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DECISION AND ORDER

Decision Issue Date Friday, December 15, 2017

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

Appellant(s): HONG JU

Applicant: TAES ARCHITECTS INC

Subject(s): 53(19) and 45(1)

Property Address/Description: 145 ELLERSLIE AVE

Committee of Adjustment Case File Number: 16 173976 000 00 CO
16 173985 000 00 MV
16 173989 000 00 MV

TLAB Case File Number: 17 193496 S53 23 TLAB
17 193500 S45 23 TLAB
17 193501 S45 23 TLAB

Hearing date: Tuesday, October 17, 2017

DECISION DELIVERED BY Ted Yao

Songlin Cai and Hong Ju wish to sever 145 Ellerslie into two lots and construct two new two-storey houses. Each new house will require 9 variances (reduced from 13 originally requested at the Committee of Adjustment). I am granting their appeal.

EVIDENCE

I heard from three witnesses: Chris Perreira, planner for Songlin Cai and Hong Ju, whom I qualified as able to provide opinion evidence with respect to land use planning. Parimal Rawal testified for the Rawal family. Mr. Rawal is an effective communicator, used to speaking in public before an audience. He spoke from an unusual perspective, that of a former owner of the subject property and who configured its present shape. Jim Gratsas testified on behalf of the West Willowdale Neighbourhood Association. Their position is that the proposal is not desirable or an appropriate development because:

"1. It is out of character for the neighbourhood; and

2. It will have a destabilizing impact on future development that (sic.) doesn't respect and reinforce the character of the neighbourhood."

Mr. Perreira supported the application on the basis that it met the development criteria in the Official Plan.

BACKGROUND

The subject lot is on the south side of Ellerslie, one house in from the corner lot and is 18.30 m (74 feet) wide and 45.69 m deep. (From this point I will use feet for the frontage measurements). The site is about four blocks to the north west of the North York Central Library, close to Yonge Street, Toronto's main street[1]. The owners seek to create two 37-foot lots.

This application is unusual for two reasons:

- 145 Ellerslie has existing zoning that already permits it to have two lots.
- the City of Toronto Planning Department recommended to the Committee of Adjustment that the application be approved.

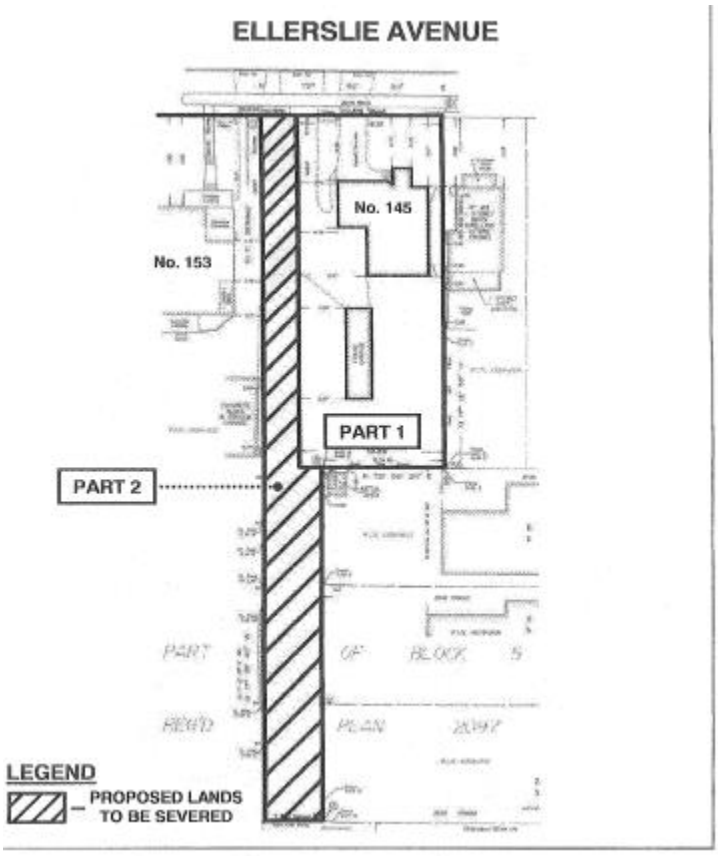
Around the year 2008, Parimal Rawal, his wife and three children purchased 145 Ellerslie and lived there for three years. During this time, he naturally became familiar with its awkward shape. It had a long "tail", 35 feet by 150.5 feet extending south from the southwest part of the lot. This tail abuts the rear lots on Tamworth on the east and No. 153 Ellerslie on the west. In 2011, No. 153 (next door to the west), came up for sale, which the Rawal family purchased, so they owned:

No. 153, with a 74.8-foot frontage; and
No 145, with a 75-foot frontage.

Mr. Rawal then carried out two "part-lot" conveyances. Within the space of a few weeks, he conveyed the "tail" plus a 15 feet wide portion fronting on Ellerslie from No. 145 to No. 153. This made No. 153, at 90-foot-wide lot, which Mr. Rawal indicated was "by far" the largest in West Willowdale. He reduced number 153's frontage by conveying a 14 feet strip back to No. 145, resulting in:

No. 153, with a 75.8-foot frontage; and
No 145, with a 74-foot frontage.

[1] The north south streets, moving west, are Yonge, Beecroft, Tamworth, Abbotsford, Claywood, and Senlac.



No 153 retained the "tail", 150 feet long and approximately 24 feet wide. These rear lands are not relevant for this narrative except to indicate that the next-door property has an exceptionally large back yard[2]. In the words of Mr. Rawal "the net result (for 145) was a narrower frontage and a perfect rectangle". As I explain on page 4, both lots are still unusually large for the neighbourhood.

The Rawal family then demolished the house at 153, and constructed a new one, much larger than the demolished house. During construction, they lived next door at 145 Ellerslie. When the new house was ready, they just moved next door and set about disposing of No. 145. Mr. Rawal says they did not need to list it on MLS, because offers flowed in, sometimes two in a day. Mr. Rawal was determined to find the right buyer, meaning someone who could assure him that their intention was not to sever the lot. Finally, a buyer satisfied him, telling him that the house would be ideal because their daughter was going to university and needed to be in the area. On closing, he found that this buyer had assigned the agreement of purchase and sale, and after seeking advice about whether he should rescind the contract, he sold to the present owners, Songlin Cai and Hong Ju.

