

DECISION AND ORDER

Decision Issue Date Thursday, July 12, 2018

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

Appellant(s): FARHAT NAYEEM KHAN

Applicant: SOL ARCH

Property Address/Description: 50 PRESLEY AVE

Committee of Adjustment Case File Number: 17 257107 ESC 35 CO, 17 257149 ESC 35 MV, 17 257150 ESC 35 MV

TLAB Case File Number: **18 108491 S53 35 TLAB, 18 108492 S45 35 TLAB, 18 108494 S45 35 TLAB**

Hearing date: Wednesday, June 27, 2018

DECISION DELIVERED BY T. Yao

APPEARANCES

Name	Role	Representative
Farhat Nayeem Khan	Appellant/Owner	Amber Stewart
Jonathan Benczkowski	Expert Witness for Mr. Khan	
Beverley and Doug Findlay (52 Presley)		

INTRODUCTION

Farhat Khan, owner of 50 Presley Avenue, wishes to demolish the existing house, then sever the lot and build two new houses.

BACKGROUND

Mr. Khan was unsuccessful at the Committee of Adjustment, as "the Committee is not satisfied that the dimensions of the proposed lots would maintain the character of the established residential neighbourhood.". He appealed, and so this matter comes to the TLAB.

At the Committee, Mr. Khan sought eight variances; but since then, with Mr. Benczkowski's (Mr. Khan's planner's) advice, he reduced the variances to those shown in Table 1. Building height, front yard soft landscaping and eave encroachment were eliminated. Essentially three variances are needed: lot size and frontage, side yard setback and parking¹. The lot size/frontage deficiency is the most important of the requested variances.

Table 1². Variances sought by Mr. Khan			
Zoning By-law 569-2013 (more recent, City-wide)			
		required	proposed
1	Lot frontage	12 m (39.37 feet)	8.38 m (27 feet 6 inches)
	Lot size	371 m ²	338.1 m ²
2	Side yard setback for one side	.9 m	.6 m
3	Parking space	3.2 x 5.6 m	2.7 m x 5.9 m
Clairlea Community Zoning By-law 8978			
4	Lot frontage	12 m (39.37 feet)	8.38 m (27 feet 6 inches)
	Lot size	371 m ²	338.1 m ²
5	Side yard setback for one side	.9 m	.6 m
6	Parking space	3.2 x 5.6 m	2.7 m x 5.9 m

¹ Plan examiners check for compliance with two bylaws even though the Clairlea by-law is superseded by the City wide by-law 569-2013, since the more recent by-law is still under appeal.

² All tables charts, photos etc. form part of this decision and order.

EVIDENCE

Mr. Benczkowski, whom I found qualified to give opinion evidence, testified for Mr. Khan. Mr. Findlay testified for himself and Ms. Findlay.

MATTERS IN ISSUE

In order to grant a minor variance, I must be satisfied that the four tests under s. 45(1) of the *Planning Act* are met. The proposal must:

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

The test for a consent to sever a lot is that I must consider a number of criteria under s. 51(24) of the *Planning Act*; of which the most applicable are also Official Plan compliance and the dimensions of the proposed lots. Thus, the Official Plan figures prominently in both the variance and consent test.

The Official Plan does not exist in a vacuum but may be seen as a part of a hierarchy of documents, with the *Planning Act* being the most general, followed by the Provincial Policy Statement and Growth Plan, then the Official Plan and finally, the zoning by-law. General statements intended to address the whole of the Province of Ontario may not be sufficiently fine grained to help decide Mr. Khan's application. For example, the Act requires the consent granter to consider whether municipal services are adequate. Since the whole of the City of Toronto has adequate municipal services, this cannot mean that every application for consent must succeed and similarly, the majority of the s. 51(24) criteria are inapplicable in an urban situation.

ANALYSIS, FINDINGS, REASONS

Provincial Policy and Growth Plan

One *Planning Act* requirement is that the consent granter must consider "the welfare of future inhabitants", which I take to mean our children and grandchildren as well as future residents of the site and its environment. Since there are no more "greenfield" sites in Toronto, the hierarchy of documents encourage "intensification" in built up areas of the Province (i.e. cities). 'Intensification' is defined in the Provincial Policy Statement as:

the redevelopment of a property or site at a higher density than currently exists.

