

DECISION AND ORDER

Decision Issue Date Thursday, August 09, 2018

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

Appellant(s): 3 MARKDALE INC

Applicant: WENDY NOTT

Property Address/Description: 3 MARKDALE AVE

Committee of Adjustment Case File Number: 16 222555 STE 21 MV

TLAB Case File Number: **18 139717 S45 21 TLAB**

Hearing date: Wednesday, August 01, 2018

DECISION DELIVERED BY T. Yao

APPEARANCES

Name	Role	Representative
3 Markdale Inc. (Melissa Routley, Senior Project Manager, Evan Johnsen)	Owner/Appellant	Meaghan McDermid
Wendy Nott,	Expert witness for 3 Markdale Inc.	
Ellen McGowan	Planner, assistant to Ms. Nott	
City of Toronto	Party	Aderinsola Abimbola

INTRODUCTION

3 Markdale Inc., a corporation whose business is owning and managing low rise apartment buildings, wishes to add a third storey to a two storey building. Currently a five-unit rental building, it will become a seven-unit condo. Originally built between 1951 and 1953, the building is located in the former City of York and predates the first York zoning by-law passed September, 1983. All the variances with the exception of the two extra units could be justified as being permitted due to their existing legal non-conforming status.

Photo 1. 1657 Bathurst St



Background

Number 3 Markdale Inc.'s related company has constructed the same type of renovation before. In the photo above, 1657 Bathurst Street (white building, left) is very similar to what is proposed; and the adjacent property, 1653 Bathurst (dark building, right) is similar to 3 Markdale's present form. After construction, each of the basement and first floor will have two units each and the 2nd and 3rd floor will have three 2 storey units. All units will be a little over 1000 sq. ft each. The renovation/addition will add exterior balconies front and back, and modernize the exterior common areas by:

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- Creating a sunken patio for one unit-holder in the basement;
- Creating a new entrance and exterior storage for the other basement unitholder (Variance 3);
- Repaving the rear yard, adding bicycle storage and an enclosed garbage area. (Variances 1,2, 7, 8-12); and
- Resurfacing portions of the side yard with patio stones.

This application was submitted Sept 14, 2016 and after two deferments and revisions made at the City’s request, the Committee of Adjustment refused the variances. Number 3 Markdale Inc appealed and the matter now comes to the TLAB. The 19 variances sought are set out below in Table 1. Two by-laws are referenced because the present city-wide harmonized by-law, 569-2013, was appealed and those appeals are still being disposed of. Until their final disposition, the Buildings Department reviews all building permit applications under the present city-wide bylaw and the predecessor by-law. There is overlap between the two zoning by-laws although it may be seen that certain provisions (for example, for parking space size) are not exact duplicates.

Table 1. Variances sought for 3 Markdale Road			
		Required	Proposed
Variances from new city-wide harmonized By-law 569-2013			
1	Minimum percentage of the lot area of apartment building used for landscaping	50%	24.4%
2	Percentage of all landscaping to be soft landscaping	50%	17.5%
3	Front yard setback	5.3 m	4.75m
4	East side yard setback	2.4 m	1.14 m
5	Number of dwelling units	3 units	7 units
6	Exterior stairs encroachment into east setback area	No closer than 0.6 m	Zero m
7	1.5 m of soft landscaping abutting another lot in a residential zone		None on either the east or west side

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8	Parking for more than three vehicles must be fenced		Parking for seven vehicles not fenced
9	Parking space location	No closer than 1.5 m to fence	Stall number one .2 m from west side lot line
10	Interior parking spaces	Min three parking spaces must be in interior of building	No parking spaces in interior of building
11	Parking space size	2.9 m by 5.6 m	2.35 m by 5.3 m
12	Visitor parking	Minimum of one parking space	Zero parking spaces
13	Interior bicycle parking spaces	Minimum of one	Zero spaces in building
14	Use	RM zone does not permit use as an “apartment building”	
15	Floor space index	1.0 times lot area	1.19 times lot area
Variances from former City of York harmonized By-law 1-83			
1	Visitor parking	Minimum of one parking space	Zero parking spaces
2	Use	R3 zone does not permit use as an “apartment house”	
3	Parking space size	2.7 m by 5.6 m	2.35 m by 5.3 m
		Parallel space 7 m long	5.3 m long
4	Minimum percentage of the lot area used for landscaping	50%	27.14%

JURISDICTION

This is an application under **both** the *Planning Act* ss. 45(1) (the four tests) and 45(2)(a)(i) (“enlargement of a legal non-conforming use”). Section 45(1) reads:

