

DECISION AND ORDER

Decision Issue Date Tuesday, September 04, 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): DOROTHY GORNIK, ANNE ANDERSON, CITY OF TORONTO, VICTORIA RUSSELL

Applicant: ANTHONY GORNIK

Property Address/Description: 405 THE KINGSWAY

Committee of Adjustment Case File Number: 17 113058 WET 04 CO, 17 113699 WET 04 MV, 17 113700 WET 04 MV, 17 113701 WET 04 MV

TLAB Case File Number: **17 164539 S53 04 TLAB, 17 164540 S45 04 TLAB, 17 164541 S45 04 TLAB, 17 164542 S45 04 TLAB**

Hearing date: Tuesday, August 21, 2018

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
Anthony Gornik	Applicant/Witness	
Dorothy Gornik	Applicant/Owner	Mary Flynn-Guglietti
City of Toronto	Appellant	Sara Amini
Victoria Russell	Appellant	
Anne Anderson	Appellant	
Alan Young	Expert Witness	
Lorelei Jones	Expert Witness	
David Bostock	Expert Witness	

Name	Role	Representative
Olivia Antonel	Expert Witness	
Mike Spencley	Expert Witness	
Dave Stephenson	Expert Witness	
Dale Leadbeater	Expert Witness	
Douglas Kinsman	Participant	

INTRODUCTION

These are appeals from the Etobicoke and York District panel of the City of Toronto (City) Committee of Adjustment (COA) in respect of 405 The Kingsway (subject property).

The COA allowed applications for severance and associated minor variances to permit the division of the subject property into three parcels, including an existing residence. Two new vacant parcels would have frontage on Edenbridge Drive, a local street running northerly and easterly from The Kingsway, a minor arterial.

The proposed land division and associated variances can be described as follows:

Part 1: retained lot, existing residence at 405 The Kingsway, 8 Conditions of severance approval; 2 requested variances and 4 Conditions of variance approval;

Part 2: middle parcel fronting Edenbridge Drive, 6 requested variances and 4 conditions of variance approval;

Part 3: easterly parcel fronting Edenbridge Drive, 5 requested variances and 4 conditions of variance approval (Applications).

The COA dealt with three applicable zoning By-laws: 568-2013 (new zoning by-law, currently under appeal); 3314 (existing zoning); 1992-24 (existing zoning). The variance conditions were interlocking to each other and of common import.

All facets of the approvals are appealed by the City, the same side neighbour to the immediate north and east, Ms. Victoria Russell and, as well, the Humber Valley Village Residents Association, represented by Anne Anderson, President.

The owner/applicant entered a limited appeal in respect of the wording of Condition 7 to the consent application; as events transpired, this appellant's aspect of

the appeals was not pursued although the matter of an appropriate Natural Heritage Impact Study (NHIS) was central to the Hearing.

The Hearing of this matter consumed 6 full days, October 23 and December 15, 2017; March 3, 14, and August 21, 22, 2018 (Hearing).

The Toronto Local Appeal Body (TLAB) heard from all of the above listed individuals, with the exception of Anthony Gornik and Douglas Kinsman.

BACKGROUND

As directed by Council, I advised of having visited the site of the subject property and vicinity. In addition, the appeals were accompanied by an extensive set of filings by all parties. These were supplemented in the evidence. In argument, counsel referred to several cases.

Due to the interplay of references, it is helpful to set out a short chronology:

April 28, 2017: Planning Department Staff Report revising March 23, 2017

May 3, 2017: Urban Forestry Staff Report (repeats April 26, 2017)

May 4, 2017: COA Public Hearing

May 12, 2007: COA Consent and Minor Variance approval decisions mailed;

July 7, 2017: Amended Davey Resource Group Arborist Report (from May 22, 2017)

July 26, 2017: Disclosure date under Rules

August 10, 2017: Witness Statements exchange date under Rules, inclusive of: Applicants Central Tree Services Report (Michael Spencley), Natural Heritage Impact Study and Addendum Report, including work of Natural Resource Solutions Inc. (David Stephenson); planning witness statements (Lorelei Jones; Olivia Antonel (summons); Appellants planner (Alan Young), ecologist (Dale Leadbeater) and arborist (David Bostock); Victoria Russell,

October 23, 2017: first TLAB sitting date.

I am satisfied that the Parties and Participants substantially met their obligations under the TLAB Rules. There were no substantive changes to the Applications that were before the COA. However, substantially all the expert witnesses and all the

contentious evidence was new to the TLAB Hearing, except perhaps for the original Central Tree Care Limited arborists Report, the recommendation for refusal from the Urban Forestry Division and the planning evidence of Ms. Antonel.

MATTERS IN ISSUE

Despite the length of Hearing, the matters in issue highlighted the differences in emphasis and result that the parties addressed in evidence, confined to relatively few subjects:

- a) The policy directions respecting intensification and the protection of the environment.
- b) Neighbourhood character and the relevance of area specific zoning.

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the 2017 Growth Plan of the Greater Golden Horseshoe for the subject area ('Growth Plan').

Consent – S. 53

TLAB must be satisfied that a plan of subdivision is not necessary for the orderly development of the municipality pursuant to s. 53(1) of the Act and that the application for consent to sever meets the criteria set out in s. 51(24) of the Act. These criteria require that "regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

- (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2 of the Planning Act;
- (b) whether the proposed subdivision is premature or in the public interest;
- (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (d) the suitability of the land for the purposes for which it is to be subdivided;
- (d.1) if any affordable housing units are being proposed, the suitability of the proposed units for affordable housing;

(e) the number, width, location and proposed grades and elevations of highways, and the adequacy of them, and the highways linking the highways in the proposed subdivision with the established highway system in the vicinity and the adequacy of them;

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

(g) the restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on adjoining land;

(h) conservation of natural resources and flood control;

(i) the adequacy of utilities and municipal services;

(j) the adequacy of school sites;

(k) the area of land, if any, within the proposed subdivision that, exclusive of highways, is to be conveyed or dedicated for public purposes;

(l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy; and

(m) the interrelationship between the design of the proposed plan of subdivision and site plan control matters relating to any development on the land, if the land is also located within a site plan control area designated under subsection 41 (2) of this Act or subsection 114 (2) of the City of Toronto Act, 2006." 1994, c. 23, s. 30; 2001, c. 32, s. 31 (2); 2006, c. 23, s. 22 (3, 4); 2016, c. 25, Sched. 4, s. 8 (2).