[2] Although the applicants seek length of building variances of about .3 m, Mr. Rawal's house extends behind the proposed residences by many meters.

The new owners of 145 Ellerslie then made an application for severance and the minor variances. It first came before the Committee in April 2017. Planning staff recommended that it be deferred because some variances were missed. The Cai/Ju application returned to the Committee in June 2017. At that time, 13 variances were sought for each house. Planning staff, using language from the Official Plan, recommended approval. Planning staff also had the benefit of a technical analysis from the City's Manager, Development Engineering, who suggested conditions respecting water services, drainage, curbs and sidewalks. These have been incorporated as conditions to this order. Over thirty people wrote to oppose the application. Common themes were that the application would be destabilizing, and that smaller lots would affect the character of the neighbourhood negatively. The Committee of Adjustment refused the application.

ANALYSIS, FINDINGS, REASONS

Mr. Rawal

I will deal with Mr. Rawal's objections first. By creating two 74-foot lots side by side and painstakingly screening buyers, he explained his long-range plan or "vision" for this subsection of Ellerslie Avenue, was for a second large house to "complement" (his words) his own house. I find it difficult to accept this view over the Official Plan's, which highlights the connection between residents and "local institutions", such as parks and schools. The map on page 5 shows Abbotsford Park, Horsham Park, Churchill Public School and Willowdale Middle School, all secured over decades of public expenditures. Those institutions, as the plan says[3], are to serve the needs of area residents and are strengthened by modest intensification in reasonable locations.

Mr. Gratsas's statistics (to be explained more fully later) show that of the 423 lots in the neighbourhood, one has an 80-feet frontage and six have 75-feet. Thus, the number 145 and 153 frontages are in the top 2% and statistically are more unusual than the 37-foot frontages that are proposed.

Mr. Gratsas

I now turn to the evidence of Mr. Gratsas. He stated that West Willowdale is one of the most intense "redevelopment" areas in the City. As an officer of the West Willowdale Neighbourhood Association, he supports responsible development but opposes inappropriate development. His function in the Association is to present this viewpoint to the three bodies (Committee of Adjustment, Ontario Municipal Board and Toronto Local Appeal Body) that deal with minor variances and severances. He has

[3] Toronto's hundreds of Neighbourhoods contain a full range of residential uses within lower scale buildings, as well as parks, schools, local institutions and small-scale stores and shops serving the needs of area residents. (Official Plan, 4.1)

studied the relevant Official Plan criteria and being (in his words) “a numbers guy”, is comfortable with manipulating spreadsheets. He has also carefully read the OMB decisions relating to this area and seeks to ensure consistent decision making. As a 15-year resident and walking the neighbourhood daily, he can refine and update statistics in the City’s Geographical Information System from an “on the ground” knowledge. It is obvious that his participation in the TLAB process represents hundreds of hours of unpaid work. His viewpoint is valuable for a decision maker like me and I thank him for taking the time to attend at the hearing whilst holding down a full-time job.

Mr. Gratsas began his analysis with two applications at the north-west corner of

this map.

No 293 Hounslow Ave, a corner lot flanking Senlac, had a 65-foot frontage. It was severed to create two 32.5 foot lots in 2004. This appears to be a decision of the Committee of Adjustment, as there is no record of an OMB decision. Mr. Gratsas says no appeal was filed because the Neighbourhood Association was inattentive; and since 293 was a corner lot flanking Senlac, an arterial street running from Finch to Sheppard, it may have felt an appeal might not have succeeded.

However, the Association regards the next application, 289 & 291 Hounslow Ave, as an inflection point. Here, two lots were located adjacent to No 293, each 50 feet wide. These were combined and the common owner Ava Moshaver severed them into three 3x33.3ft lots. The result was s a row of five severed properties:

two frontages of 32.5 feet; and

three frontages of 33.3 feet.

Of concern to Mr. Gratsas is OMB Vice Chair Seaborn's justification of the new severances (quotation below) by connecting them to the adjacent two undersized lots previously created in 2004:

> I have considered carefully the opinion evidence as it related to the criteria for consent as set out in s. 51(24) of the Act and, regard has been had to the dimensions and shapes of the proposed lots. The evidence indicated that the property immediately to the west (293 Hounslow) of the subject lands was severed in 2004 following a decision by the Committee. As result, the resulting two lots have frontages of 9.9 m. On this basis, the three new lots at just over 10 m are compatible with the existing lot fabric on the street. While the circumstances of the severances are different insofar as 293 Hounslow was originally a lot with a frontage of just over 19 m, the resulting frontages and lot areas are almost identical*. On this basis, the streetscape and fabric of new homes on Hounslow will remain consistent.* Similar consents have been given for several properties on Horsham and Churchill Avenue (both to the south of Hounslow) with resulting lot frontages of 9.9 m to just under 13 m. The lot studies confirmed that following provisional consent the new lots on Hounslow will not be the smallest in the area.[4] (my italics)

Mr. Gratsas's concern is heightened because the combination of two 50-foot lots side by side is common in West Willowdale. He is concerned that any severance becomes a catalyst for succeeding severance applications because they will be used as an example of "a consistent fabric" for future severances. It is Mr. Gratsas's inference that 293 and 289 & 291 Hounslow are part of the 145 Ellerslie neighbourhood; these five lots do not appear in the community study. Recently, the Association has been successful in opposing variances at the OMB and Committee of Adjustment; by his estimate, eight consecutive hearings. In his opinion, these may have served to deter fresh severance applications:

> If we [the West Willowdale Neighbours Association] didn't win those three [284 and 194 Hounslow at OMB (grey in the Table 1 below), 145 Ellerslie at Committee of Adjustment], I guarantee there would have been more coming forward on Hounslow or near there. Stopping those has, I think, has helped slow the flood to a more reasonable trickle

Mr. Gratsas's evidence may be summarized in Table 1 below:

[4] 289-91 Hounslow, *Moshaver v Toronto,* PL140142. PL140143, PL140144, PL140145, PL140146, (Sept 11, 2014)