"Redevelopment" means;

“the creation of new units, uses or **lots** on previously developed land” (my bold).

A consent to sever is redevelopment, and the creation of two dwelling units on land where currently only one dwelling unit exists is intensification. The Policy Statement goes on to say:

- 1.4.3 b) [Planning authorities shall meet housing targets by] permitting and facilitating:
1. all forms of housing required to meet the social, health and wellbeing requirements of current and future residents, including special needs requirements; and
 2. all forms of residential intensification, including second units, and redevelopment in accordance with policy 1.1.3.3 [the identification of opportunities for intensification];

The phrase “welfare of future inhabitants” occurs in the context of “health, safety, convenience, . . . and welfare of the present and future inhabitants” in s. 51(24) of the *Planning Act*; this phrase is similar to “social, health and wellbeing of current and future requirements” etc., in the Provincial Policy Statement. So, both documents together contemplate lot creation as part of the Province’s intention to encourage intensification in appropriate locations.

This principle is further restated in the 2017 Growth Plan: “Prioritize intensification and higher densities to make efficient use of land and infrastructure and support transit viability”. The Pharmacy/St Clair area of Toronto is clearly a settlement area, well served by transit, is close to schools and other services. I find that a decision approving a consent that results in intensification is “consistent with” the Provincial Policy Statement and “conforms to” the Growth Plan. Of course, “consistent with” is a very light directive; “consistent with” does not mean that every lot in Toronto must necessarily be severed.

Turning now turn to the Official Plan, the most important test says new development must “respect and reinforce” the existing physical character of the neighbourhood. This is a complex test because “character of the neighbourhood” has many dimensions: lot fabric, whether zoning standards are generally observed, architectural unity and styles. A full understanding of the neighbourhood requires that I at least be aware of some of its historical evolution and planning, which will include previous decisions of the Committee of Adjustment and the OMB for the area.

The delineation of the “neighbourhood”

The first step is to define the neighbourhood, which for Mr. Benczkowski, was the area which you would cover in walking a dog. His study area was centred on Presley as a vertical spine, adding the two blocks east and west. The north limit was St Clair

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Avenue East and the south limit Donside Drive, which is approximately one and a half blocks south of the subject site. His map is reproduced below as Diagram 1. I accept this as the study area.



Diagram 1. Lot frontages in study area (subject denoted by black rectangle)

Mr. Benczkowski came to four major conclusions:

- The study area is “fractured” in terms of arrangement of built form on the lot;
- Mr. Khan’s proposal avoided some of the most disadvantageous fractured characteristics;
- There are few candidate lots for severing and therefore the proposal will not be destabilizing; and
- That, in comparison with the nearby severed lot development authorized by OMB decision (125 Donside Drive), Mr. Khan’s is superior.

“Fractured” built form in the relevant study area

Mr. Benczkowski was of the opinion that the character of the neighbourhood is “fractured”, which I interpret as not existing a consistent neighbourhood built-form arrangement. His view is based on the photograph below and a number of similar photographs.



- Nos. 25-31 Bertha (illustrated above) have a disparity of styles, heights and front yard setbacks. Hard surfaces predominate.
- No. 50 Presley’s front yard is grass with shrubs that, in his opinion detracts from an attractive streetscape. “It doesn’t address the street at all. It creates a sheltered look that pushes everything on the street away.”
- No. 50’s driveway is excessively wide. It and 48 Presley have side by side driveways creating a 30 foot width of asphalt paving, and although this “look” is found throughout the area, he did not think it “advantageous” .
- “Throughout the area” there are rear yard garages. This brings automobile activity and hard surfaces to the back yard.
- Nos 35 to 39 Presley include a chalet structure, possibly three storey, next to a bungalow, next to a two storey home. Across the street are completely conflicting styles and lot sizes, with extensive front yard hardscaped surfaces
- Nos. 55-59 have Presley completely different built form and architectural styles; which Mr. Benczkowski also considered “not advantageous”.

