is designed to encourage and facilitate discussion and settlement. To ignore a settlement when it occurs would be a repudiation of this desirable and transparent process.

The Toronto Official Plan, dealing with density bonuses etc., contemplates one planning consideration might be the balancing of a broader public interest against private interests:

> This Official Plan recognizes that planning issues related to a proposed development go beyond consideration of matters necessary to support that particular development. They include consideration of appropriate amenities and services in the local community within which the development is to be located. In other words, the planning issues may go beyond appropriate built form, use, compatibility, direct impact, site planning, adequate servicing and the proper functioning of the development to include the adequacy of, for example, the green space system, community services and

[1] Convocation is the body of elected representatives of the legal professions that meet to make by-laws and adopt resolutions of the Law Society.

> facilities, the bikeway network, arts and cultural facilities, the public transit system and *other aspects of the public realm* (page 5-2, my italics)

In the case before me, the lowering of the roofline at 263 Gamble Ave. forms part of the "appropriate built form", but the protection of a City owned tree is an "appropriate amenity in the local community" and an "aspect of the public realm". A lowered roofline and preservation of the honey locust are desirable amenities; these amenities are in furtherance of the intent and purpose of the official plan and being "desirable for the appropriate development of the land".

Finally, TLAB Rule 19.1 states the TLAB is committed to encouraging settlement of "some or all of the issues. . .." As the *Cooper* Appeal Tribunal noted, if settlements are disregarded, parties will have less incentive to enter them.

In conclusion, it is my view that I do not have to accept a settlement uncritically. But if I reject it, the rejection must be done judicially. If I accept the settlement, the basic tests must still be met, but the evidentiary burden is lessened.

THE APPLICATION OF THE ABOVE PRINCIPLES TO 263 GAMBLE

This was a settlement between the City and the Stavropouloses. No one else appeared. The City is a government and in a unique position. It is not only the author of the official plan and zoning by-law but also can and did provide expertise in zoning plan review and forestry, two of the areas at issue in this case. As set out above, there are apparent public benefits and so the settlement is entitled to deference.

Is there any evidence supportive of a conclusion that the settlement is unreasonable? No; the only evidence tendered was in support. Mr. McKay, giving planning evidence, did not merely give his opinion without regard to the settlement negotiations but interwove the settlement with the revised list of variances to produce a comprehensive planning opinion. An example relates to the parking pad for the easterly lot, which was "reasonable and not inappropriate", as there were many pads in the area, both with integral garages and without. The variance to increase the driveway width from 2.44 m to 2.6 m was sought because of a conflict between the former zoning by-law and the new harmonized by-law; (2.44 m being a minimum under the former and 2.6 m being a minimum of the latter). The provision of a parking pad will reduce the minimum soft landscaping from 75% to 64%, but this will be mitigated by using open pavers for the pad. This treatment contrasts with other parking pads in the Gamble/Torrens Ave area that are completely asphalted over, and impervious to inflows. This an example of how a design reached through settlement negotiations may be superior to one that is "winner take all".

Accordingly, I do not find that this settlement is unreasonable. The variances meet the statutory tests. The result here does not constitute a precedent for lots in the neighbourhood because of the atypical dimensions of 263 Gamble Avenue and because the list of variances needed was reached by way of a reasonable settlement with a public body.

DECISION AND ORDER

I authorize the following variances and approve the consent requested.

263 Gamble Avenue (Part 1 – West Lot)

1. Chapter 10.20.20.40.(1), By-law 569-2013
A dwelling unit is only permitted in a detached house.
In this case, the dwelling unit will be located in a semi-detached house.

2. Chapter 10.20.20.10.(1), By-law 569-2013
A dwelling unit use is only permitted in a detached house.
In this case, the dwelling unit use will be located in a semi-detached house.

3. Chapter 10.20.30.10.(1)(A), By-law 569-2013 and Section 7.8, By-law 6752
The minimum required lot area is 185 m2.
In this case, the lot area of the retained lot will be 148.65 m2.

4. Chapter 10.20.30.20.(1)(A), By-law 569-2013 and Section 7.8, By-law 6752
The minimum required lot frontage is 6.0 m.
The lot frontage of the conveyed lot will be 4.877 m.

5. Chapter 10.20.30.40.(1), By-law 569-2013 and Section 7.8, By-law 6752
The maximum permitted lot coverage is 35% of the area of the lot (52.03 m2). The lot coverage will be equal to 48% of the area of the lot (71.47 m2).