Table 1 Cases in which the Association has an interest

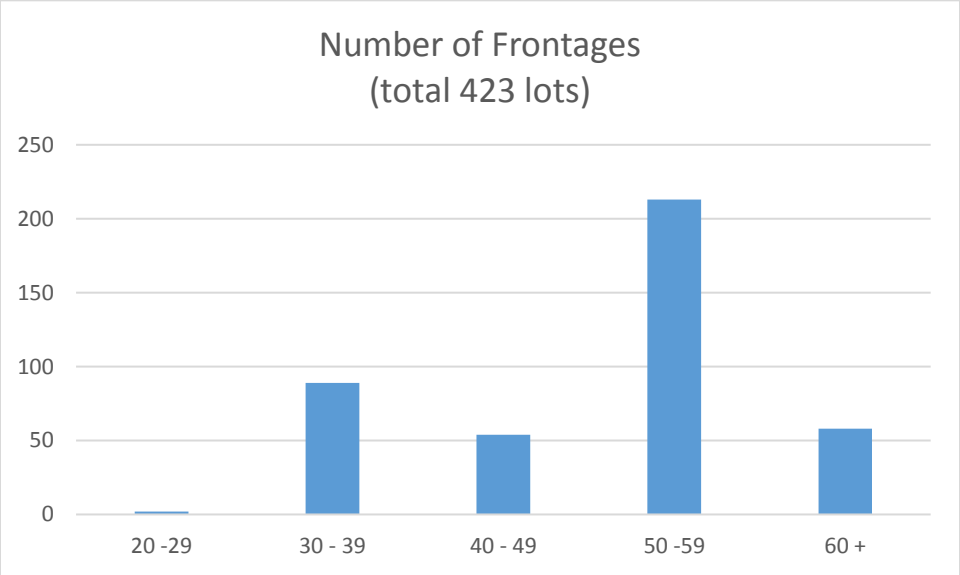
	Address	Starting and ending frontages in feet	
2004	293 Hounslow	1 x 65 = 2 x 32.5	Approved at OMB
Sept 2014	289-291 Hounslow (Moshaver)	2 x 50 feet=3 x 33.3	Approved at OMB
June 2016	284 Hounslow (Darling)	1 x 60=2 x 30	Not approved at OMB
July 2016	194 Hounslow (Gavrilenko)	1 x 63.3 = 2 x 31.7	Not approved at OMB
June 2017	145 Ellerslie (Cai and Ju), i.e. this case	1 x 74 = 2 x 37	Not approved at C of A, appealed to TLAB
June 2017	105 and 107 Churchill Ave (Jamnejad)	2 x 53.25 = 3 x 35.5	Not approved at C of A, appealed to TLAB and scheduled for hearing December 2017
July 2017	210 Horsham (Shirvani-Ghomi)	1 x 60 = 2 x 30	Not approved at C of A, appealed to TLAB, and scheduled for hearing December 2017

On the incomplete evidence before me, I cannot find that the *Moshaver* decision was the proximate cause of increasing numbers of applications to sever. Nor can it be the only cause. Considering only the 293 Hounslow block, three new lots in ten years must be taken to be a "gradual change", in the words of the Official Plan. This period was also a period of expansion of the subway system (Sheppard-Yonge line) and many capital improvements in the TTC, which has enhanced the accessibility and livability of this neighbourhood, which is so conveniently located to the Yonge University line. The period after 2014 was also coincident with a rapid rise in land and housing prices in all parts of Toronto, which puts pressure for intensification on land in desirable neighbourhoods. Decision making at the Committee of Adjustment and OMB may have been a factor but not the only factor.

I now turn to the hard data and Mr. Gratsas's numerical analysis. Planning staff for any application to the Committee of Adjustment usually produce a "community study" for the Committee to enable it to understand the physical characteristics of the neighbourhood. This is a spreadsheet of properties, (in this case about 423) with

frontages, lot sizes and age of houses. Both Mr. Perreira and Mr. Gratsas used this community study to draw planning conclusions.

After correcting it for errors (e.g., eliminating zero lot frontages), Mr. Gratsas sorted the list in order of smallest to largest lot frontages. He found the following distribution:



Mr. Gratsas spreadsheet shows [5]:

- A new 37.5-foot frontage would rank 49th smallest out of 423 lots
- 11.5% of lots in the study are 37 feet or less
- 21.9% are 40 feet or less
- 34.9% are 49.9 feet or less
- 50.4% are between 50 and 59 (213 lots).

This information suggests that neither the 153 nor 145 Ellerslie frontages are typical of the area.

By-law 19955 in the context of North York Township and Toronto Official Plans

I considered Mr. Gratsas's statistics but concluded the unique circumstances mentioned at the start of the Background section outweigh any conclusion that can be drawn from them. A by-law exists that already gives 145 Ellerslie zoning permission for two lots.

[5] Gratsas PowerPoint presentation, p 11

In 1965, the Township of North York passed zoning By-law 19955, which stated:

> . . .(notwithstanding Section 13.2.1 [the frontage requirements], the lands [legal description of property at 145 Ellerslie] may be used for the purpose of two single family lots, the westerly lot having a frontage of thirty-five feet and the easterly lot having a frontage of forty feet, provided that all other provisions of By-law 7625 . . .are complied with.

The new City-wide zoning by-law brings this site-specific by-law forward as a site-specific exception to the normal requirements:

> (685) Exception RD 685 The lands, or a portion thereof as noted below, are subject to the following Site Specific Provisions, Prevailing By-laws and Prevailing Sections.
>
> Site Specific Provisions: (A) The lands may be used for two lots each with a detached house.

The frontages of 40 and 35 feet set out in 1955 are still applicable even in 2017 and so the application needs a variance from the larger frontage. RD 685 modified 19955 as follows:

- that the enumerated frontages of 40 and 35 feet are dispensed with, and
- that the exemption which applied to “the lands” at 145 Ellerslie, now applies to “a portion thereof”;
- the exception no longer has the condition that all other zoning provisions must be complied with.

According to Mr. Perreira and I agree with him, none of these modifications were of substance and RD 685 reflects a modern rewording of the intent of the 1965 by-law. Thus, the chronology of zoning and official plans in the evidence is:

June 1952	Zoning By-Law 7625 of North York Township enacted
May 1965	Zoning by-law 19955 of North York Township enacted
Nov 2002	Official Plan of the City of Toronto adopted
May 2013	Zoning By-law 569-2013 of the City of Toronto is enacted, incorporating RD 685.