Minor Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

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

EVIDENCE

A. OVERVIEW

In the broadest of terms, the Applicant sought to establish that the proposed 2 new lots constituted justifiable intensification, with due regard to protecting environmental integrity and area character. The City and resident appellants countered by challenging the reliability of the environmental assessment conducted, the alleged failure to adhere to policy direction and the adverse impacts the proposed intensification would have on the environment, area character and the adjacent neighbour.

Several factors bear on these differences that were common to the evidence and not in dispute. The language of each however, together with the evidence, is germane to the weight given their application:

1. Provincial policy, both in the Provincial Policy Statements (PPS) and in the Growth Plan, addresses the issues of 'intensification' and preserving 'green infrastructure' or, more broadly, the 'natural environment'.
2. In like manner, the City Official Plan (OP), including OPA 262 and the adopted but not yet final OPA 320, addresses these subjects, and area character importance for 'fit'. It is the principal vehicle intended to implement, with the potential to enhance, provincial policy.
3. The subject property has two designations under the OP: 'Neighbourhood' and 'Natural Area';
4. The subject property is subject to the new zoning by-law and the area specific existing zoning.

A. Area Description

There is a distinction in this appeal that is worthy of note. It is the presence on the subject property of a significant, undeveloped area that is heavily treed by old growth forest components. Within the City, vacant parcels that are eligible for infill housing (or other) consideration, are relatively rare.

Common evidence warrants a more fulsome description of the site of the applications for severance and variances.

The subject property by any residential standard for an inner city location, is large. The existing residence fronts on The Kingsway with two access driveways. Said to be built in the 1950's era, it presents itself as a discrete, substantial, even magnificent stone residence imbedded in mature landscaping enveloped in a deep front yard surrounded by hedgerows. The subject property enjoys adequate side yard spaces that set-off the contextual value of the structure in a serene setting beneath a canopy of tall trees. Separated from The Kingsway by a substantial boulevard, sidewalk, hedgerow, entrance wall and front yard setback, the residence is a credible asset to the community

and indeed, to the inventory of significant Toronto residential buildings. By all appearances, it is well maintained, immaculately landscaped, traditional and contemporary in design. It is a large and a befitting edifice in a setting that reflects and reinforces the immediate community in which it is situate. To the north and west across Edenbridge Drive lies an equally substantial residence located in a park like setting with an even more substantial setback of large tree and forest canopy, also fronting on The Kingsway. Indeed, the residence to the east of the subject dwelling, at 403 The Kingsway, presents a similar longitudinal orientation to The Kingsway, with a shallower and wide frontage continuing the canopy coverage and mature vegetation theme emblematic of the immediate surroundings.

Across the Kingsway are further examples of substantial residences of a similar period and ilk, albeit in a slightly different regulatory regime to the subject property. The subject property shares a built form, setback, zone category, interesting topography and mature vegetation presentation with parcels in the immediate vicinity, fronting on Edenbridge Drive. These transition into a more rolling terrain of Edenbrook Hill and other streets extending north easterly to Royal York Road, a north/south arterial. To the north of Edenbridge Drive, and without apparent nearby access, is the St. Georges Golf and Country Club, abutting many of their rear lot lines. These properties reflect a wooded, undulating and varied topography of unique settings, mature landscaping, high forest canopy, large residences and are of substantial individual architectural variety and expression. A similar, if somewhat more sedate character of streetscape residences is reflected on the south and east side of Edenbridge Drive. These properties reflect a more gently sloping topography but are still enveloped by mature landscaping and a forest like tree canopy in the front, side and rear yards of these substantial residences.

The neighborhood and community represented by this exclusive area of residential building forms constitutes a uniquely identifiable pocket of prestigious, well maintained, differentiated and substantial housing in a park like setting. The area is not characterized by similar building typologies beyond single detached residential uses. Renovation and new construction has clearly demonstrated a conscientious effort to match and continue the quality, character, ambiance and landscaping of the surroundings.

In contrast, Hartfield Road and Hartfield Court, roughly parallel Edenbridge Drive to the east, while demonstrating many of same descriptive attributes, lacks the topography, building size and spacing, mature vegetation, zone standards, renewal and built form variety.

More is said in the evidence review of dwellings across The Kingsway and their characteristics, including frontages and lot areas.

For the purposes of this description, Edenbridge Drive is assumed to run north/south adjacent the subject property.

Finally, to return to the subject property, its description is incomplete without a full consideration of its context and especially its 'rear yard'. As a setting, the residence's impressive frontage is augmented by an even greater rear yard, comprised of manicured lawn areas and sprinkled with mature, high canopy forest like trees, surrounded by mature hedgerows, except adjacent the existing residence. Again, as a park like setting it is an extraordinary and elaborate setting for any urban residence. As a rear yard in modern times it is excessive, even gargantuan, pristine and arguably wholly unnecessary to serve the occupants of even this substantial a residence. Yet it is an asset appreciated by the community framing part of the entrance to Edenbridge Drive and it contributes noticeably to the ambiance of the setting in which it is found.

The 'rear yard', so described, of the subject property has frontage on the east side of Edenbridge Drive. It has all the characteristics of a private park of manicured lawn, more particularly depicted in the arborists' photography and report of Central Tree Care Ltd., found in Exhibit 1, Tab 8, beginning at page 77. The photography is supplement by text in the Natural Heritage Impact Study, also conducted by Central Tree Care Ltd., dated May 29, 2017, found in Exhibit 1 at Tab 26, page 193. It is further amplified, on behalf of the Applicant in the Witness Statement of David Stephenson, Exhibit 4, including a joint authorship Addendum to the Natural Heritage Impact Study dated August 10, 2017 (David Stephenson and Mike Spencley, authors). Mr. Spencley is an arborist with Central Tree Care Ltd; Mr. Stephenson is a renowned ecologist and natural systems evaluator.

The rear yard setting is braced by hedgerows against Edenbridge Drive on its west side, a residence at 3 Edenbridge to the north owned by an Appellant, Ms. Victoria Russell, and the rear of portions of two lots fronting on Hartfield Road, to the east.

The southern edge, vegetated and treed but absent hedgerows, is the residence proposed by the Applications to be 'retained'.

