

DECISION AND ORDER

Decision Issue Date Thursday, August 30, 2018

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

Appellant(s): YAYING WANG

Applicant: CHRIS LI

Property Address/Description: 93 MONA DR

Committee of Adjustment Case File Number: 17 168336 NNY 16 MV

TLAB Case File Number: **18 131770 S45 16 TLAB**

Hearing date: Tuesday, August 14, 2018

DECISION DELIVERED BY Ted Yao

APPEARANCES

Name	Role	Representative
Jia Wang, Guojun Guan	Owners	Annik Forristal
Jane McFarlane	Expert Witness	
Tom Bradley	Expert Witness	
Yaying Wang	Appellant	Andrew Jeanrie
Aristotle Christou	Expert Witness	

INTRODUCTION

Ms. Wang and Mr. Guan wish to construct two two-storey additions at the rear of their house at 93 Mona. They need sideyard and floor space index variances. The Committee of Adjustment granted the requested variances on February 28, 2018. The neighbour to the north, Mr. Yaying Wang appealed and so this matter comes to the TLAB.

BACKGROUND

The variances

Ms. Wang and Mr. Guan, the owners of 93 Mona, need four variances as follows:

Table 1. Variances sought for 93 Mona Drive			
From Toronto-wide By-law 569-2013			
		Required/permitted	Proposed
1	Maximum floor space index	.35 area of the lot	.55 area of the lot
2	Minimum north side yard setback	1.5 m	.92 m
3	Minimum south side yard setback	1.5 m	.92 m
From (former City of Toronto) Zoning By-law 438-86			
4	Maximum floor space index	.35 area of the lot	.55 area of the lot

There are two by-laws being considered because there are still appeals of the zoning By-law 569-2013 (enacted in 2013), and until they are resolved, the Buildings Department requires applicants to seek variances under both the more recent city-wide harmonized By-law 569-2013 and its predecessor, (former City of Toronto) Zoning By-law 438-86.

Evidence

Ms. Jane McFarlane gave planning evidence for the owners Ms. Wang and Mr. Guan. Mr. Aristotle Christou gave evidence on behalf of the appellant Mr. Wang. I qualified both as able to give opinion evidence in land use planning. Mr. Tom Bradley,

whom I qualified as able to give opinion evidence on forestry, gave evidence on behalf of the owners.

MATTERS IN ISSUE

The matter in issue is whether the variances sought by Ms. Wang and Mr. Guan meet the four tests in in the *Planning Act* and are consistent with and conform to higher level Provincial documents. The four tests are:

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

I find that the higher-level Provincial documents are not an issue.

The Project

The two rear additions are shown in Diagram 1; the notched addition (top arrow) extends out the back close to the north lot line and measures 5.56 m wide by 4.15 m deep (or 18.2 ft by 13.6 ft). The lower arrow indicates the other addition (rectangular unshaded area) near the south lot line. The second addition is 7.1 m wide by 5.5 deep (23.3 x. 18 ft). Both are two storey.

The owners made a number of concessions to ensure there their request would be viewed as reasonable by the Committee of Adjustment. Originally, they proposed a roof top deck on the