By contrast, in Mr. Benczkowski’s opinion, the proposal retains the best physical elements of the neighbourhood as well as correcting some disadvantageous “looks”:

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- There is only one single second floor balcony tucked into the front corner to prevent overlook to adjacent rear yards.
- The rear deck and walk out doors of the two new buildings are placed so that will interact with each other; not with the adjoining neighbours
- The front door sill is 2.5 feet above grade; (finished first floor must be at least 1.2 m above grade).
- There are no variances requested for front, rear or side yard setbacks,



Diagram 2. Front elevation of proposed dwelling (right half)

save a small reduction between the two proposed houses. Small side yard setbacks from house to house are frequent in the neighbourhood.

- There is no height or main exterior wall height variance.
- The height is caused by the peak of the stairwell skylight feature at the midpoint of the building (8.1 m, when 9 m permitted); the roof itself at the front is estimated at 7.95 m, 1.05 m below the permitted height.
- Mr. Khan has not attempted to “pile on” variances and has refrained from proposing a house with the maximum height.

In my view, most decisive aspect is that the proposed Khan houses will present themselves **as true two-storey houses; not as two stories-above-garage**, which present as three stories. I find that this two storey “look” is respectful and reinforces the

planned context of the area: namely residential detached (RD zoning) homes 10 m high, with the setbacks as set out in the zoning by-law. As such, the lot frontage and lot size variances seen in their total legislative and policy context meet the Official Plan tests and are minor.

Few other candidates for severance

Section 4.1 of the Official Plan states “neighbourhoods are considered physically stable areas”, so a severance must not set a destabilizing precedent. For some residents of Toronto, no severance is acceptable; however, as mentioned previously, the Province requires planning authorities to facilitate housing targets by the use of intensification. The Official Plan indicates that house forms and lotting patterns of 1951 (and prior to the Clairlea By-law in 1959) don’t represent the ideal for all time³ and that decision makers should be aware of opportunities to intensify existing residential area through severances, where appropriate.

Mr. Benczkowski examined the range of frontages in the neighbourhood as follows:

frontages		Number of lots	%
6-9 m	16.8 – 25.3 ft	9	2.8%
9.01 – 11 m	25.3 – 30.9 ft	18	5.5%
11.01 – 12.2 m	30.9 – 34.3 ft	190	58.1%
12.21 – 22 m	34.3 -61.8 ft	110	33.6%
Total		327	99.9%

In Diagram 1 on page 5, the subject property is situated in a block with darker shading indicating 12.21 m frontages (40 feet) and up. Mr. Benczkowski said that the study area only has about 8 or 9 lots as large as the subject property, mostly concentrated in the south end, where nos. 48 and 50 Presley are located. No one lot size predominates as a pattern. Nine out of 327 properties equal to or greater than 16.76 m (57 feet) meaning the subject property is larger than about 97% of the lots in the study area. On the other hand, lots at 27.5 feet the proposed lot frontages) appear to be somewhere in the 2.8 to

³ “2.3 Stable but not Static: Enhancing Our Neighbourhoods and Green Spaces. Fully three-quarters of the City’s land area is devoted to neighbourhoods, parks, ravines, watercourses and valleys. Unlike the Downtown, the Centres, Avenues and Employment Districts, these stable areas will see little physical change.” Little physical change does not mean no physical change.

8.3 percentile. So, we are, not surprisingly, changing one of the largest lots to two of the smallest. Mr. Benczkowski said nonetheless, they will “fit in”. When I walked the site, particularly in the south end, I found it difficult to pick out a wide lot over a less wide one. I accept his conclusion that only 3% or so of the houses in the study area would be candidates for a severance application and that the majority of lots are too narrow to produce two lots in the 25+ foot range. The Official Plan test — not causing destabilization — appears to be satisfied because of the limited number of potential severance sites.

A closer examination of the Presley Avenue statistics

I wanted to further test Mr. Benczkowski’s conclusions in order to satisfy my obligation to exercise independent judgement, and not merely accept evidence uncritically. In making my site visit, I drove south from St Clair, and it appeared to me that the lots in the first two blocks of Presley were very similar to each other, although south of Florens there was considerable diversity, both in terms of architecture and lot size.