It is this 'rear yard' that is the subject matter of the Applications for severance and resulting minor variances to accommodate the lot configuration and resulting dwelling units contemplated of the three parcels sought to be created.

This 'rear yard' is considered surplus to the existing residence and is proposed to become its much reduced yard, thereby freeing up the balance of the space for development and 2 units of 'infill' housing.

The space enclosed by the existing 'rear yard' is clearly excessive. Some local residents objecting to its severance and development acknowledged in their communications to the COA and, by extension to the TLAB, the appropriateness of a limited severance of the parcel, but provided that area character and environmental

protection could be simultaneously achieved. Others were supportive of the Applicants plans. Generally, local residents in the clear majority were stoutly opposed to the proposals. The City joined that latter position as a formal Appellant to the TLAB.

B. Applicants Evidence

Lorelei Jones

The planner, Ms. Jones, reviewed and applied:

1. PPS
2. Growth Plan
3. City OP, and amendments
4. Minor variance tests
5. Consent tests,

all to conclude her assessment in support of the Applications.

The evidence, supplemented by Exhibit 2, her witness statement, was thorough and augmented by references, photography, the Appellants' Document Book, Exhibit 1 and attachments. She provided, in section 6 of Exhibit 2, direct reference and reliance on other Appellant documents, especially the Natural Heritage Impact Study and the Addendum, the joint report of the Arborist and Mr. Stephenson, found in Exhibit 4, the latter's Witness Statement.

With nothing further, her evidence in its entirety supports a compelling basis for the Applications.

Her evidence on the requested variances began by way of a Chart formulation found at paragraph 5.5.1 of Exhibit 2. Its text applied to each variance for each Part and in respect of each By-law, new zoning and existing. No real reference was made to the site specific origins of the Etobicoke Zoning Code, in relation to the zoning district in which the subject property is located. In cross examination there was an admission that that history had not been reviewed.

As in most appeals to the TLAB, Ms. Jones defined a study area in order to pick a geography to form comparisons between the Applications for the two proposed parcels and dwellings and the 'character of the area'. In her case, the study area was a broad amalgam of surrounding streets, bounded on the east and west by arterials, and on the north and south by distinctly different patterns of land use. The following criteria were identified in drawing the study area boundary:

1. Arterial roadways act as barriers
2. Walking distance to area amenities, including schools and parks
3. Centring on the subject site

4. Zoning
5. Transit accessibility

From this area were drawn a number of elements for measures of compatibility: a lot size analysis (Exhibit 2, Appendix C); lot frontage analysis (Exhibit 2, Appendix D); conclusions on building forms; and Committee of Adjustment decisions on fsi/gfa and other altered zoning standards (Exhibit 2, Appendix E). For other measures, an undefined area of narrower focus was the subject of descriptive comment for such measures as: dwelling separation distances (Exhibit 2, Appendix F); 'Natural Area' delineation; front yard setbacks and lot analysis.

Ms. Jones indicated that the selection of an area for comparative analysis was, in effect, mandated by the City Official Plan given its policy direction that new development 'respect and reinforce' area character and 'fit' within the established neighborhood.

She included but eschewed reference to the Neighborhood definition direction, or any reference to OPA 320, on the basis that its appeal remained outstanding and the 'approach of the Ontario Municipal Board has been to give it 'no weight'. She had no knowledge of the general approach of the TLAB on the issue: relevant, but not binding.

The delineation of a study area requires judgement and planners are indeed schooled in the art of selection, determination and use. It strikes this Member that it is not so much the area boundaries of a study area, as it is the use of the area that is being made to advance issues of character. In my view, an overly large area engaging statistics on a long list of criteria can serve to dilute the relevance of data and move the findings in the direction of a normal distribution curve of variety, range and attributes.

The City, however, is not the product of sameness throughout, rather, there are broad expanses of uniformity, pockets of distinction, districts of diversity, heritage districts, random eclectic areas and mixes of use types, architecture, age, building materials and built form.

This is to say that the choice of an area for comparison needs to respect the use of information from that area that is intended to be applied to the subject property as a basis for opinion evidence. To this Member, it can be of limited assistance to choose an area of multiple zone categories, all residential, wherein differing performance standards exist, e.g., lot frontage definitions and minimums, to compare to a specific site. Similarly, if the range of use types is not as limited as to the property in issue, it may prove totally inappropriate to provide statistical measures including that use, separately or grouped, that are not applicable to a related measure for the subject property.

In the case at hand, measures of lot area and lot frontage were provided over the larger study area, to draw range measures by percentage prevalence, to the standards proposed by the Applications. For the larger area, it was said that the proposed new

lots, on these measures, were not out of character with the area wide comparative analysis. However, on a narrower zoning area focus, the street on which frontage would be shared, the lot frontage as calculated for the variance application and the lot sizes proposed, were said to be the smallest yet to be advanced. The choice of areas for comparison yielded a significant contrast in opinion as to appropriateness on the application of both consent and variance 'tests' and the statutory directions, above listed, for consideration.

I agree with Ms. Jones that despite the zoning calculation of lot frontage, the appearance of frontage on Edenbridge Drive is greater by virtue of the curve of the street and the actual lot width at the street property line. And I agree that the orientation of the proposed two new houses reflects the initial appearance of substantial side yards, narrowing to rear of the proposed pie shaped lots. These are two physical manifestations of the Applications worthy of note.

I find, however, that Ms. Jones larger study area, engaging zones of differing standards is of limited assistance in supporting an appropriate lot area, frontage or character appreciation for the subject property, in the context of land division. They were, however, elaborately described. This is not to suggest that these were the only measures she used to assess and express her evaluation and opinion on the physical character of the area. Nor are they the only measures available of area character.

Ms. Jones was retained in mid-summer, June 6, 2017, well after the COA decision and the appeals had been lodged. By that stage, very extensive supporting submissions had been supplied to the COA through Mr. Gornik on behalf of the owner. These included a representation that the subject property was an 'edge' condition, transitioning out of uses interior to the neighborhood and on the periphery of the zone category that is otherwise common to the properties on Edenbridge Drive, and beyond.

While the existing house at 405 The Kingsway is indeed oriented to the more major street, the Applications as pointed out by the City, select their frontage to be on Edenbridge Drive. Ms. Jones adopted the 'edge' reference and applied it to two elements of the application: the requested modification to the site specific area zoning and to the pocket of 'Natural Area' delineation, covering a significant portion of the proposed new lots.