Neither 19955 nor RD 685 were appealed, and both are in force for minor variance purposes.

Deemed Conformity

I now turn to the "deeming conformity" section of the of the *Planning Act*:

> 24(4) If a by-law is passed under section 34 [i.e. a zoning by-law] by the council of a municipality . . . in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan, . . .

To understand the intent of 24(4), the reader first must have reference to s. 24(1), which requires all public works and all by-laws conform to a municipality's official plan. S. 24(4) provides finality on zoning by-law conformity, once the time for appeal of the zoning by-law has elapsed. Without this section, a zoning by-law could be impugned after decisions had been made in reliance upon its validity and after the appeal period had passed. If official plan conformity of 19955 or RD-685 is settled by 24(4) then that line of inquiry is taken out of my hands.

The owners' lawyer, Ms. Stewart made written submissions on s. 24(4) in which she took the position that s.24(4) is applicable to RD-685 since it was enacted after the current Official Plan, whereas it is inapplicable to 19955 since 19955 was enacted prior to the current Official Plan. I agree with the first part of her conclusion but disagree with the second; I think both must be taken to conform to the present Toronto Official Plan. Messrs. Rawal and Gratsas did not make submissions on 19955, wishing to accept her conclusion of the inapplicability of 19955.

S. 24(4) is triggered when "an official plan is in effect" at the time of enactment of the zoning by-law. Since the Township of North York's zoning by-law was adopted in 1952 and the *Planning Act* contemplates that all zoning by-laws conform to an official plan, North York Township must have had an Official Plan in 1952 and therefore there is deemed conformity to "the official plan". The question, which no party really addressed, is whether "the official plan" is the one in effect in 1965 or 2017. I find it is 2017.

Ms. Stewart's assertion that RD-685 is deemed to conform to the 2017 version is supported by the Court of Appeal in *Saïd v Duval Excavating*[6]. The facts were that in

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[6] *Saïd v. Maurice Duval Excavation Inc*., 2006 CanLII 21036 (ON CA) *Saïd* also follows *Campeau Corporation v Township of Gloucester*, 1978 CanLII 1356 (ON SC), affirmed on the issue of conflict between a zoning by-law and a subsequent official Plan by 1979 CanLII 2061 (ON CA). In *Campeau,* Cadillac Fairview's lands were zoned commercial sixteen years prior to the Regional official plan, which designated the lands residential. The court held that

> There is a statutory obligation imposed upon the municipality to amend its by-laws and in the interim the municipality should refuse any application for a

2005, Duval requested a license from the OMB under the *Aggregate Resources Act.* to excavate sand. The OMB had to have regard to zoning and official plan considerations. Duval's lands were in the Township of Alfred and Plantagenet, which had its own official plan, and which were also governed by the upper tier municipality, Prescott and Russell. The question for the Court of Appeal was whether the OMB erred:

> (b) In failing to recognize that the by-law of [Township of Alfred and Plantagenet] was subordinate to the official plan of [Prescott and Russell] and, therefore, was inoperative to the extent that it did not comply with that Official Plan (at para 2)

The planning chronology in *Saïd* was:

Prior to 1995	The official plan of the Township of Alfred and Plantagenet provided that the Duval site may be used for a sand pit, with a capacity of up to 15,000 tons per year.
1995	The Township passed a zoning by-law permitting the operation of a sand pit at the site, with no limitation as to extraction tonnage.
After 1995	The upper tier municipality [Prescott and Russell] adopted an official plan that does not provide for the operation of the Duval site as a sand pit.

> building permit, even though such application complies with its by-law, if the by-law does not conform to the official plan of the regional municipality.

However, in the result, Mr. Justice Holland refused to issue a building permit for the commercially zoned lands because it would contravene applicable law. This has led to the inference that there is always some basis for finding a zoning inoperative with respect to a subsequent and conflicting official plan. I do not think this is a proper inference. This was an interlocutory injunction by Campeau asking the Court to restrain the issue of a building permit for the Cadillac Fairview site, where only one regional shopping centre was viable. Considerations of irreparable harm and balance of convenience were important. There was a pending OMB hearing where the respective merits of the Campeau and Cadillac site would be "properly evaluated". If the local municipality, Gloucester had proceeded to rezone as directed under s. 27 (1) of the *Planning Act*, this would surely have triggered a fight with Cadillac, which had enjoyed commercial zoning rights since 1960 but had not developed its shopping centre. In my opinion, the Court preserved the pending OMB hearing as a forum for Gloucester's obligation under s. 27(1) to amend its non-compliant zoning by-law and all stakeholders could weigh in on their views of existing rights, new official plan policies and proper planning.

In both *Saïd* and *Campeau*, (footnote 6) there is a clear conflict between the zoning and official plan and only one can prevail. I must determine "conformity", a looser kind of finding in the facts of 145 Ellerslie, where both could operate. "Conformity" happens to be the same word that is used in s. 24(4).

Number 145 Ellerslie is designated Neighbourhood, with no specific lot frontage limitations. The Official Plan says frontage standards with be will be implemented by the zoning by-law and minor variance process. Its Neighbourhood designation contemplates many Residential zones, among them R4 and RD, with minimums of 40 and 39.4 feet. Thus, Neighbourhood policies and the exceptional frontage permitted by RD-685 can co-exist. It is easier to deem conformity here than in *Saïd*, where there was actual conflict between the zoning and both official plans. The Court deemed conformity of the *Saïd* by-law with the local official plan at para 7[7]. This is the one in place at the time of passage like RD-585. (Mr. Gratsas and Mr. Rawal dispute applicability of deemed conformity of RD-685 on grounds of faulty notice, which I will deal with in the next section.)

With respect to 19955 (analogous to the upper level plan in *Saïd*), Ms. Stewart's position is that a prior zoning by-law does not attract deemed conformity, seeming contrary to the interests of her client. However, the Court holds otherwise. The Court of Appeal referred to Section 27 of the *Planning Act* requiring lower tier municipalities to review their zoning by-laws whenever an upper tier municipality adopts a new official plan[8] Failure to do so, the Court concludes, implies "the [zoning] by-law remains in

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[7] [7] In our view, however, the inconsistency between the by-law and the local municipality's official plan is resolved by reference to s. 24(4) of the Planning Act, R.S.O. 1990, c. P.13. [quote omitted] In the present case, because the local municipality's official plan was in existence at the time the by-law was adopted and no objection to the by-law was taken, the by-law is now conclusively deemed to be in conformity with the official plan. This, in our view, means that the by-law is considered to be valid and operative according to its terms.