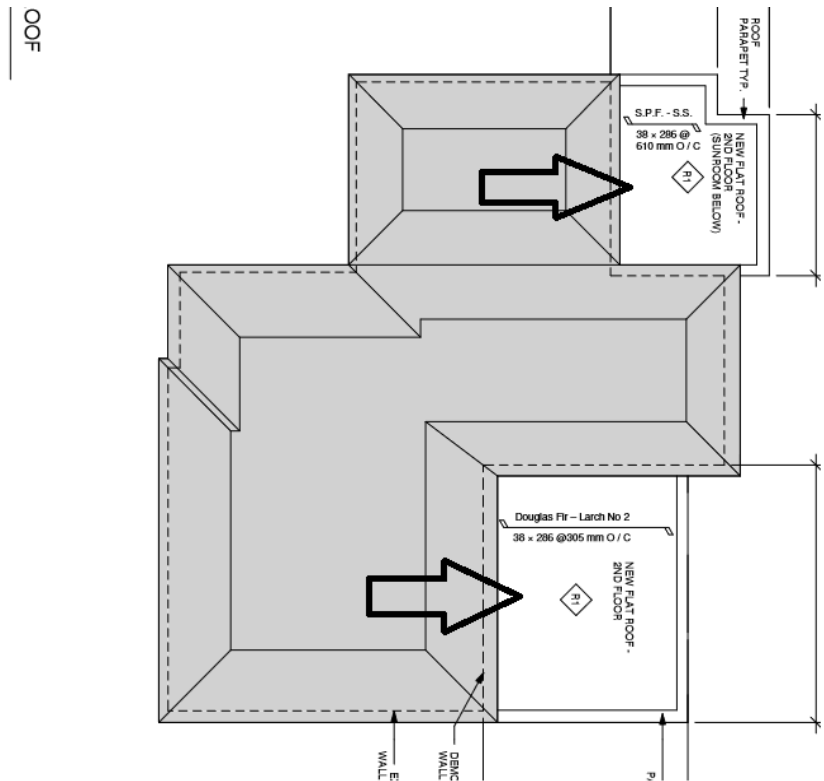


Diagram 1. North and South Additions

south addition, which they dropped after opposition from neighbours at 146 Strathallan Blvd, Mr. Hawker and Ms. Tung. In their letter, the Strathallan neighbours wrote:

93 Mona Drive is an unusually shaped lot, and because of the proximity of this property to the corner of Mona Drive and Strathallan Blvd, in addition to our backyards sharing a portion of property line, they also overlook one another.

The Strathallan neighbours' house is a full lot away from the south addition.

The Committee of Adjustment approved the variances, presumably because the neighbours were satisfied. However, Mr. Wang, owner of 335 Glencairn, who was temporarily away from his residence, learned of the approval and appealed.

The tree issue can be conveniently dealt with in the introduction. In response to a letter from Urban Forestry, Mr. Bradley the expert arborist, testified that one private tree had to be removed and replaced by the planting of three more trees, per City policy. He also testified that Mr. Wang's would be unlikely to be harmed if the owners used helical piers in the foundation. As part of his retainer he would attend the site during construction to ensure the trees were professionally protected. Accordingly, Mr. Jeanrie, lawyer for the appellant Mr. Wang, agreed that no tree issues were in dispute in this hearing.

The side to rear spatial relationship of certain houses on Mona Drive.

Mona Drive is a north south street, intersecting with Briar Hill to the south and Coldstream to the north. Diagram 2 (next page) shows a two-block section from Strathallan to Glengrove and containing the subject property and Mr. Wang's. South of this two-block section, corner lots front on the **east west** street and an observer walking on Mona has a view into the back yards. However, from Strathallan northwards, the observer will see that the second house from each corner has been turned 90 degrees to face Mona Drive. I presume this is to create a pleasing streetscape on Mona, which is an attractive and stately street.

The two southern intersections Mona/ Briar Hill and Mona/Hillhurst were in the former City of Toronto, with a minimum lot frontage of 9 m (30 ft). At Hillhurst, the North York zoning requires 15 m (49.2 ft) resulting in larger lots north of Hillhurst. 93 Mona is one of those larger lots.

The purpose of Diagram 2 is to highlight lots where a rear addition may impact a neighbour's **rear** yard instead of the usually affected **side** yard. Lots with a pink outline are lots whose rear yards are potentially "affected"; lots causing possible impact ("affecting") are outlined with a thin black line. Diagonal lines indicate the possible areas of concern. Most of the "affecting" lots are Mona properties, i.e. 90, 91, 92 and 93

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Mona, but sometimes another property is “affecting”, and it is the Mona property that is “affected”. See 294 Glengrove, 304 and 352 Glencairn.