The implication from this evidence was that an 'edge' condition constituted a basis to consider, even support, relief from the zone standards or policies providing the existing protections for the features, functions and performance standards extant are maintained. As was acknowledged in cross examination, while there may well be principles of good community planning calling for 'transitions' in use or built form, these are appropriately addressed by policy and regulation in the instruments supportive of that transition. There are none here, by admission. In the evidence of Mr. Young, the City's consultant planner, the principle of transition elements cannot be readily applied to properties within a zone category or policy layer, in the absence of compelling

evidence of intention, built form, express language or ‘on the ground’ constraints, or other realities.

In substance, it was said to do so undermines the ‘bones’ of the applicable zoning regulation or policy and grafts on an approach or presumption that warrants language for support or some other reality. In the case here, it was acknowledged, neither is present. Rather, Ms. Jones could have supported the consequence of zoning revisions and environmental preservation on their individual assessment, but chose differently.

I am unable to place any weight (for either aspect) on the suggestion that the subject property is an ‘edge’ condition warranting special dispensation in the consideration of the requested relief.

I cannot fault the thoroughness of Ms. Jones analysis or her acceptance and application of the environmental opinion evidence of Mssrs. Sketchley and Stevenson. She was not called in reply. However, I am left with a series of matters and concerns, listed below, having reread the trial notes, her Witness Statement, Exhibit 2 and her reference materials:

1. Her planning conclusion that the on-site ‘Natural Area’ designation is not part of the City’s Natural Heritage System;
2. How, having called the proposed development area ‘woodlands’, a ‘remnant treed area’ and a ‘cluster of individual trees’, she concluded, for planning purposes under the City OP, that it was a ‘habitat like a hedgerow in an urban environment without connectivity and having no ecological significance’;

In Exhibit 2 she stated as follows:

“7.2.20 A portion of the property is within a Natural Areas designation in the Official Plan but although the area has mature tree cover, the woodlands are not significant as defined by the PPS, the development will have no significant impact on any ecological features or functions and the impacts of development can be mitigated by implementing the recommendations of the NHIS, through compensation and enhancements.”

In cross examination, she agreed that it is not necessary to be a woodland to have the Natural Area OP policies apply.

3. Her advice that the proposal “retains the majority of the urban forest”, when the arborist, Mr. Skechley reported in the Natural Heritage Impact Study (Exhibit 1, Tab 26, page 11):

“5.2 Wildlife

With the removal of several Oak trees within 405 The Kingsway, the loss will account for approximately 65% of the property’s canopy cover. Within the NHS boundary, the canopy loss accounts for approximately 30% of the area. While the NHS was not considered to be environmentally significant or suitable for providing habitat for significantly diverse/threatened species, there are some migratory birds that use this semi-cleared woodlot.”

4. Her conclusion that the loss of the rear yard and its setback reduction proposed for Part 1 is appropriate “because of substantial space on the lot”. At approximately 2 m and with the immediate presence of a proposed two storey dwelling, platform and patio area proposed over the full active length of 405 The Kingsway (itself with no identified access to its west yard), the resulting juxtaposition of built form appears to create conflict and a jarring and abrupt change for this prestigious residence.
5. The interpretation that both the Natural Heritage System and the Natural Areas policy of the OP provide that development is not permitted therein, but that the policy language is qualified by the word ‘generally’ and since the new zoning by-law was passed after the adoption of the OP, it is deemed to conform and development is permitted as recognized in the zone category. Further, that the word ‘generally’ contemplates development in the already developed rear yards of existing lots, subject to impact.
6. The planning relevance to the Applications of the repeated expression of an intention to retain the existing house at 405 The Kingsway.

In addition. Ms. Jones made a number of acknowledgements in cross examination:

- a) The proposed Part 2 and Part 3 would be the smallest lots in the area with the smallest frontages within the area that shares the area specific existing zoning;
- b) The existing zoning was passed in 1974 to increase the standards applicable to its geographic area to address its character, in 1974;
- c) There have been no severances in that existing zoning area, since 1974;
- d) Zoning by-laws must conform to the OP and help implement it and its interpretation (not vice versa);

- e) Her Witness Statement did not include OP provisions in Chapter 4 respecting Parks and Open Space, found in the City document book, Exhibit 3, Tab 24, pages 4-7. She agreed that there are no policies for an exception to determine whether development in Natural Areas is warranted by way of an assessment or of minimizing impact. She said one is a designation (Natural Area) and one is a policy and that read as a whole, “the one directs a study”. She agreed that the Natural Area policies apply and that they allow for development to occur as a subset section of “Parks and Open Space’. She reads OP Chapter 4, section 6 a) to require that any development will “protect, enhance and restore trees, not that you can’t apply but that a natural heritage impact statement “will provide an assessment of that quality on the site”. She said the use of the word ‘generally’ is not an outright prohibition. She also agreed that there was no policy language supporting the “minimizing” of impacts, in the Parks and Open Space policy. 3.4.10 ff.
- f) Her Witness Statement, she acknowledged, did not include the PPS on Natural Heritage Systems, Exhibit 3, Tab 22, policy 2.1.3; the ‘Natural Heritage System’ is a defined term and that the City can go beyond the minimum standards provided there is no conflict (PPS, s. 4.9); and that the Natural Area designation is part of the Natural Heritage System. That said, she claimed there was no obligation on a proponent to define the areal extend of the Natural Area and that the advice to her was that there were ‘no features’.
- g) Her Witness Statement did not include excerpts of the Growth Plan placing important and significant weight on approved Natural Heritage Systems in an OP.
- h) Ms. Jones acknowledged that the Urban Forestry Conditions had not been included in her recommended list of conditions, Exhibit 2, Appendix G, and should be added to her already revised request to require construction substantially in accordance with the site plan and elevations supplied.

Ms. Jones was followed by two witnesses, originally intended to be called as a panel, fundamental to all her expressed environmental opinion evidence: Mike Spencley, Arborist, and David Stephenson, ecologist. The former is the principle author of the Central Tree Care Ltd. ‘Arborists Report’ dated February 15, 2017 (commented on April 27, 2017) before the COA , subsequently completed on May 29, 2017 and amended again by memorandum in April.