[8] Amendments to conform to official plan
27. (1) The council of a lower-tier municipality shall amend every official plan and every by-law passed under section 34, or a predecessor of it, to conform with a plan that comes into effect as the official plan of the upper-tier municipality. 2002, c. 17, Sched. B, s. 7.
Failure to make amendments
(2) If the official plan of an upper-tier municipality comes into effect as mentioned in subsection (1) and any official plan or zoning by-law is not amended as required by that subsection within one year from the day the plan comes into effect as the official plan, the council of the upper-tier municipality may amend the official plan of the lower-tier municipality or zoning by-law, as the case may be, in the like manner and subject to the same requirements and procedures as the council that failed to make the amendment within the one-year period as required. 2002, c. 17, Sched. B, s. 7.
Deemed by-law
(3) An amending by-law passed under subsection (2) by the council of an upper-tier municipality shall be deemed for all purposes to be a by-law passed by the council of the municipality that passed the by-law that was amended. 2002, c. 17, Sched. B, s. 7.
Conflicts

force and is not rendered inoperative or invalid" (par. 10).[9] This is the same reasoning as *Campeau*. (footnote 6)

Attempting this analysis with respect to a North York Township by-law is complicated by the fact that the former upper tier municipality, Metro Toronto, no longer exists. Toronto as a single level municipality can be assumed to assume the role formerly played by Metro. I believe that before Toronto adopted its new City-wide zoning in 2013, it did review all the exception clauses to ensure they conformed to the Official Plan and that is why the wording of the two exceptions are different. But with due respect to the Court of Appeal, I do not have to resort to s. 27 of the *Planning Act;* I simply observe that the intent of 24(4) is to provide finality. If conformity of 19955 to the present official plan could be challenged, and the only way to deal with such

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(4) In the event of a conflict between the official plan of an upper-tier municipality and the official plan of a lower-tier municipality, the plan of the upper-tier municipality prevails to the extent of the conflict but in all other respects the official plan of the lower-tier municipality remains in effect. 2002, c. 17, Sched. B, s. 7.

[9] [8] The second issue raised by the appellants relates to the interplay between the by-law and the official plan of the upper tier municipality. Subsequent to the adoption of the by-law by the municipality, an official plan was put into place by the upper tier municipality. Duval Excavation acknowledges that this official plan does not provide that the land in question can, as proposed, be used as a sand pit. Duval Excavation submits, however, that the by-law is the governing legislation. The official plan is a planning document and, to the extent that it is not implemented by the municipality, it does not operate so as to limit the land use.

[9] We agree. The *Planning Act* provides for the amendment of by-laws so as to conform with the provisions of an official plan of an upper tier municipality. Section 27(1) of the *Planning Act* stipulates that a municipality "shall amend … every by-law … to conform with a plan that comes into effect as the official plan of the upper-tier municipality." Section 27(2) then provides that if the local municipality has not amended its by-laws to conform with the upper tier municipality's official plan, the upper tier municipality "may amend the … zoning by-law … in the like manner and subject to the same requirements and procedures as the council that failed to make the amendment within the one-year period as required."

[10] In the present case, well over one year has elapsed from the adoption of the upper tier municipality's official plan, and neither the local municipality nor the upper tier municipality have taken any steps to make the amendments as provided in s. 27(2). In our view, absent an amendment to the by-law, the by-law remains in force and is not rendered inoperative or invalid. The by-law still governs the permitted uses of lands within the municipality. Specifically, a sand pit operation continues to be a permitted use for the land in question.

[11] Significantly, s. 27(1) does not say that a non-conforming by-law is inoperative. To the contrary, the scheme of the section implies that by-laws remain in force until amended. This interpretation is reinforced by s. 27(4). That subsection stipulates that, in the case of a conflict between an official plan of a lower tier municipality and an official plan of an upper tier municipality, the latter prevails. If the legislature intended that the official plan of an upper tier municipality was to prevail over a by-law, it would have provided for it in drafting s. 27(4).

challenge was to embark on a historical analysis of the 1995 Metro Official Plan, we would have the same invidious dilemma that s. 24(4) is intended to prevent.

The *Planning Act* requires both the severance and the minor variance applications conform to and be consistent with the official plan; indeed, in many cases this is one of the most critical issues.[10] I find both site specific exceptions, 19955 and RD-585 are deemed to conform to the present Official Plan. Such conformity has powerful effects on the other tests I must carry out. But before I go on to them, I must deal with Mr. Rawal's second argument, whether he should have received notice of RD-685.

Whether Mr. Rawal can claim faulty notice

Mr. Rawal and Mr. Gratsas say that s. 24(4) is inapplicable to RD-685 because the City failed to tell him about the passage of the City-wide Zoning By-law 569-2013 when he owned 145 Ellerslie. Had he received notice, they claim, Mr. Rawal would have appealed RD-585, and with that appeal, the pre-condition for operation of s. 24(4) (i.e., within the appeal period, no appeal has been taken) would not be established. Ms. Stewart says, "Mr. Rawal's ignorance of a City-wide zoning by-law process is not an excuse and does not give rise to a challenge of the by-law's validity." I agree with Ms. Stewart on this point.

Mr. Rawal's written submission states that RD-585 is "void" because he was not given notice of the intention to adopt it.[11] The *Planning Act* does not say that zoning by-laws are invalidated if Council gives notice and affected persons fail to receive notice or do not "twig" to a published notice. Council has two major legal obligations with respect to notice. Before passage, it must give information to the public about the proposed zoning by-law, so that the public may "generally" understand it (s. 34(12)). This notice may be given by newspaper, which was undoubtedly the case in 2013, owing to the enormous number of changes and lands affected (O. Reg. 545/06, s 5(7)). The second

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[10] 51(24)(c). whether the [severance] conforms to the official plan.

And in s. 45(1), a minor variance may be authorized if in my opinion, "the general intent and purpose of the by-law and of the official plan, if any, are maintained". I find and elaborate further in the main body of the decision, that the two lots are conformity with the official plan for purposes of s.51(24)(c) and they maintain the intent of zoning and official plan for purposes of 45(1).