The orientation of the Mona “affecting” properties, generally two per block, are unusual; Ms. McFarlane, the owners’ planner, noted

This creates an unusual experience for the pedestrian on Mona Drive as the view from the street is often of side yards, driveways or fencing.



Diagram 2. Mona Drive from Strathallan to Glengrove

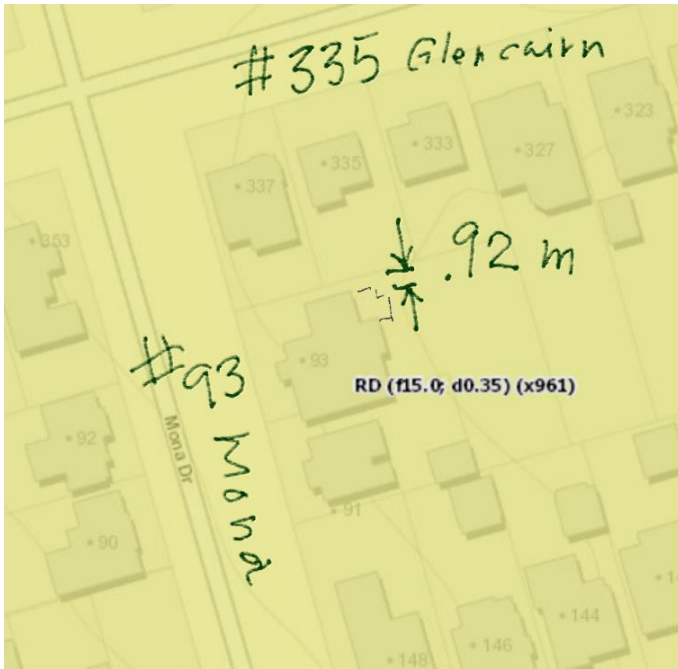


Diagram 3. North addition at 93 Mona in relation to 335 Glencairn

She also noted that some properties had “improved elevations to address the flanking street”; in other words, the builder has added design features such a secondary “front door” to the side elevation to create the illusion that the side yard is a front yard.

Diagram 3 (left) shows the relation of the owners’ (Ms. Wang’s and Mr. Guan’s) **north** addition to Mr. Wang’s residence. Mr. Wang’s residence is second house from corner on Glencairn, with the north addition sketched (not to scale) in its approximate position. For clarity I have omitted the south addition as it appears that it raises no objection.

ANALYSIS, FINDINGS, REASONS

The Official Plan

Section 4.1.5 of the Official Plan states:

4.1.5. Development in established Neighbourhoods will **respect and reinforce** the existing **physical character** of the neighborhood, including, in particular:

- c. massing. . .of nearby residential properties;
- f. prevailing patterns of rear and side yard setbacks and landscaped open space;

No changes will be made through . . .minor variance . . .that are out of keeping with the **physical character** of the area. (my bold)

I start with paragraph 97 in Ms. McFarlane’s witness statement, (the planner for the owners of 93 Mona) in which she concluded that all OP criteria (including ones I have not quoted) were met. In particular, on the subject of massing, she said the proposed addition is “consistent” with adjacent properties within the area. (I should add that I was impressed with the thoroughness with the way she documented her delineation of the study area.) She went on to say in paragraph 97c, “The addition will

not be seen from the street”. This is true because both additions are at the rear of 93 Mona, but visibility from the street does not seem to be especially important if the key issue is visibility from 335 Glencairn and impact on that property. Ms. McFarlane went on to say that the requested floor space index of 0.55 (0.48 existing and 0.35 maximum under the zoning) is “generally within the range of existing and approved FSI’s (floor space indices)”.

She carefully documented all available Committee of Adjustment and OMB decisions on FSI and side yard setbacks. She found for example, out of about 500 properties, 38 had FSI variances under the new by-law and 86 under the former by-law.