David Stevenson

Mr. Stephenson was retained July 6 and completed the Addendum Report with Mr. Spencley by August 10, 2017. He described two site visits and cited, throughout, the necessity to ‘ground truth’ maps, biological and ecological assessments. He said this had not been done on any prior assessments to identify the ‘Natural Area’. He

noted that the Natural Heritage Impact Study had been conducted on a 'highly scoped' basis without the standard Terms of Reference document; he had 'suggestions' resulting, ultimately, in the joint Addendum Report. He claimed primary authorship of part b) "Characterization of Treed Area' (Wildlife Habitat; Species at Risk; Significant Wildlife Habitat Screening). Of these, he attended one day in August and later to observe for bat roostings in 'cavities', perhaps with binoculars.

Mr. Stephenson sketched 'polygons' of leaf canopy and concluded their discontinuity, small and narrow width and discounted their identification as a 'woodland' by reference the Natural Heritage Reference Manual (NHRM) of the Ministry of Natural Resources. He proffered the opinion that 'manicured yards' are not considered 'natural areas', that a 'forest' requires a minimum of .5 ha and it is not normally associated with treed lawns. He concluded that the linear, narrow tree feature is ecologically similar to a hedgerow and that back yards are not part of a natural habitat. He said his tests demonstrated that the elements of a Natural Heritage System are not found on the subject property and that therefore the policies so related are simply not applicable.

He concluded that if the elements of a Natural Heritage System are not present, the OP is not applicable, and the question of impact on elements is not relevant. Namely, that nothing provincially significant was present and really no Natural Heritage Impact Study was necessary. He acknowledged that to plants and wildlife, there was not much present beyond a 'stepping stone', in that the area does not connect to end habitats and that the loss of .6 ha was a very limited loss with no impact on ecological functions as there were no natural features present.

The simplicity and circularity of this reasoning is beguiling.

He supported diversity in the planting of understory, the payment of compensation for tree loss to development and the removal of invasive species as a positive contribution and area improvement

In cross examination he agreed tree removal is not 'prevention' as expressed in the OP; he described that the trees on site are not part of a 'remnant historical woodlot' or historical woodland: "they are simply trees in somebodies back yard". He acknowledged the presence of 7 black oak trees at or near the building envelop and did not know if more were contained in his off-site (seasonal) polygons. He admitted to no experience with clusters of black oak. He had made no inquiry of Mr. Spencley as to who or how observations had been made on data in the previous Natural Heritage Impact Study, which he agreed had been brought forward. He agreed that because it was a 'back yard', it was not important for survey work and such was not needed.

Mr. Stevenson also agreed that residential development would lead to soil compaction that could affect adversely the growth of trees.

In reply evidence, he defended his bat observation protocol as MNR compliant, despite more recent advances of which he was aware but did not employ. He noted

that black oak was not the dominant species on the site, but is present “as a remnant”. He acknowledged that black oak is coded by TRCA as ‘L2’ and is identified as “a species of conservation concern, related to land use changes” and is “unable to withstand disturbance”. These descriptors, he acknowledged, are intended as guidance for land use planning decisions.

In speaking to Exhibit 11a, an Exhibit tendered on consent through Alan Young, in the event of any approval, he felt that the early development of an agreed landscape plan satisfactory to the City was important.

Mike Spencley

Mr. Spencley provided evidence as an Arborist, not an ecologist. He provided Exhibit 10, an enlargement from his Arborists Report and Tree Preservation Survey. It identifies 60 studied trees on site which, by the time of the Addendum Report, acknowledged the removal of ¼ of the westernmost polygon. In summary, his Exhibit 2, Attachment 3 contemplates: 4 trees removed; 1 City tree injured; 12 additional trees injured (or more) and 14 saplings removed. He noted the Ravine By-law of the City requires a 10 m buffer zone from construction. This does not appear to have been applied in Exhibit 10 or mentioned in his Witness Statement.

He participated in the identification of the ‘drip line’ shown by a dotted line on Exhibit 4, Addendum Report, Appendix 2, marked “Drip line as staked”. He noted it went midway through the proposed house on Part 3. He acknowledged a 3 season flora and fauna study was not feasible “for the TLAB”.

In cross examination, he admitted to never having done a Natural Heritage Impact Study, was not an ecologist and he had a very short interval for wildlife studies and mapping. He acknowledged that a ‘drip line’ was a normal way to identify the areal extent of a feature. Based on it alone, he agreed there would be multiple more trees eligible for removal. He agreed that in his May Report and his mapping he identified site features (Exhibit 1, Tab 26.) He found these no longer appropriate after concluding his Natural Heritage Impact Study and the Addendum Report, employing provincial criteria.

Mr. Spencley said he recalled reading OP policies that generally prohibited development in the Natural Heritage System and specifically in ‘Natural Areas’; however, he is not a planner or schooled in the interpretation of planning documents.

Finally, he acknowledged in his Natural Heritage Impact Study, at page 3, calling the site a ‘woodland’ but had since concluded accepting Mr. Stephenson’s opinion that it was not significant. He agreed that there are 8 trees in the category of requiring a ‘permit to injure’ and that these could result in removal. As such, since the ultimate impact is unknown, he agreed with the question put that ‘there should be no consent granted without the final assessment in hand’, and it did not exist. He agreed removal is

an impact and there are 8 tree unknowns without further study. If lost, his estimate of a 65% loss of canopy cover on Parts 2 and 3 would have to be revised, upward. Indeed, he said this should incorporate the 14 saplings known to have to be removed not previously counted and for which no 'compensation' is required.

He acknowledged this consequence did not meet the Natural Environment policy, 3.4 of the OP to preserve and enhance the urban forest and that compensation (2 replanting and 21 cash-in-lieu contributions), is not a mitigation of loss on the subject property and "does not meet the intent of this policy as it applies to a portion of the site".