6. Chapter 10.20.40.40.(1)(A), By-law 569-2013 and Section 7.8, By-law 6752
The maximum permitted floor space index is 0.75 times the area of the lot (111.49 m2).
The new semi-detached dwelling will have a floor space index equal to 0.96 times the area of the lot.

7. Chapter 10.20.40.70.(3)(B), By-law 569-2013 and Section 7.8, By-law 6752
The minimum required side yard setback is 0.9 m under By-law 569-2013 and 0.6 m under By-law 6752.
The new semi-detached dwelling will be located 0.61 m from the west side lot line and 0.0 m from the east side lot line.

8. Section 200.5.10.1, By-law 569-2013 and Section 7.8, By-law 6752
The minimum required number of parking spaces is 1.
The proposed number of parking spaces is 0.

9. Section 7.4.2, By-law 6752
In a R1C zone, the only permitted building is a detached dwelling. In this case, a semi-detached dwelling will be a permitted building.

10. Section 7.8, By-law 6752
    The maximum permitted building length is 16.75 m.
    The proposed building length is 16.8 m.

11. Section 7.8, By-law 6752
    The minimum required rear yard setback is 9.0 m.
    The proposed rear yard setback is 7.68 m.

263 Gamble Avenue (Part 2 – East Lot)

1. Chapter 10.20.20.40.(1), By-law 569-2013
   A dwelling unit is only permitted in a detached house.
   In this case, the dwelling unit will be located in a semi-detached house.

2. Chapter 10.20.20.10.(1), By-law 569-2013
   A dwelling unit use is only permitted in a detached house.
   In this case, the dwelling unit use will be located in a semi-detached house.

3. Chapter 10.20.30.10.(1)(A), By-law 569-2013 and Section 7.8, By-law 6752
   The minimum required lot area is 185 m2.
   In this case, the lot area of the retained lot will be 148.65 m2.

4. Chapter 10.20.30.20.(1)(A), By-law 569-2013 and Section 7.8, By-law 6752
   The minimum required lot frontage is 6.0 m.
   The lot frontage of the retained lot will be 4.877 m.

5. Chapter 10.20.30.40.(1), By-law 569-2013 and Section 7.8, By-law 6752
   The maximum permitted lot coverage is 35% of the area of the lot (52.03 m2). The lot coverage will be equal to 48% of the area of the lot (71.47 m2).

6. Chapter 10.20.40.40.(1)(A), By-law 569-2013 and Section 7.8, By-law 6752
   The maximum permitted floor space index is 0.75 times the area of the lot (111.49 m2).
   The new semi-detached dwelling will have a floor space index equal to 0.96 times the area of the lot.

7. Chapter 10.20.40.70.(3)(B), By-law 569-2013 and Section 7.8, By-law 6752
   The minimum required side yard setback is 0.9 m under By-law 569-2013 and 0.6 m under By-law 6752.
   The new semi-detached dwelling will be located 0.61 m from the east side lot line and 0.0 m from the west side lot line.

8. Chapter 10.5.50.10.(1)(D), By-law 569-2013
   A minimum of 75% of the required front yard landscaping must be soft landscaping (10.24 m2). In this case, 64% (8.8 m2) of the front yard will be soft landscaping.

9. Chapter 10.5.80.10(3), By-law 569-2013
   The required parking space may not be located in a front yard or a side yard abutting a street. The proposed parking spot is located in a front yard.

10. Section 7.4.2, By-law 6752
    In a R1C zone, the only permitted building is a detached house.
    In this case, a semi-detached dwelling will be a permitted building.

11. Section 7.8, By-law 6752
    The maximum permitted building length is 16.75 m.
    The proposed building length is 16.8 m.

12. Section 7.8, By-law 6752
    The minimum required rear yard setback is 9.0 m.
    The proposed rear yard setback is 7.68 m.

13. Section 7.1.3(2)(iii), By-law 6752 as amended by By-law 828-2000
    The permitted parking pad may have a maximum width of 2.44 m.
    The proposed permitted parking pad shall have a width of 2.6 m.

CONDITIONS OF MINOR VARIANCE APPROVAL

1. The proposed dwellings shall be constructed substantially in accordance with the Revised Site Plan and Elevations prepared by Tony Valentin Design, and with the Tree Inventory, Protection and Removals Plan prepared by MHBC, filed as part of Exhibit 3. For clarity, basement walkouts may be added to the building permit plans provided that they comply with the authorized variances.
2. The owner shall submit a complete application for a permit to injure a City-owned tree, Municipal Code Chapter 813, Article II (Street trees). A Contractor's Agreement to Perform Work on City-owned Trees will be required prior to the injury of the subject tree. The owner shall also submit a tree protection guarantee security deposit to guarantee the protection of City-owned trees according to the Tree Protection Policy and Specifications for Construction Near trees or as otherwise approved by Urban Forestry.
3. The owner shall submit a complete application for a permit to remove privately owned tree(s), Municipal Code Chapter 813, Article II (Private trees).