Table 2. Ms. McFarlane’s study area statistics		
Approved FSI variances for study area		
	FSI < 0.55	FSI > 0.55
New by-law, 38 applications	39%	61%
Old by-law, 86 applications	52%	48%
Approved sideyard variances for study area		
	< 0.92 m	> 0.92 m
New by-law, 31 applications	35%	65%

Ms. McFarlane wishes me to conclude that FSIs of 0.55 are frequently granted, both in terms of the number of applications and their overall success rate, and I so find. But, these are almost all side-to-side applications. She reported 86 applications were made to the Committee of Adjustment out of about 500 properties in the study area or approximately 17% of lots. This certainly suggests to me some amount of minor variance activity. The applications for FSI variances were invariably successful as the two refusals were appealed to the OMB or TLAB and the refusals overturned.

Mr. Christou’s approach

Mr. Cristou criticized Ms. McFarlane’s analysis:

- for analyzing FSI and side yard variances separately instead of together; and
- for failing to search out only applications with a side-to-rear yard spatial relationship.

A “cumulative” analysis would tease out only the approvals consisting of **both** FSI and side yard setbacks. Admittedly, it is hard to “drill down” into Committee of Adjustment decisions to analyze this since building plans are often not attached to the decision. Even Mr. Christou could not comprehensively analyze the decisions in this way, but I think he was correct to attempt to make a combined analysis.

In the 93 Mona case, the building already has more than permitted gross floor area and any addition anywhere will trigger an FSI request. It is worthwhile and obligatory for me to investigate the two variance issues, FSI and side yard setback together, along with an eye as to how the owners have chosen to place that massing on the lot. Mr. Christou characterized the result of the massing choice as creating “a foreboding and invasive massive wall”.

Ms. Forristal’s (lawyer for the owners of 93 Mona) cross examination established that the actual impacts were perhaps less than these adjectives suggest. Shadow impacts were agreed to be “slight” as well as loss of skylight views. It is conceded by Ms. Forristal that there is loss of view, but Mr. Christou, a former OMB member, agreed there is no right to a view. There is overlook, but it will be from a viewer looking obliquely out a window that does not face Mr. Wang’s back yard.

However, I agree with Mr. Cristou, who felt that Ms. McFarlane’s 89 FSI area applications are only a starting point. I now turn to Mr. Cristou’s evidence. For reasons that were not clear, staff at the City only gave Mr. Christou 49 decisions instead of the approximately 170 received by Ms. McFarlane. I don’t regard this difference as significant, because Ms. McFarlane did not deeply investigate the question posed by Mr. Christou.

Of those 49 decisions, Mr. Christou found nine with side yard to rear yard relationships and only one, 90 Mona, in which were both side yard and FSI variances together. Both planners agree on this fact. Number 90 Mona is a 2015 Committee of Adjustment decision in which the owners, the Dales, could only build an extension to the maximum 19 m building length if they also provided a south side yard setback of 3 m. The Dales only provided 1.99 m. These numbers are larger than the 1.5 m requirement here.

Mr. Christou stated that there were important differences between 90 and 93 Mona; for the former, the rear yards were deeper and there were in some cases intervening subsidiary buildings belonging to the Strathallan owners. 90 Mona was north of the affected properties (172 and 170 Strathallan), where the reverse is true for Mr. Wang. A southern orientation could be expected to block more light when the sun is low. I agree with Mr. Christou that there are differences, mostly in favour of finding 335 Glencairn (Mr. Wang) being more impacted than 172 and 170 Strathallan.

Reinforcing the existing physical character

To return to the words of the Official Plan, there seem to be three steps in the analysis.

1. Establish the **neighbourhood**.
2. Establish the **physical character** that must be respected and reinforced.
3. Within this character to be respected and reinforced, include the **prevailing pattern** of massing, side yards, rear yards and landscaped open space.

I looked at the zoning maps, which contain the lotting pattern and a depiction of each building. I am aware that this information has to be updated with building permit information, which neither planner has done, but it is unlikely that the lotting information changes much over time. I found approximately 13¹ properties, including 93 Mona, with a side yard to rear yard relationship enough to meaningfully speak of a “neighbourhood” or “sub-neighbourhood”.