45(1) The committee of adjustment, upon the application of the owner of an land, building or structure affected by any [zoning] by-law, or a predecessor of [any zoning by-law] . . . may, . . . authorize such minor variance from the provisions of the by-law , in respect of the land building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure , if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

Section 45(2) reads:

- (2) In addition to its powers under subsection (1), the committee, upon any such application,
- (a) where any land, building or structure, on the day the by-law was passed, [September 1983] was lawfully used for a purpose prohibited by the by-law [e.g. 5 apartments], may permit,
 - (i) the enlargement or extension of the building or structure, if on the day the by-law was passed . . . continued until the date of the application to the committee [Sept 14, 2016] . . . ,

EVIDENCE

This appeal is unopposed. I heard from Wendy Nott, whom I qualified as able to give opinion evidence on land use planning. Ms. Abimbola, the lawyer for the City, did not advance any evidence but made submissions in support of the conditions. The condition of a cash contribution was agreed to by the parties and I considered this condition “advisable” pursuant to s. 45(9) of the *Planning Act*.

ANALYSIS, FINDINGS, REASONS

The test under s. 45(2)(a)(i)

Unlike s. 45(1), s. 45(2)(a)(i) has no explicit test for the granting of an extension of a legal non-conforming building. Like Ms. Nott, I do not believe the silence in s. 45(2)(a)(i) imposes **no** statutory test. According to her, OMB jurisprudence states that the test is similar to the third and fourth branches of the four-part test, namely whether variances are desirable for the appropriate development of the land and whether they are minor. Ms. McDermid (the owner’s lawyer) submitted *Foster v Toronto*¹, in which OMB Member Melling stated:

[42] In the absence of the sort of direction provided by s. 45(1), board jurisprudence has generally applied good planning principles in deciding whether permission should be granted under s. 45(2)(a)(i). That analysis has involved consideration of questions like those posed by the third and fourth parts of the s.

¹ 1996 CarswellOnt 5837, 33 O.M.N.R. 280, V950392

45(1) test: is the proposal desirable for the appropriate development of the subject property? Is its impact upon surrounding uses unacceptably adverse? . . .

In *Foster*, the applicant landowner had an existing density of 0.83 (a legal non-conforming status) and wished to construct a new addition raising the final density to 0.991 (0.6 permitted). Member Melling observed that the relevant block of Edgewood Road where the property was located had numerous lots with densities above 1.0. Accordingly, he found that the general intent of the density provision was not “threatened”, since the purpose of the zoning by-law was to prevent overdevelopment of lots, which would not result in this case if the variance was granted. All the lots had high densities because of the existence of a rail line near the houses caused small lots with average sized houses. This case is similar, with numerous neighbouring multi-unit properties in the Markdale/Bathurst area that also do not comply with the current zoning density limits.

Based on *Foster*, Ms. Nott proposed the following test for s. 45(2)(a)(i) as:

Whether the enlargement or extension is desirable (for the appropriate development of the land), represents good planning, and generates no unacceptable adverse impacts within the physical context.

Since her formulation repeats a branch of the “four tests” or reformulates a component of a branch, I find here, I could analyse this application in the way dictated by s. 45(1) application. The variances reflect a situation that is many decades old and any adverse impacts must be deemed to be accepted by adjoining landowners by their purchase, being aware of the legal non-conforming use of the subject lands as an apartment house. This is the same conclusion as *Foster*: no unacceptable adverse impact. Whether an application is considered under s 45(1) or 45(2)(a)(i) of the *Planning Act*, it is my view that any meaningful analysis of “good planning” needs recourse to the general intent of the Official Plan and zoning by-law.

This is essentially a “baseline” application in that most of the variances represent bringing the building up to modern zoning standards rather than any real change in physical character of the building. Faced with an application for a 65+ years’ old building, the Buildings Department has asked the owner of 3 Markdale to “regularize” the building by obtaining all variances from two by-laws, one being itself 35 years old. The applicant could insist on relying on the status of legal non-conforming use, but it is easier for both the Department and the owner to have one piece of paper to point to, rather than round up witnesses. The owner would have to prove in each successive building permit application not only what the use was on September 1983 and that there has been no interruption in use since that date. For a variance such as #11, the undersized parking space, it would be very difficult to find records of any kind.