I believe a closer examination of lot dimensions corroborates Mr. Benczkowski’s conclusions. His data shows the following **depths**:

51 – 147 Presley	115 feet
39- 49 Presley	177 feet
1 – 37 Presley	281 feet

From a map, the extremely deep lots at the south end of Presley, look as if the subdivider was dealing with the irregular border created by Warden Woods Park and Taylor Creek (to the east and right in Diagram 1). These lots are even deeper than the combined lots between Presley and Highvale.

I now look at the **frontages**:

Even numbers.		Odd numbers	
	Frontage in feet		Frontage in feet

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116 -148 Presley	35.3		51 -147 Presley (excluding 91 Presley)	40
64-114 Presley (excluding 92 Presley)	40			
52 ⁴ -62 Presley	35.66			
50 Presley (subject)	57		39-49 Presley (4 properties)	55
48 Presley	70		37 Presley	72
32 Presley	55		31 Presley	66
26-28 Presley	40		27-29 Presley	40
22 Presley	70		25 Presley	32
20 Presley	45		19-23 Presley (3 properties)	55
			15-17 Presley	25
			11 Presley	55
			3A, 3, 5, 7 Presley	40
			1 Presley	51.6

These show an extreme variability in the house numbers 20 to 50 range (the numbering is irregular). Counting the larger properties, I get 7 properties at 55 feet, the subject at 57 feet and four greater than 57 feet, all south of Florens Avenue. It appears that the area north of Florens is exceedingly regular, both as to frontage and lot depth.

Turning to the dates of construction, I find most of Presley was built in the years 1950-1952, hence the extremely similar architectural style, suitable for its time, but now with the disadvantageous characteristics noted by Mr. Benczkowski. There are a few

⁴ My notes say that Mr. Findlay thought his lot, 52 Presley, was closer to 41 feet but I am unable to corroborate this from the tapes. This is what Mr. Benczkowski's data says. Either way, it doesn't affect the basic conclusion.

date outliers: mostly in odd numbers south of Florens. Below are their addresses, dates of construction and frontages.

15 Presley	1922	25 feet
17 Presley	1935	25 feet
19 Presley	1946	55 feet
23 Presley	1926	55 feet

The large lots are .375 acres and even the small lots are a fifth of an acre. I speculate that these early constructed lots were originally serviced by wells and septic tanks. When proper piped servicing came in 1950, the neighbourhood was probably subdivided from north to south from services on St Clair. Thus, the houses with house numbers in the hundreds were built in 1951 and 1952; number 21 Presley was built in 1955 and 22 Presley in 1966; No. 23 Presley is the last house built on Presley, in 2004.

Whether my speculation is historically correct or not, it demonstrates there are many indicia supporting a second “sub-neighbourhood” on both sides of Presley, south of Florens. The atypicality of this area is seen from both wide and narrow lots, deep and shallow lots, having many dates of construction, some spanning decades. It is very different from the lotting north of Florens and elsewhere in the study area. While it seems that this is an area of exclusively large lots, the two at 15 and 17 Presley and at 125 Donside⁵, are even smaller than those proposed by Mr. Khan. These features permit me to confirm Mr. Benczkowski’s analysis of “fractured” neighbourhood characteristics.

125 Donside – the precedent

No 125 Donside was submitted to me as a precedent for Mr. Khan’s application for a consent to sever. The subject lot, no. 50 Presley’s dimensions are 16.68 m (55 feet) with a depth of 40.35 m (132.4 feet) and Donside houses are similar. I can’t make further inferences about the character of the Donside neighbourhood because, unfortunately only ten Donside houses are listed in the data Mr. Benczkowski obtained, whereas the map shows there should be about 20 houses. Ms. Stewart relied on this December 2014 OMB decision⁶, for two purposes, first, those two new houses on two 25 foot lots have now physically and legally become part of the neighbourhood and second, those variances granted are somewhat greater than those Mr. Khan now seeks.

⁵ The exact house numbers are missing from Mr. Benczkowski’s data.