[11] "Thus my key argument against accepting the applicability of By-Law 569-2013 and RD 685 against the subject property is that I as the owner of 145 Ellerslie Avenue was given no opportunity to appeal. As this right is directly referred to in s. 24(4) of the *Planning Act*, in this context, this new by-law must be considered void and certainly not in conformance with the Official Plan." (Mr. Rawal's written submissions, undated, but about Nov. 20, 2017)

major obligation is to give notice of passing of the bylaw, dealt with by s. 34(18). This notice is to be given to:

> the applicant, if any;
> each person that asked to be notified; and
> prescribed persons and public bodies.

Since By-law 569-2013 was a comprehensive consolidation of existing by-laws of the six separate local municipalities, there was no applicant. Mr. Rawal has not given evidence that he asked to be notified. He does not fall in the class of prescribed persons. So, he has not proved that Council failed to give proper notice of passing. He certainly was aware of 19955 and the special status it gave to 145 Ellerslie. The scheme set out in the *Planning Act* envisions that interested persons like Mr. Rawal will ask to be notified. In any case, the *Planning Act* does not make zoning by-laws invalid for supposed failure to comply with the giving of notice provisions. Absent the notice argument, all parties agree there is deemed conformity of RD-585, and the deemed conformity operates in terms of the underlined sentence above.

Application of the other tests for a severance

> The other criteria are contained in s. s. 51(24). The first of these criteria is:
>
> the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality,

I have regard to these factors; I have mentioned how this transit friendly location is suitable for a new lot.

The next criterion is:

> (f) the dimensions and shapes of the proposed lots;

I find that By-law 19955 has settled this issue specifying a 35 x 150-foot lot and a 40 x 150 lot.

Next, I consider:

> (b) whether the proposed [severance] is premature or in the public interest;
> and (c) conformity to . . .adjacent plans of subdivision, if any;

It is hard to say that the severance is premature when By-law 19955 was enacted by the Council of the Township of North York fifty-two years ago. I find it is not premature, is in the public interest and there are no adjacent plans of subdivision.

Finally, I consider:

> (a) the effect of development of the proposed {severance} on matters of provincial interest as referred to in section 2 [of the *Planning Act*];

The PPS clearly prefers an urban severance to one outside a settlement area, that might result in the loss of agricultural land:

> The Provincial Policy Statement focuses growth and development within urban and rural settlement areas while supporting the viability of rural areas
>
> Efficient development patterns optimize the use of land, resources and public investment in infrastructure and public service facilities.

The severance is consistent with the Growth Plan of the Greater Golden Horseshoe to provide a "compact and efficient form of intensification within a settlement area which can be accommodated within the existing service parameters." Therefore, having regard for all the policies and criteria, the severance should be approved.

The tests for a minor variance

I rely on the evidence of Mr. Perreira and the City's Planning Report[12]. Both applied the official plan tests of whether the development fitted-in and whether it respected and reinforced the physical character of the neighbourhood.[13] Both Mr. Perreira and City staff believed the tests were met. Both felt that modern planning principles would prefer two 37-foot frontages to those specified: The City's report stated:

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[12] The City did not appear, but I am entitled to consider a written report by its Planning Staff that was before the Committee, as evidence.

[13] While communities experience constant social and demographic change, the general physical character of Toronto's residential Neighbourhoods endures. Physical changes to our established Neighbourhoods must be sensitive, gradual and generally "fit" the existing physical character. A key objective of this Plan is that new development respect and reinforce the general physical patterns in a Neighbourhood. (Official Plan, page 4-3)

4.5.1. Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular: a) patterns of streets, blocks and lanes, parks and public building sites; b) size and configuration of lots; c) heights, massing, scale and dwelling type of nearby residential properties; d) prevailing building type(s); e) setbacks of buildings from the street or streets; f) prevailing patterns of rear and side yard setbacks and landscaped open space; g) continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood; and h) conservation of heritage buildings, structures and landscapes. No changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood (Official Plan, page 4-4)

> Although the Site Specific Provision outlines the lot frontages on the subject site, Planning Staff are of the opinion that the proposed frontages are more in keeping with the overall character of the neighbourhood, and respects the Official Plan requirements as it relates to neighbourhood redevelopment next turn to the intent of the zoning by-law. Performance standards are enacted to ensure compatibility with established residential neighbourhoods.[14] Since the zoning by-law already dictates two lot frontages in the 35 to 40-foot range, compatibility and the intent of the zoning by-law are settled issues.

I will conclude with some of Mr. Perreira's evidence. As an urban designer as well as planner, upon being retained, he sought to soften the impact of the development by making subdued design choices:

> Upon reviewing the contextual nature of the site and drawings, I provided suggestions to the architect, to reduce the number of variances while maintaining the integrity of the proposed house designs. These revisions have been incorporated in the plans now before the Local Appeal Body.

He also stated, and I agree that the proposal is also consistent with the PPS and Growth Plan:

> . . .by providing an efficient form of small scale intensification that fits the area's current and emerging context, optimizes use of land and minimizes servicing costs.

His conclusion, which I accept, is that:

> Again, small scale minor sensitive intensification on a site. The proposed development provides an appropriate fit, with the existing and emerging context, and the proposed lot sizes, configuration, orientation and height and setbacks are consistent with and are in keeping with the overall character of the neighbourhood. The design provides high quality design that will provide a positive contribution to the streetscape, as well as I have previously indicated it meets the four tests of a minor variance.