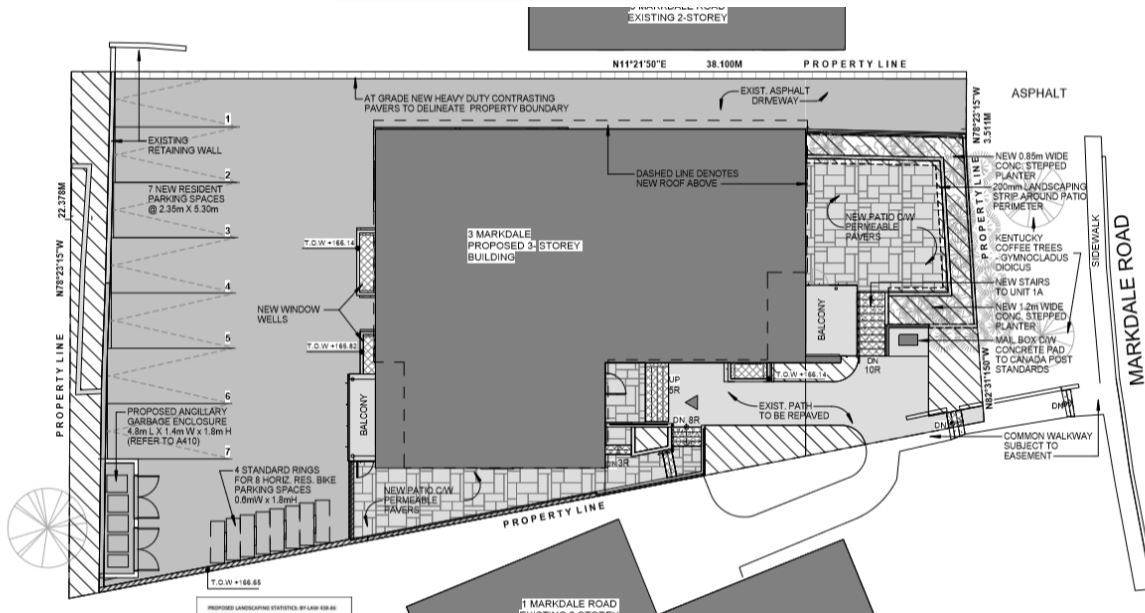
Most variances are pre-existing

Most of the variances do not require a detailed analysis, are obviously minor and desirable for the appropriate development of the property. In Diagram 1, below, north is to

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the right, in the direction of the words “Markdale Road” and east is toward the bottom. The landscaping requirement (number 1 and second number 4) is a trade-off between providing parking and on-site outdoor amenity (soft landscaping) in an urban location. The parking space variances, (numbers 8 to 13) are a result of attempting to make the best use of the rear yard asphalt surface to the rear (south or to the left in Diagram 2), which is sunken and therefore somewhat less obtrusive to the adjacent detached houses on Croydon’s rear yards. The improvements here include resurfacing, installation of signage, and a new garbage storage unit and will be a net betterment over what exists at present. No visitor parking space is provided (Variance 12 and second number 1) but there is street parking on Markdale Road.

Diagram 1. Site Plan



The east side yard setback (variance 4) results from the trapezoidal-shaped lot and the “pinch-point” at the bottom of the Diagram 1 is caused by the projection of the corner close to the angled lot line; other wise there is ample space between 1 and 3 Markdale (The buildings have different owners.) The buildings were designed to be symmetrical with respect to this pinch point. The front yard setback variance and second east side yard setback (variance 3 and 6) is caused by two new basement entrances.

The front basement apartment will be unusually attractive; it has above grade windows and its own exterior patio. This is a desirable for the appropriate development of the building. This basement’s entrance and front balconies all project into the front yard setback; only the entrance is “caught” because there is an exception for balconies but not below grade stairs. The 1.5 m soft landscaping strip (variance 7) is required because the

zoning by-law contemplates there may be another residential building to serve as a buffer. In this case the west side of 3 Markdale has an asphalted driveway to the rear of the building I find all these to be minor and desirable.

I now turn to the increase in unit count from five to seven and the increase in floor space index from .71 to 1.19.

The PPS and Growth Plan

There are numerous policies that promote efficient and resilient land use patterns². I find the increase in units meets the *Planning Act* regard which must be given to higher-level policies.

Zoning Intent

Diagram 2 (below) shows the zoning maps for the respective by-laws, each recognizing the apartment building characteristic of this area of Toronto. By-law 1-83, the Zoning By-law of the former City of York (passed in 1983) permitted the following uses:

- a Detached House;
- a Semi-detached House;
- a Street Townhouse;
- a Triplex House;
- a Double Duplex House; and
- a Double Triplex House”