What then is the physical character of this sub-neighbourhood? Ms. Forristal’s McFarlane wrote that there were “many examples” of side yard to rear yard relationships and mentioned number 90 Mona (already discussed) and 109 Mona². Number 109 Mona is a side to rear property where a side yard would possibly impact 306 Glencairn. She stated that the setbacks for this lot were “narrow”. Looking at the aerial photo on page 35 of Ms. McFarlane’s Witness Statement, the existing house for 109 Mona (which does not have a documented Committee application) does block the rear yard, but in a fashion that is short of the present application. I tried to examine other lots from her aerial photos, but for the most part, important information was obscured by trees and I did not feel confident in making conclusions that were not tested by the hearing process.

Continuing with Ms. Forristal’s submissions of August 23, 2018, she commented that I did not include two “possibly affected” (my words) properties: 333 Glengrove and 108 Mona, which could be impacted by additions from 116 Mona and 352 Glencairn respectively. These “possibly affected” are corner properties where Ms. McFarlane has photographed the side/rear yard relationship and which Ms. Forristal said had “generous space separations between houses”. This was not quantified but I will accept that that they are in a similar range as for Mr. Wang’s property and represent the worst possible case: a blank two-storey wall built right up to the old North York side yard limit of .9 m from the side yard. Even so, I do not think that these properties are part of the sub neighbourhood because:

¹ I get this number from Diagram 2 and a similar map for Mona from Glengrove to Coldstream, not reproduced. I forwarded these maps to counsel after the close of the hearing before using them and allowed them to comment if they wished. Neither made any comment.

² Para 66, McFarlane Witness Statement

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- These are corner properties, with the benefits and drawbacks of flankage. 355 Glencairn is not a corner property.
- None of these properties has experienced change by way of the minor variance process since the original laying out of the lots and so subsequent owners have accepted an already existing rear yard condition in a way that Mr. Wang has not.
- No feasible addition is possible for the “side” property that would impact these rear properties unless one builds in the front of the house.

The burden of establishing the physical character, including the prevailing pattern of side and rear yard setbacks is on the owners. I know that the Dales (90 Mona), obtained an FSI of .6833 and a side yard of 1.99 m (3 m required), but this is the only sub neighbourhood property found to have side to rear variances that met the OP tests.

Mr. Jeanrie’s submissions on Diagram 2 were that:



- Some properties arranged their massing on the side away from sensitive area: 352 Glencairn, 115 Mona, 344 Glengrove, 139 Mona and 92 Mona.

- Some properties with side yards abutting rear yards, did not, or barely caused “incursion” into the rear yard: 109 Mona, 116 Mona.

In Diagram 4, (left) 93 Mona’s garage is placed to impact the rear yards of 337 and 335 at the midpoint of their joint lot line so that the two Glencairn properties “share” equally

the impact of the garage. It is this carefully planned juxtaposition that is at the heart of this dispute.

I find the proposal does **not reinforce** the physical character of the sub-neighbourhood, where up to now, effort has been made to minimize “impactful” situations.

Respecting the existing physical character

Does the subject proposal “respect” the existing physical character? This is a different question from “reinforce”. Ms. McFarlane’s opinion was that it did, and pointed to the design decisions made by the architect, C& Partners:

- to “notch” the corner, to shorten the amount of side wall facing Mr. Wang;
- keeping the profile below the third storey;
- a flat roof (the Wang/Guan house already has third floor living space);
- no windows in the north wall.

She also wrote:

65. . . There are many examples of properties along Mona Drive and within the broader neighbourhood that have dwellings with narrow sideyard setbacks abutting rear yards of lots on the adjacent parallel streets.

66. One example of this existing condition in the neighbourhood is 90 Mona Drive, across the street from the Subject Property. Photo 19 of Attachment 5 to this Witness Statement illustrates how close the side wall of 90 Mona Drive is relative to the rear yards of the three abutting properties to the south of Strathallan Boulevard. Another example is 109 Mona Drive as shown in Photo 8 of Attachment 5 to this Witness Statement. Narrow setbacks within the neighbourhood can also be seen from the Air Photograph in Attachment of this Witness Statement.