I accept that both Mr. Spencely and Mr. Stevenson are competent in their respective fields. Like Ms. Jones, however, I am left with a series of matters and concerns, listed below, having reread the trial notes and their Witness Statements, Exhibits 4 and 5, and the joint Addendum Report, Exhibit 4, Appendix 3 and their reference materials:

1. The terms of reference scheduled as Attachment 1 in the Addendum Report, Exhibit 4 contemplated the identification of features and functions, its delineation and assessment on appropriate observation intervals, including breeding seasons. I am concerned that the level of analysis, on an ecological basis was superficial, conducted over two weeks, and failed to result in any delineation of the Nature Area boundary or reliable temporal assessment of 'ground truthed' observation, of any tangible duration.
2. Mr. Stephenson employed his extensive knowledge of provincial policy and sources (NHRM) to draw conclusions on the absence of 'significant' on-site features. From that, he concluded opinion evidence on the interpretation of the City OP, concluding that its' Natural Heritage Systems language was not applicable. At the same time, he acknowledged that the City has its own criteria not trumped by the PPS, which determined the presence of the Natural Area, in 2008. No groundwork for the validity of this transfer, his exposure or experience with the City policies or his OP interpretation credentials, was laid.
3. Using the Natural Heritage System language of the PPS, Mr. Stephenson employed its definition of features and functions as an exclusive list. The actual language, employing 'including', is not exclusive. It is open for the City, in defining the Natural Area to recognize the forest structure as it did in 2008. At issue is whether there was a sufficient level of analysis, if development is permitted, to examine impact on the forest structure.
4. Mr. Spencely identified the larger circles on Exhibit 10 to match the required Tree Protection Zone mandated by the City. These zones are instrumental in determining whether construction nearby warrants tree removal or injury applications. The TPZ for trees for Trees 14A and 14B appear to be wrongly described, without explanation, and can be observed as probable uncorrected errors, meaning their impact risk is understated. These are oak trees with the size of the root system being "unpredictable", in the arborist's assessment.

5. Mr. Spencley recognized that it was a common technique to delimit a feature, in this case an identified 'woodland', by way of plotting the drip line of the trees. Mr. Stephenson did not do a woodland assessment but Mr. Spencley accepted the Stephenson position that the feature was not significant. Since the arborist recognized the presence of trees, was able to stake a drip line and inventoried the degree of impact or 'loss', a 65% canopy removal, is it consistent to conclude the woodland feature is not impacted?

Olivia Antonel

Olivia Antonel was called by the Applicant. She is no longer with the City but did supply to the COA an early Planning Report citing no objection to the Applications. She later changed that recommendation to suggest a deferral pending the assessment requested by another division of the City.

The COA dealt with the applications by approval "in 30 seconds", and imposed a condition requested by the Applicant's counsel that a natural heritage impact study be conducted.

Ms. Antonel agreed that the proposed new lots, substandard in frontage and area, could still be justified when considering properties on Hartfield and across The Kingsway. She had no familiarity with the history behind the existing zoning and had supported the City request for a deferral pending a study into impacts on the Natural Area, noting she was not competent to opine on whether the trees on site constituted a 'special landscape feature'. She deferred to Urban Forestry staff for that assessment.

C. City Evidence

The City called three witnesses, Dale Leadbeater, an ecologist and biologist, David Bostock an arborist, and Alan Young, a Registered Professional Planner.

Dale Leadbeater

Ms. Leadbeater had been retained to provide a critique and opinion as to whether the Natural Heritage Impact Study (as it then was) was satisfactory under the PPS and the OP. Her evidence was expanded to address the joint Addendum Report, Exhibit 4.

She claimed to have found several significant deficiencies in the Applicants impact assessments. Her evidence is detailed in Exhibits 8 a), b) and c) and is excerpted here for brevity. The conclusions were not altered by the addition of the Addendum Report:

1. In my opinion the NHS boundary is not accurately depicted therefore calculation of removal of canopy does not equal removal of NHS
2. In my opinion, that background report provides evidence that the NHS is environmentally significant. The feature represented in the NHS at small scale is the older growth woodland (not individual trees). The older growth trees that characterize The Kingsway neighbourhood are likely part of the postglacial Black Oak Savannah that is protected and maintained in High Park.
3. In my opinion the impacts created by the proposal have not been accurately assessed with respect to the extent and importance of the NHS as a feature identified in the Toronto Official Plan (TOP) and supported by principles in the PPS. Species at Risk habitat has not been properly identified nor has mitigation/ compensation been addressed in its absence. I disagree with the assessment of significance and there is no evidence that this project will benefit the ravine zone.
4. In my opinion, natural capital includes groundwater infiltration, carbon storage, air quality improvements, mitigation of urban heat island effects and psychological wellbeing all provided by the NHS associated within these lands.
5. In my opinion, the NHS provides these essential functions, and in particular contributes to bio-diversity (calculated not only on species richness but also abundance) in terms of species diversity, (white oak is rated as “vulnerable” by TRCA1 and well represented in this neighbourhood, and in terms of diversity of age, where so many of the trees are more than 150 years old and possibly much older.
6. In my opinion, the extent of the natural heritage system has not been properly identified because as noted on page 3-33 of the TOP, “the natural heritage system shown on Map 9 is an evolving natural system that may grow beyond these boundaries”. The functions and extent of the feature (the NHS) have not been identified in the context of the system. As a result, the potential impacts are incomplete, and those identified have not used the criteria provided in the TOP.
7. In my opinion, loss of canopy cover, that is a component of the NHS, especially of this magnitude, is a serious impact that has not been adequately defined or mitigated
8. In my opinion, the effects of this proposal will contribute to the cumulative loss of the natural heritage system including wildlife habitat. Protection, maintenance and enhancement of the natural heritage system is greater than the protection and/or removal of individual trees.
9. The paradigm for study is flawed: the NHIS presumes development with mitigation proposed to minimize effects. The study does not seek to avoid impacts and achieve a net gain.
10. Natural heritage needs to be delineated and protected as an initial step. Then the proposal should be evaluated against the goal of preserving natural

heritage as opposed to a presumption that removal is acceptable. That is not the objective of any of the applicable policies

Ms. Leadbeater did not perform any original analysis as her brief was to provide advice on the acceptability of the Applicants work, as it evolved.

She said the challenge was to identify the feature and this was not done. She said the OP identified a Natural Area and the presence of old growth trees is an important element of bio diversity rare in the City, and rarer still if the presence of a black oak cluster reflects an attribute of the glacial Lake Iroquois Shoreline or sand plane, as are protected in High Park. She said MNR mapping suggests a woodland might be on the site and the evidence was inadequate under the Terms of Reference to say anything about site habitats. She opined that the drip line is a benchmark to understand the location of the feature and the canopy is something the City clearly values, as reported by Urban Forestry.

She said the polygons prepared by Mr. Stephenson do not match up to the staked edges of the tree canopy and has been ignored in favour of the assumption that manicured lawns mean the trees are largely capable of being ignored.