Finally, I wish to look at the variances specifically and apply my own independent judgement. Mr. Perreira gathered statistics on some 17 properties "in the vicinity" that had been granted minor variances. Included is number 153, which had a maximum building length variance of 27.89 m (17 m permitted) and a height variance of 9.35 m (10 m under 569-2013, 8.8 m under the former North York bylaw). Minor variances occur in a context and cannot be judged just by looking at the numbers. I suspect that

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[14] 8. Zoning by-laws will contain numerical site standards for matters such as building type and height, density, lot sizes, lot depths, lot frontages, parking, building setbacks from lot lines, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential Neighbourhoods. (Official Plan, page 4-5)

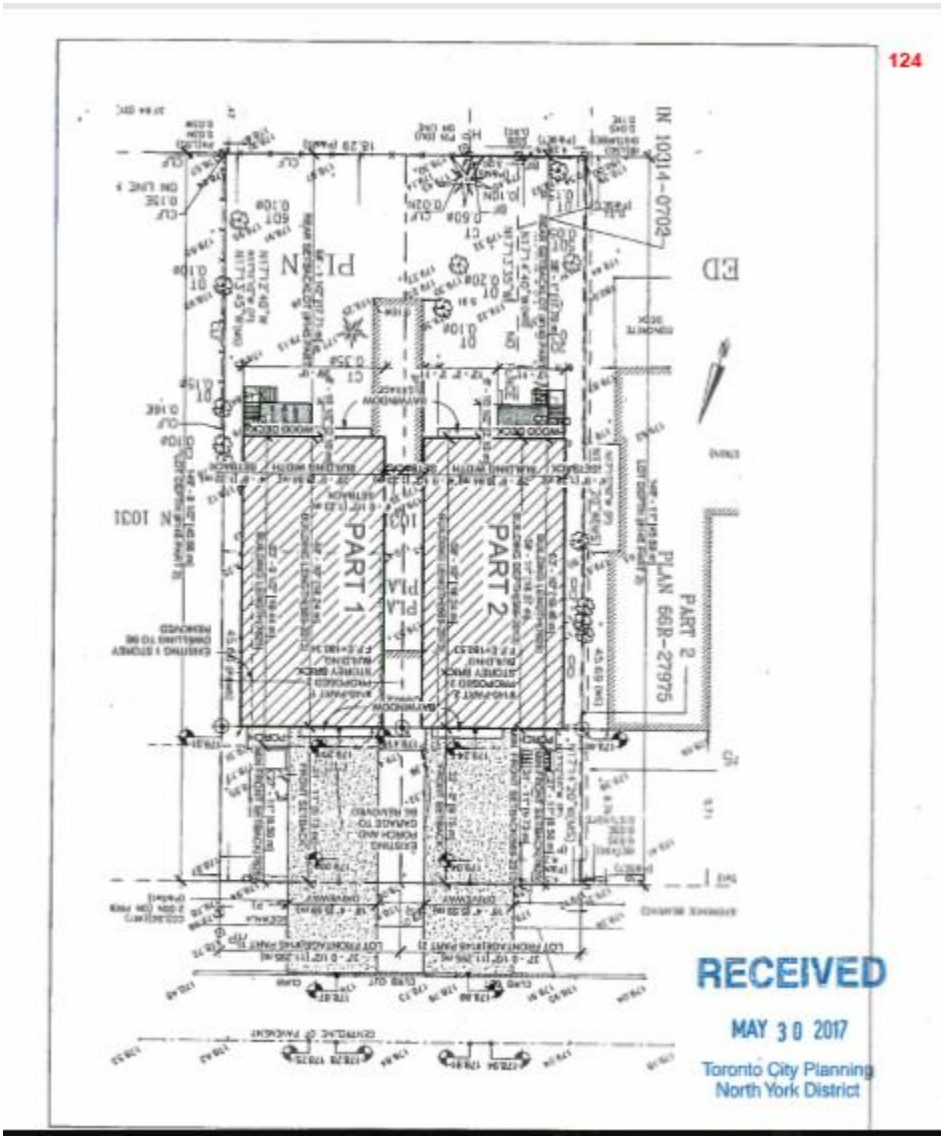
no. 153's building length variance results from the unusual garage-forward design as much as anything else. And for both 145 and 153 Ellerslie, a requirement for a building height variance is triggered because the older standard in the former North York by-law is superseded by the new City-wide by-law.

Of Mr. Perreira's seventeen "relevant" properties, the side yard and height variances for 145 are among the lowest, and seem unremarkable. The frontage variance is 11.295 m (15 m required). Sorted, we have the 17 lots as follows: 10.36 m, 10.68, 11.05, 11.20, two at 11.295 (subject property), 12.17, 12.19, 13.41, and eight lots for which no variance was requested (i.e. 15 m plus). This puts 145 Ellerslie on the low side overall, but still toward the middle of the range of the properties that obtained frontage variances. I find this to be minor.

In short, in the totality of the evidence, I find the variances are minor, desirable for the appropriate development of the land, maintain the intent and purpose of the official plan and zoning by-law and conform and are consistent with the higher-level plans and policies.

DECISION AND ORDER

The appeal is allowed, and provisional consent is given to the subject property, 145 Ellerslie to the creation of two 37-foot residential lots identified as Parts 1 and 2 on the plan below which is an attachment to the City Planning Report and date stamped May 30, 2017.



This consent is subject to conditions such that, before a Certificate of Consent is issued as required by section 53(42) of the *Planning Act*, the owner/applicant complete within ONE YEAR all conditions.

I authorize the following minor variances:

LIST OF VARIANCES

145 Ellerslie Avenue (part 1, east lot)

1. Chapter 10.20.30.10.(1) By-law No. 569-2013 The required minimum lot area is 550 m^2. The proposed lot area is 515.70 m^2.

2. Chapter 10.20.30.20.(1), By-law No. 569-2013 The required minimum lot frontage is 12.0 m. The proposed lot frontage is 11.295 m.

3. Section 1 By-law 19955 The minimum required lot frontage is 12.19 m. The proposed lot frontage is 11.295 m.

4. Section 13.2.2, By-law No. 7625 The required minimum lot area is 550 m2. The proposed lot area is 515.70 m2.

5. Section 13.2.5A, By-law No. 7625 The maximum permitted building length is 16.8m. The proposed building length is 17.27 m

6. Section 13.2.3(b), By-law No. 7625 The minimum required side yard setbacks are 1.5 m each side. The proposed west side yard setback is 1.23 m.

7. Section 13.2.3(b), By-law No. 7625 The minimum required side yard setbacks are 1.5 m each side. The proposed east side yard setback is 1.22 m.

8. Section 13.2.6(1), By-law No. 7625 The maximum permitted building height is 8.80 m. The proposed building height is 9.09 m.

9. Section 6(8), By-law No. 7625 The minimum lot width is not to be less than the lot frontage for the zone in which the building is to be constructed. The minimum required lot width is 12.19 m. The proposed lot width is 11.295 m.