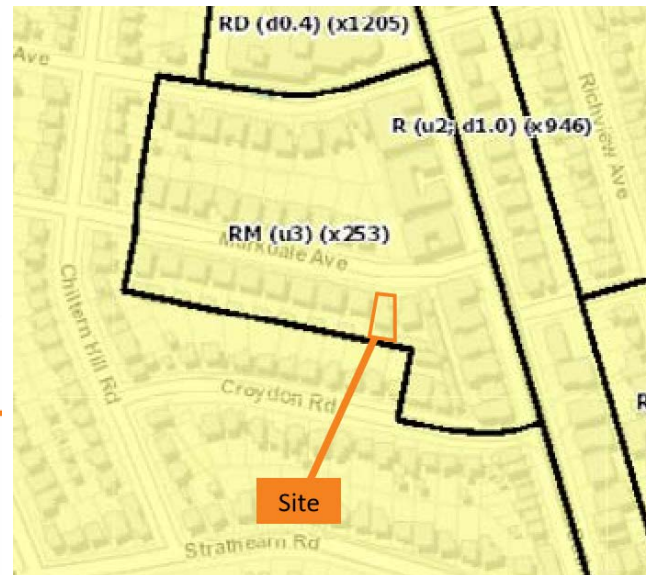
By-law 3623-97, an amendment to 1-83, was passed September 30, 1997.

Under the new harmonized by-law, the lands are zoned “RM (u3)” which permits:

- a detached house;
- a semi-detached house;
- a duplex;
- a triplex; and
- a townhouse.

²The development promotes efficient development and land use patterns (Policy 1.1.1(a)); • promotes cost-effective development patterns and standards to minimize land consumption and servicing costs (Policy 1.1.1(e)); • is an efficient use of land (Policy 1.1.3.2(a)1); • efficiently uses the infrastructure and public service facilities which are available (Policy 1.1.3.2(a)2); • incorporates appropriate development standards which facilitate compact urban form (Policy 1.1.3.4); • provides for an appropriate range and mix of housing types and densities on the Subject Site and in the surrounding area (Policy 1.4.1); and • directs the development of new housing towards a location where appropriate levels of infrastructure and public service facilities are available, at a density which efficiently uses land, resources and existing transit (Policies 1.4.3(c) and (d)).

Diagram 2. By-law 1-83 zoning map left; 569-2013 zoning map right.



This RM (u3) zone is also subject to Exception RM253, which reiterates that no residential uses other than those listed are permitted. Under the current by-law, the five units are an “apartment building”, which is defined as:

a building that has five or more dwelling units, with at least one dwelling unit entirely or partially above another, and each dwelling unit has a separate entrance directly from outside or through a common inside area. A building that was originally constructed as a detached house, semi-detached house or townhouse and has one or more secondary suites is not an apartment building.

This recounting of unit count is misleading for the neighbours. For example, on July 12, 2017, (the first Committee of Adjustment decision, which was deferred to allow the City staff to examine the Croydon owners’ objections), the owners of 10 Croydon, (the Wises), wrote with respect to variance 7:

It seems that the lot in question is already in contravention of the By-laws in that there are five dwelling units in the building (which have been there for many years). To increase this number to seven means that the owners now wish to **have more than double what is allowable** (i.e. three). This means that an additional floor will be built onto the existing structure which will result in construction disruption for a considerable period of time. Why

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should the owners collect additional rental income when the other dwellings in the area (Croydon Road) cannot do so without contravening the By-law³. (my bold)

The Buildings Department not only administers the zoning by-law but also the Building Code. Both pieces of legislation must deal with multiple unit buildings, which are more complex than single detached buildings. Some will be purpose-built, others created by addition or conversion (i.e., interior renovations only) of a single or semidetached. By whatever means, planners know a proposal for multi-unit needs to be examined for both planning issues (density, massing, parking) and Building Code issues: (e.g., exits, fire alarm systems, common garbage areas etc.)

Accordingly, the zoning by-law is deliberately conservative; for example, “u3” represents not the ideal number of units, but a low-density threshold to ensure that nothing slips through the cracks. In 1953, there was no zoning, let alone no requirement for one inside bicycle parking space. Societal expectations have evolved. Number 3 Markdale Inc. is installing seven outdoor bicycle spaces to meet these recent regulations but no interior ones. I believe that this is the reason for silence on the relevant test in s. 45(2)(a)(i) in the *Planning Act*; some enlargements call for a deeper examination with reference to the Official Plan, but for others (e.g. one interior bicycle parking space), it is unreasonable to expect compliance in an older building.

Diagram 2 (above) shows the R3 zone to the left and RM (569-2013) zone map to the right. It is apparent they are identical. The City-wide bylaw simply continued the R3 zone but relabelled it RM (u3). This is not an attempt to limit the number of units to three or fewer, but to ensure all renovations to multi-unit buildings are comprehensively studied.