She said this inconsistency and the absence of impact analysis based on intransigence to not recognize the role mature growth trees play in the City's policy and regulatory world means the ecological value and the impacts proposed have simply not been evaluated. In her view, the reports jump to conclusions without the intervening step of evaluation and go on to suggest mitigation 'benefits'.

In summary, she challenged that there was no support base to conclude there are no significant features or functions on the subject property. Had City references, support for the urban forest, support for the migratory functions of the habitat been investigated, there might have been a support base for conclusions. Without that, City definitions have been ignored, City policy left unapplied and compensation 'mitigation' has no relation to ecological impact. As such, in her view, the obligation to consider preservation, not removal of trees has been side-stepped by an inappropriate methodology out of the City context.

And the essential issue of impact on the Natural Heritage System has not been satisfactorily described.

In cross examination, Ms. Leadbeater was chastised for performing no original research, not going on the property and demonstrating a less than concise working knowledge of the Natural Heritage Impact Study and the Addendum. She was accused of stretching credulity by suggesting the site might be on the former Lake Iroquois Shoreline.

These aspects were protested, largely as a basis for more work that the Applicant was obliged to do and did not. She admitted that the consultants had followed the process but without an accurate record, with no scoping advice, with surveying conducted at the wrong time of year, no migratory bird survey and with no comments on future impacts. She maintained the reports were inadequate and the conclusions and mitigation strategy were incomplete; she was not confident in the conclusions. She was adamant that the site was a black oak woodland and a woodlot at the local level. She noted that at the national level black oak is noted a S4, a species requiring special consideration; at the local level, black oaks are rated L2, susceptible to impact and that no consideration is shown to have been given to this vulnerability, despite the identification of trees 6, 11,15-17.

David Bostock

David Bostock has some 25 years of experience as an arborist, joining the Urban Forestry division of the City in June, 2015.

Having attended the site, he confirmed almost its entirety is subject to the ravine by-law, requiring permits for any activity, He described the trees as generally mature, including white, red and black oak, likely 90-120 years old.

He identified the trees agreed as requiring removal by the Applications proposal: 11, 12, 12A and 13 and felt four additional would not survive: 5, 9, 10 and 14, all depicted on Exhibit 10, closer to Edenbridge Drive. On the basis of advice to date, Urban Forestry would not issue a permit to injure these trees.

As expressed earlier, he felt the Applications constituted putting the “cart (approvals) before the horse (exploratory investigation)”.

He applied his experience to assess the prospects of survival of each additional tree, above noted describing excavation practices, future patios, clerical errors in trees related to their TPZ (Trees 13 and 14, similar diameters but differing TPZ circles) and felt the estimates of impact were understated.

He cited OP policy non-compliance related to: section 2.3.5 Policy 5 (sustainability through preservation); 3.1.2.1 d) (Built Form benefits of mature trees); 4.1.5 (trees function as a ‘special landscape feature’) and policy 3.4, policy 1 (preserving the urban environment).

He was of the opinion Urban Forestry directives and preservation targets are not met: namely, to increase canopy coverage and preserve mature forest canopy coverage. The consent application, in his opinion would lead to a loss of multiple healthy trees that, left alone, can provide years of community benefits: reduction in air pollution and dust; reduced energy consumption; reduce wind speeds; mitigate erosion; hold CO₂; and attenuate storm water, to name a few.

In cross examination he acknowledged that Urban Forestry believes the drip line demarks the feature on the subject property and that only Tree's 13 and 14 are at risk of removal, within one representation (mustard colour) of the Natural Area, "while others would be in need of protection". As a natural feature on the subject property, he said the large mature canopy is the product of the trees that are excellent examples.

In cross as well, he revealed Urban Forestry is not satisfied with the protection offered for the construction of driveways and those applications would not be approved at this point.

Alan Young

The City called Alan Young to give professional land use planning opinion evidence. He focused on the lot area variance and recited the history of existing zoning, notably By-law 3314 as preservative zoning to recognize and respect existing area character. He said it had been in place since 1974, had survived policy and regulatory review and had experienced no severance activity since 2001 reflecting 'very different' and identifiable controls over a discrete enclave of rolling terrain and mature tree canopy.

In addition to the 2001 recognition, Map 9, he described how, in 2008, the City had amended its ravine protection by-law to extend to tableland forests and woodland blocks, including the subject site area, not associated with ravines.

He was of the opinion that the creation of the two smallest lots in the neighbourhood does not respect and reinforce the existing physical character of the area where the higher standards and greater spaciousness are more amenable to tree preservation.

In this regard, environmental preservation, he referenced the Growth Plan and PPS as supportive policy directives appointing the City OP as the most important vehicle to ensure natural heritage conservation. He said the City OP has accepted this direction, avoids Neighbourhoods as identified recipients of major intensification and mandates that environmental tree preservation be protected for the long term (Policies 2.1, 2.1.1, 2.1.2, 2.1.5).

On the subject site, he said the two different designations found on Map 14, Neighbourhood and Natural Area, to work together require the definition of very important boundaries.

In his view, this had not been addressed by the Applicant and the creation of new backyards would aggravate conflict. He stated the principle for Natural Area is 'no development' as that would undermine the preservation objectives of the OP, including OPA 262, and provincial policy.

He concluded that the OP policy protection in section 3.4 is for 'protection, restoration and enhancement' and not to be compromised by growth: the Natural Heritage System, of which the Natural Area on the site is part, is to be protected for the long term.

He indicated no surprise that the City wanted to and did stake the drip line in the field, early in the process, as this is a common means to demark a feature.

He felt it anathema to grant a provisional consent without first having identified the constraint line, including consideration of a buffer. In reference to the evidence of Mr. Bostock, he concluded that the impact on the urban forest is not in keeping with the urban forestry policies of the OP, section 3.4.1.b), Exhibit 2 Tab 24, page 329, to preserve, enhance, maintain and reinforce canopy coverage.

His opinions on non-conformity with the Growth Plan and the City OP, and inconsistency with the PPS are detailed in section 4 of his Witness Statement, Exhibit 9.

His opinions on the failure to meet the four variance tests and the criteria set out in section 51(24) of the Planning Act are detailed in section 5 of his Witness Statement, Exhibit 9.