The impact on Mr. Wang, while not negligible, is limited (see comments on Ms. Forristal’s cross examination above). Analogizing how an addition would “respect” the physical character and pattern the same way a human being would, I think first there must be **acknowledgement** of the situation, which the architect obviously did. The second component of “respect”, as opposed to simple “awareness”, is **the appropriateness of the response**. And it is reasonable return to the starting point to the decision to add gross floor area to 93 Mona.

Mr. Guan and Ms. Wang own one of the largest houses and largest lots in the neighbourhood and their house is already over the permitted FSI, so this was a warning sign to be cautious. Moreover, their lot has an unusual feature of a “dog leg” that could be exploited in many different ways: a garden, an accessory building or pool (they have chosen the last option). This dog leg’s 2500 sq. ft of lot area allows an extra 875 sq. feet of gross floor area. Mr. Guan and Ms. Wang’s house already contains three levels

of living space, while many other houses in the neighbourhood are on two levels. I do not see any evidence that options other than extending along both side lot lines were considered, as if this was a typical side-to-side type of lot. I find this is not “respecting” the existing physical character of the neighbourhood, including the prevailing pattern of rear and side yard setbacks, given the disproportionate impact on neighbours. And thus, the variances do not meet the test in 4.1.5, and do not meet the general intent of the Official Plan.

Three approaches to interpretation

I now turn to the zoning intent, which requires me to determine whether the general intent of the zoning by-law is maintained. The zoning by-law is a law and to ascertain its intent, I have relied on the principles of statutory interpretation (in this case, by-law) in Driedger’s text³, which sets out that three approaches:

- What do the plain words mean?
- The entire by-law should be read together harmoniously to avoid any contradiction or absurdity.
- What harm or mischief is the by-law trying to correct?

All three approaches should be used together, not dissimilar to how we are to apply the four tests for variances under the *Planning Act*. The first approach, the plain words of the zoning by-law, are the source a common complaint from neighbours who receive a notice from the Committee of Adjustment. Since the first thing they see is that the plans show that the zoning by-law is being contravened, they are surprised that the City permits a hearing about a project that from the outset does not comply with the law. They do not understand that Committee is tasked to look beyond plain meaning to ascertain the **general** intent. This is because the City of Toronto has hundreds of neighbourhoods, that have evolved over time, and it is impossible to study and set out special regulations for every lot. What the *Planning Act* is looking for are the general applicable policies.

Plain meaning refers not just to the FSI and side yard setbacks but to other sections, even those for which the owners do not seek variances. For example, the normal rear yard setback requirement of 7.5 m and 93 Mona’s setback is 9.6 m, more than enough, but in the “normal” situation a rear yard would back on another rear yard resulting in a 15 m building to building distance. 93 Mona’s rear yard faces a series of yards but in sideways fashion. This creates an unbroken vista, which the numerous

³ E. A. Driedger, *On the Construction of Statutes*, TMR Edition. By Ruth Sullivan. Toronto: Butterworths, 1994. The most recent edition is R. Sullivan, *Statutory Interpretation* (Concord, ON Irwin Law, 1997)

windows on the additions rightfully may enjoy. At the same time the crook of the dogleg wraps around the rear yard of 91 Mona, constraining future expansion of both lots in this area. This suggests to me that the designers were sensitive to the limitations faced by the owners of 93 Mona and tried to counterbalance some of the limitations with advantages.

The plain mean suggests a rear yard to rear yard building separation of 15 m; a side to side separation of 3 m and a side to rear separation of 8.5 m. But this approach is inadequate because the first two are reciprocal but the third is not. This tells us that in this unusual situation, we should carefully balance Mr. Wang's back-to-back expectations with the Ms. Wang's and Mr. Guan's side-to-side expectations which are quite different.