145 Ellerslie Avenue (part 2, west lot)

1. Chapter 10.20.30.10.(1) By-law No. 569-2013 The required minimum lot area is 550 m2. The proposed lot area is 515.70 m2.

2. Chapter 10.20.30.20.(1), By-law No. 569-2013 The required minimum lot frontage is 12.0 m. The proposed lot frontage is 11.295 m.

3. Section 1 By-law 19955 The minimum required lot frontage is 12.19 m. The proposed lot frontage is 11.295 m.

4. Section 13.2.2, By-law No. 7625 The required minimum lot area is 550 m2. The proposed lot area is 515.70 m2.

5. Section 13.2.5A, By-law No. 7625 The maximum permitted building length is 16.8m. The proposed building length is 17.27 m

6. Section 13.2.3(b), By-law No. 7625 The minimum required side yard setbacks are 1.5 m each side. The proposed west side yard setback is 1.23 m.

7. Section 13.2.3(b), By-law No. 7625 The minimum required side yard setbacks are 1.5 m each side. The proposed east side yard setback is 1.22 m.

8. Section 13.2.6(1), By-law No. 7625 The maximum permitted building height is 8.80 m. The proposed building height is 9.09 m.

9. Section 6(8), By-law No. 7625 The minimum lot width is not to be less than the lot frontage for the zone in which the building is to be constructed. The minimum required lot width is 12.19 m. The proposed lot width is 11.295 m.

Conditions to the consent:

1. Confirmation of 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 Survey and Mapping Services, Technical Services.

3. Where no street trees exist, the owner shall provide payment in an amount to cover the cost of planting a street tree abutting each new lot created, to the satisfaction of the General Manager, Parks, Forestry and Recreation.

4. Two copies of the registered reference plan of survey integrated with the Ontario Coordinate System and listing the Parts and their respective areas, shall be filed with City Surveyor, Survey & Mapping, and Technical Services.

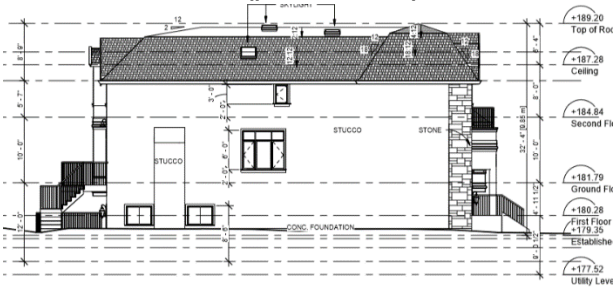
5. Three copies of the registered reference plan of survey satisfying the requirements of the City Surveyor, shall be filed with the Committee of Adjustment.

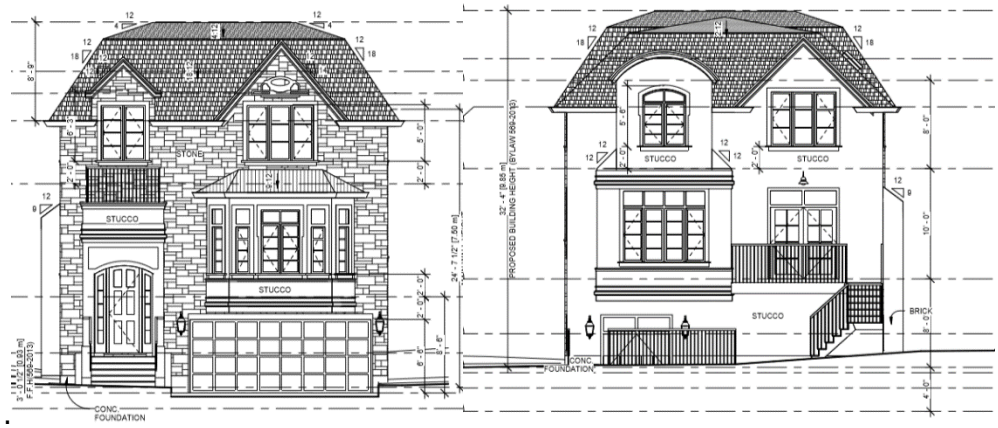
6. Within ONE YEAR of the date of the giving of this notice of decision, the applicant shall comply with the above-noted conditions and prepare for electronic submission to the Deputy Secretary-Treasurer, the Certificate of Official, Form 2 or 4, O. Reg. 197/96, referencing subsection 53(42) of the Planning Act, as it pertains to the consent transaction. If there is difficulty with any of the conditions, I may be spoken to.

Conditions to the minor variances - Planning

7. The proposal be developed in accordance with the site plans for Parts 1 and 2, and the West elevation and East elevation drawings submitted to the TLAB as

Exhibit 3 Tab 27 (p 188, site plan, 194 – 197, elevations), filed October 2017.





(pp 194-197 vignetted above)

8. Prior to the issuance of a building permit, the applicant shall satisfy all conditions concerning City owned trees, to the satisfaction of the Director, Parks, Forestry & Recreation, Urban Forestry Services.

Conditions to the minor variances - Engineering

9. The owner will be required to make application to the Toronto Water Services Division, and pay for the installation of City service connections for each building from the property line to the City mains and the abandonment of the old service

connections. The owner is responsible to provide for the installation of the water and sanitary service connections from each building to City services at the property line.

10. The owner shall install a sump pump in the dwellings for the purposes of draining private water from weeping tiles and any driveway catch basins to grade.

11. This property is in a current basement flooding EA study area (Study Area #26). As a precaution, the applicant shall install back flow preventers to the satisfaction of the Executive Director, Engineering and Construction Services.

12. The owner in redevelopment of this property shall ensure that existing overland drainage patterns on adjacent properties shall not be altered and storm water runoff from the subject development shall not be directed to drain onto adjacent properties.

13. All accesses must be at least 1 meter from existing utilities and must be explicitly shown on site plan drawings. If required, the relocation of any public utilities would be at the cost of the owner and shall be subject to the approval of the applicable governing agencies.

14. Any damage to the existing municipal sidewalk and curb due to the construction of this development will require the owner to restore sidewalk and curb along the frontage of the property per City of Toronto standards to the satisfaction of the Executive Director, Engineering and Construction Services.

15. The applicant is required to apply to Engineering and Construction Services Division, Mapping and Survey Section for revised municipal numbering prior to filing an application for a building permit. (This may be duplicative of Condition 2.)

X Ted Yao

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