The R3/RM area currently consists only of low-rise “apartment buildings”; there are no singles. The only single detached houses are on the east side of Chiltern (the north-south street to the west or left in Diagram 2) and the north side of Corydon (the east west street south of Markdale), which are outside this zone. Those inside the zone have buildings of a 2 to 5 storey built form, with the denser buildings located on Bathurst.

Ms. Nott concluded that under a s. 45(1) analysis,

A variance to recognize the legal non-complying building containing 5 dwelling units and to allow for 2 additional dwelling units through a built form that fits with the existing physical character of the area and does not result in any adverse impacts, maintains the general intent of the zoning by-law.

Because modern forms of apartments have evolved since the 1983 language of “double duplex” and “double triplex”, I find that there has always been a zoning intent for multi-unit development, under which By-law 1-83 contemplated as many as six units (a double triplex = 6 units and was permitted). The building was then “downzoned” by 569-

³The Official Plan and zoning permit secondary suites”, which the owners of 10 Croydon could have built and generated extra income, should they have chosen to do so.

2013 to three units for reasons I have explained. A seven-unit building in this legislative and physical land use context maintains the general intent of the zoning bylaw. “

Official Plan

Ms. Nott provided a thorough analysis of Official Plan provisions divided into headings as follows:

Healthy Neighbourhoods Policies. The object of section 2.3 is to provide for stability, which Ms. Nott concluded had been fulfilled. This proposal respects and reinforces the existing physical character of Markdale Road, which is composed of 2-3 storey multi-unit buildings.

Built form policies. The property is in an area designated “Apartment Neighbourhoods, for which Policy 4.2.2. requires a transition in scale to lower intensity areas and Policy 4.2.3 requires adequate sunlight, privacy and areas of landscaped open space. Planning staff has a policy of making sure that a Committee of Adjustment application is held up until it undergoes a form of site plan review. Through this process the City responded to concerns of the residents of: 8, 10 and 12 Croydon. As a result, 2 Markdale Inc. produced a sight line study (March 2018) and because of grade differences the third story of 3 Markdale is lower than the second story of the Croydon houses as well as having a 37 m building-to-building distance with intervening fence and vegetation.

Housing policies Since the conversion results in the loss of fewer than six rental units, the policies in 3.2.1.5⁴ etc. do not apply. However, the project contributes to a complete range of housing options.

Apartment Neighbourhoods policies. Significant growth is not expected although these neighbourhoods permit a greater scale of buildings. Ms. Nott said that going from 5 units to seven was not significant growth.

Conclusion

I find the variances meet the statutory tests in the *Planning Act* and provide for a modest amount of intensification under the provisions relating to an enlargement of an existing legal non-conforming use.

⁴ 5. Significant new development on sites containing six or more rental units, where existing rental units will be kept in the new development: a) will secure as rental housing, the existing rental housing units which have affordable rents and mid-range rents; and b) may secure any needed improvements and renovations to the existing rental housing, in accordance with and subject to Section 5.1.1 of this Plan, without pass-through of such costs in the rents to tenants.

DECISION AND ORDER

I authorize the variances set out in Table 1 upon the following conditions:

1. The Owner's property shall be landscaped substantially in accordance with the Proposed Site Plan & Landscape Plan (Drawing Number A007), prepared by KFA Architects + Planners Inc., originally dated November 23, 2016, revised December 15, 2017, and date stamped received by the Committee of Adjustment January 8, 2018, to the satisfaction of the Director of Community Planning, Toronto and East York District.
2. Prior to the City's issuance of a building permit, the applicant shall submit a payment in the amount of \$583.00 for the planting of one large growing shade tree by Urban Forestry Renewal on City property in front of the site.
3. The Owner shall sign the parking spaces for use by 'small cars' only.
4. Prior to issuance of a building permit, the owner shall make a cash contribution to the City in the amount of \$18,000 to be allocated at the discretion of the Chief Planner and Executive Director, City Planning Division in consultation with the Ward Councillor, toward any one or more of the following:
 - a) Local park and library improvements;
 - b) Improvements to local community and arts and culture facilities;
 - c) Affordable housing in the vicinity of the lands; or
 - d) Community infrastructure in the vicinity of the lands.

The cash contribution shall be in the form of a certified cheque and is to be indexed upwardly in accordance with the Statistics Canada Non-residential Building Construction Price Index for Toronto, calculated from the date the Toronto Local Appeal Body decision becomes final to the date the payment is made. In the event the cash contribution has not been used for the intended purpose within three years of the date of payment, the cash contribution may be redirected for another purpose, at the discretion of the Chief Planner and Executive Director of City Planning, in consultation with the local Councillor, provided that the purpose is to support community or social infrastructure in the vicinity of the lands.

X 

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