CONDITIONS OF CONSENT APPROVAL

1. The owner shall confirm the payment of outstanding taxes to the satisfaction of Revenue Services Division, Finance Department.
2. Municipal numbers for the subject lots indicated on the applicable Registered Plan of Survey shall be assigned to the satisfaction of the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services. Contacts: John House, Supervisor, Land and Property Surveys, at 416-392-8338; jhouse@toronto.ca, or his designates, Elizabeth Machynia, at 416-338-5029; emachyni@toronto.ca, John Fligg at 416-338-5031; jfligg@toronto.ca
3. The owner shall submit two (2) copies of the registered reference plan of survey integrated to NAD 83 CSRS (3 degree Modified Transverse Mercator projection), delineating by separate Parts the lands and their respective areas, shall be filed with the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services. Contact: John House, Supervisor, Land and Property Surveys, at 416-392-8338; jhouse@toronto.ca
4. The owner shall submit three (3) copies of the registered reference plan of survey satisfying the requirements of the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services shall be filed with the Committee of Adjustment.
5. Within ONE YEAR of the date of the giving of this decision, the applicant shall comply with the above-noted conditions and prepare for electronic submission to the Deputy Secretary-Treasurer, the Certificate of Official, Form 2 or 4, O. Reg. 197/96, referencing either subsection 50(3) or (5) or subsection 53(42) of the Planning Act, as it pertains to the conveyed land and/or consent transaction after which this consent to sever (and associated variance approvals) shall lapse[2].

X Ted Yao

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

[2] Note I have added words to this condition to clarify what happens if the condition is not met.

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[i]Excerpts from *Law Society v. Stephen Alexander Cooper*, (2009 ONLSAP 7 (CanLII)),

GENERAL PRINCIPLES

[13] A hearing panel is entitled to decline to accept a joint submission presented by the parties. That is a reflection of the independence of adjudicators from the parties.

[14] That being said, Convocation adopted a policy in March 1992 that remains in force and which is consistent with existing jurisprudence.

[15] The policy reflects that adjudicators are encouraged to accept joint submissions except where the Committee [now a hearing panel] concludes that it is outside a range that is reasonable in the circumstances. If the Committee does not accept the joint penalty submission after hearing submissions, it is free to impose a penalty it deems proper and it must give reasons for not accepting the joint submission.

[16] Recognizing that these are not criminal proceedings, nonetheless, joint submissions on penalty in discipline proceedings are most analogous to joint submissions on sentence in criminal proceedings.

[17] It is settled law in criminal cases that a sentencing judge is not bound to accept a joint submission. However, a joint submission should not be rejected unless it is contrary to the public interest and the sentence would bring the administration of justice into dispute. If departing from a joint submission, the court must explain and justify a departure from a joint submission (citation omitted)

[18] What motivates that jurisprudence (and Convocation's policy) are compelling policy reasons to presumptively accept joint submissions. The presumptive acceptance of joint submissions promotes resolution, the saving of time and expense, and reasonable certainty for the parties. If joint submissions are regularly disregarded, there is less incentive to enter into them.

[19] This means that generally, a hearing panel should not "tinker" with the joint submission, as long as it is not contrary to the public interest, by substituting another penalty that is also within a range of reasonableness. Simply put, only truly unreasonable or "unconscionable" joint submissions should be rejected.

[20] Another important point arises from the jurisprudence. If a hearing panel is seriously contemplating a departure from the joint submission, the parties should not learn about it for the first time when the decision is rendered or reasons are

delivered. Given the presumed acceptability of a joint submission, the panel should indicate to the parties that it recognizes the high threshold for rejecting a joint submission, inform the parties that the panel may be disinclined to accept the joint submission and afford them an opportunity to make further submissions on the matter. The parties may even be permitted in the panel's discretion (if they initiate a request) to re-open the evidence to call additional penalty evidence (such as from the licensee) to support the joint submission.

[21] This jurisprudence applies whether the hearing panel is thinking about deviating "upwards" or "downwards" from a joint submission.

[22] The necessity to explain in reasons why the hearing panel has departed from a joint submission means that the panel should articulate not only why the particular penalty has been imposed, but why the public interest (and perhaps the jurisprudence) cannot support the penalty that was jointly proposed.