⁶ PL140296



The 125 Donside applicant, Mahbuba Aktar, started with a 50 foot lot, so the resulting lots were 25 feet instead of 27.5 feet. Also Mr. Aktar needed greater side yard variances: .0.52 m instead of Mr. Khan's 0.6 m (the 0.08 m difference is about 3 inches).

The evidence in the Donside case was quite different from the evidence here. The City opposed Mr. Aktar, who was successful at the Committee of Adjustment. The main OMB point of contention was whether the area west of Pharmacy should also be considered as part of the study neighbourhood. After an affirmative finding on that issue, the Board reasoned that “undersized lots have existed in the area for decades and have not destabilized the area” without making any factual finding that the undersized lots *were the result of severances*. Also, there was no articulation of the tests of “respect and reinforce the physical character of the neighbourhood”, new development being “sensitive, gradual and generally ‘fit’ the existing physical character” and neighbourhoods being “stable but not static”.

If I grant approval for Mr. Khan's development, there will then be two “precedents” for future severance applications. In light of the superior planning evidence I was fortunate to receive, I hope future applicants for severances will not only bring forth evidence on the extent of the boundaries for the study area, but also evidence relating to massing, built form arrangement and streetscape and whether the scale and massing is respectful of and reinforces the physical character of the neighbourhood.

Ms. Stewart submitted that her client's two and a half feet advantage in lot frontage is "quite significant" because the narrower Donside lot translated into the "built form that people **typically don't like**, with the garage at grade with two stories above, the more Mansard roof with the second story pushed up against the roof". By contrast, her client offered a more grade related presence with low first floor and living room window and the pitched roof entirely over the second floor. While she was careful not to criticize the Donside houses, and the OMB decision speaks for itself, she invited me to conclude that Mr. Khan's proposed built form is more respectful of the character of the neighbourhood than 125 Donside. I accept this conclusion.

Mr. Findlay's evidence

Mr. and Ms. Findlay live directly north of the subject site. Their house marks the beginning of the regular lotting pattern we see all the way to St Clair. He said that he had lived at 52 Presley for 28 years, and had three daughters, for whom he built a rear two-storey addition in 1994. He believes the builder obtained whatever zoning permissions were required.

I basically find the proposal is out of character with the immediate area, not to speak of Donside. I know the area well and the people so a new development [is not positive in their consideration]. So, say what you like about respect, it's basically build a house and move on, to me it's basically a house flip. This is a respect [but only] for the pocket book.

The relevant planning documents do not reference the financial motives of the applicant as a factor in interpreting the Official Plan and zoning by-law. I understand Mr. and Ms. Findlay (the immediate neighbours) are unhappy with the proposal and are not convinced that the variances are minor etc.. I am required to consider if statutory tests are met and have gone to some length in examining the study area because that is what the Official Plan directs me to do. I must also consider the various Provincial Policies as directed by the Planning Act. It is my conclusion that intensification policies in appropriate areas, and this is one, combined with the less intrusive built form, in the total historical and geographical context are meaningful and persuasive.

Conclusion

I will not repeat the evidence on the remaining tests of minor etc., with respect to frontage and lot size, which overlaps what has been set out already. The side yard variances only affect the space between the new residences, not from the existing east and west neighbours. This is another example of respecting the existing character. The parking space variance arises because the interior walls of the single car garage are considered an "obstacle", which imposes a wider standard for a parking space. I consider the space provided adequate and this variance is minor.

The consent criteria s. 53(24) of the *Planning Act* to which I must give regard are either met or are non-applicable.

I find both the minor variances and the consent meet the tests under the *Planning Act*

DECISION AND ORDER

I authorize the variances in Table 1 on the following conditions:

Minor Variance Conditions

- (1) The proposed development shall be constructed substantially in accordance with the Site Plan and Elevations dated February 14, 2018.
- (2) The Applicant shall submit to Urban Forestry a complete application to Injure or Destroy Trees for privately owned trees, as per City of Toronto Municipal Code Chapter 813, Article III.

Consent Conditions

- (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) 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.
- (4) 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.
- (5) 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.
- (6) Three copies of the registered reference plan of survey satisfying the requirements of the City Surveyor, shall be filed with the Committee of Adjustment.
- (7) 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.

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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.

X

Ted Yao

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