This requires use of the second interpretive approach, to avoid contradictions. While not exactly a contradiction, I find Ms. McFarlane's analysis is an apples-to-oranges comparison. It also underlines Mr. Wang's reasonable expectation to enjoy a rear yard without a 5.84 m high and 4.15 long addition in close proximity. Whether it should be 0.9 m or 0.92 m or 1.5 m away is largely irrelevant compared to back to back setback numbers. I find Driedger's second approach indicates that these variances would seem not to meet the general intent of the zoning by-law.

The third Driedger approach, to enquire into the purpose of the zoning bylaw, is a familiar one to planners, because this is exactly the language of s. 45(1). Mr. Christou said that side yard setbacks are to provide "adequate space for access to the rear yard, for drainage, for separation from abutting properties and for light and air circulation. I have also discussed Ms. McFarlane's massing comments (page 6). But the legislative context is also important. If a change is made in the by-law, it is assumed to be in response to some problem or perceived problem, which the by-law amendment is attempting to put right.

Prior to 2013, the former City of Toronto By-law only required a 0.9 m side yard setback for the Wang/Guan garage, which, either by design or happenstance, was 0.92 m from the side yard line and therefore complied. The more recent By-law 569-2013 imposed increased side yard setbacks. This was done on a sliding scale, higher "f" values required greater side yard setbacks. (The letter "f" is a specification added to the RD zoning that indicates the minimum frontage requirement.) An f = 15 m applies to all lots in the old North York catchment area, so the new by-law raised side yard setbacks from 0.9 m to 1.5 m. Number 93 Mona does not need a variance from the 15 m requirement since it has a frontage of 20.17 m (66.2 feet).

The purposive approach tells us when the by-law was changed it was for a reason, whereas the Guan/Wang application asks to go back to the old number. This calls for **some** explanation as how this would be consistent with the 2013 by-law's

intent. The most obvious answer is that the lot, while subject to a 15 m frontage requirement, is itself narrower, and so is entitled to a variance. For example, s. 10.20.40.70 of 569-2013 requires that a 12 m wide lot only needs a 0.9 m side yard setback. However, this answer is not available for this lot and I don't see an answer from the owner's professional advisors. Since the onus on the applicants is not met, I find, under the purposive approach, this application fails to maintain the zoning intent.

This is not to say that **no** post-2013 side yard variance application could ever succeed; obviously the Committee is comfortable with many standard side-to-side applications going from 1.5 m to 0.9 m. I have found that these are not the applicable neighbourhood and I wish to be careful not to overgeneralize. I am not saying that all variance applications like this one would fail. In the event of a future application by Mr. Guan and Ms. Wang, neither party should study this decision for comments to help bolster their case. "Each case is decided on its own merits" and my comments are restricted to the unusual application before me. I think the *Planning Act* requires me to be sensitive when additional massing placed on an already over-limit FSI may have a disproportionately large impact.

Driedger says to use all approaches in a combined fashion and when I do, I find the application does not maintain the general intent and purpose of the zoning by-law.

Remaining Tests

I am required to look at two other tests under the *Planning Act*. I am skeptical that "minor" and "desirable" can be neatly partitioned off from the Official Plan and zoning tests. The *Planning Act* says:

5(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.

The "if" clause asks me to apply the OP and zoning tests as a condition precedent, although ultimately, the four tests blend together. If I cannot formulate a favorable opinion on the Official Plan and zoning intent tests, which I cannot, there is no need to go further. If I am wrong, I find for the reasons already set out in this decision that the variances sought are not minor. Nor am I of the opinion that they are "desirable for the appropriate development of the land and building". The appropriate development would be to exploit the advantages of the site without acerbating a side to rear condition and to

attempt to develop along the principle that other persons' rear yards should be impacted as little as possible.

DECISION AND ORDER

The appeal is allowed, and the decision of the Committee of Adjustment is set aside. The variances set out in Table 1 are not authorized.

X 

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