He concluded the Applicants impacts on the urban forest were neither minor nor desirable and recommended that the Applications be refused. If permitted, he endorsed conditions proposed in Appendix G, Exhibit 2 by Ms. Jones, those compiled by the COA and those negotiated with the Applicant found in Exhibit 11a, with any construction to be in accordance with plans submitted and a limitation preventing any new or enlarged driveways. He also suggested a condition limiting the owner to retaining and not adding to the existing residence and to provide security to be posted for construction and mitigation measure required to protect the trees.

In cross examination, his choice of study area, restricted to the area of existing zoning was challenged, allowing only that the choice between the alternatives was a determination of appropriateness.

He agreed that the 'drip line' may not require a buffer but that further work was called for and he did not rely on any line. He agreed that no outright prohibition on development existed but that the policy intent was that development 'generally not permitted' in the City's Natural Heritage System. He felt the Natural Area designation was even more restrictive and that the Applications constituted development by way of intensification of use and soil compaction that was material. He said the presence of the Natural Area designation in the OP gives it status and that its diminution is only appropriate through an OPA, not applied for.

In re-examination, he noted that he was not aware of any policy distinction between a 'woodland' and a 'hedgerow' or of recognition of back yards in Natural Areas.

D. Residents Evidence

Anne Anderson

Ms. Anne Anderson, as President, conveyed the sentiment of the Humber Valley Village Residents Association (membership 2100) opposing the Applications. She relied upon the site specific 'preservative' zoning protecting 163 properties, uninterrupted, since the 1970's.

She felt changes to these essential parameters, in this circumstance (lot frontage; lot area) should remain a Council prerogative. She felt the proposals were not minor, were 'oddly' configured and did not respect and reinforce the neighbourhood of exclusive zoning.

In particular, she objected to the destruction of trees, a 'unique character' attribute of the neighbourhood.

She would amend Exhibit 11 a, to require first the establishment of the limit of the Natural Area and require study and works be concluded 'prior to the issuance of a building permit', in clause E. She would add a prohibition on underground garages, but failed to describe the evil these posed over basements.

Victoria Russell

Ms. Victoria Russell is the owner of 3 Edenbridge, the abutting property to the north. She opposed the loss of trees, the proximity of the reduced side yard adjacent her property and the potential for injury and removal of a large oak tree near the common boundary.

She objected to the orientation of the two proposed houses projecting past hers and affording overlook, privacy incursions and reduced light and air to her property.

She observed that a Juliet balcony and enlarged platform, both at the second floor levels, were angled as direct incursions on her dwelling's privacy and use of outdoor pool space.

In summary, she opposed the Applications as too big, too close and too small in lot area to be respectful of area character or considered minor or to avoid undue impact. She requested an 8.43 m minimum Tree Protection Zone around the 69 cm diameter white oak Tree 14A, on her property, not the 4.2 m excavation zone proposed.

She noted that the TPZ shown on Exhibit 10 for Tree 14A is not reflective of City policy; a proper circle should be compared to Tree 5 at 65 cm showing a much larger radius.

In cross examination she acknowledged an existing wood fence and hedgerow protecting against view, but answered that the hedgerow was not maintained and gaps existed throughout. She also acknowledged that the Applicant, Mr. Gornik, was a 'great developer of quality houses'.

She requested denial of the applications in their entirety or, if felt appropriate, severance into two lots requiring by-law conformity and any balcony to be on the opposite side from her.

ANALYSIS, FINDINGS, REASONS

I am satisfied having heard six days of evidence that it is incumbent on me to approach this appeal from an 'environment first' perspective. This arises not necessarily from any policy preference or directive but because a driving rationale used to support the Applications is infill housing in aid of 'intensification'. I agree that 'intensification' does not trump 'good planning' and good planning includes consideration of the environment.

Intensification for residential purposes itself is shackled by a number of directives, including identified prioritization areas, policy priorities such as support for the provision of needed and assisted housing, and support for infrastructure including transportation hubs and transportation corridors. None of these are present here.

Intensification is also coupled with the very significant caveat to its encouragement, and that is its support: "where appropriate". Clearly, intensification is directed to built-up areas and, while not a priority, intensification can occur within Neighbourhoods in the City's OP, where appropriate.

Here, the opposition takes the position that the proposed intensification is not appropriate on the evidence of the 'Issues', defined above: namely, that it is not appropriate to have intensification take place detrimental to a protected Natural Area; further, that intensification that erodes area character, defined to include OP, zoning, subdivision and variance test considerations, should not be allowed.

At the policy level, I find that the case for environmental consideration as a threshold requirement is made out. The Applicant's planner acknowledged that the PPS and the Growth Plan recognize the strategic importance of Natural Heritage Systems and Green Infrastructure as important components of City building. In turn, the City OP

contains policies related to Parks and Open Space, Natural Heritage Systems and recognizes Natural Area's, a site designation component.

The subject property enjoys a Neighbourhoods designation subject to an identified Natural Area overlay over an undefined and crudely delimited portion of the property.

Despite the initial failure of Planning Staff of the City to recognize the environmental attributes of the Natural Area on the subject property, a properly informed applicant would not. However, the Applicant and its advisors have appeared initially to give short shrift to the environmental side of the equation until pressed for answers.

I come to the 'short shrift' finding on the evidence:

1. No planning or environmental assessment information, apart from an initial Arborists' Study, was provided to the COA;
2. The Urban Forestry recommendation of refusal was initially the product of the scoped Arborists assessment of impact, itself sequentially 3 times modified and replaced by a Natural Heritage Impact Assessment, then again replaced and augmented by a joint Addendum Report;
3. The retained planning advisor omitted requisite PPS, Growth Plan and OP environmental policies from the planning assessment, in part;
4. The Applicant avoided or excused its deficiency of effort to contact Toronto Region and Conservation or City resources, having accepted it was needed under its own OP interpretation to conduct a Natural Heritage Impact Study;
5. Exercising a number of unilateral decisions regarding the environmental analysis: instructing the arborist to prepare his first ever Natural Heritage Impact Analysis despite an admitted lack of qualifications that would have been evident at the time; instructing the late retainer of an experienced ecologist to add depth to the environmental analysis based primarily on experience without appreciable time or license to conduct original research.

This finding does not obviate the environmental work that was available at the Hearing. It does, however, place its' challenge in a certain light as to adequacy, potential for oversight, inaccuracy and compromised impact assessment.

Staying with the 'environment first' principle. I find that the Official Plan identified a 'Natural Area' on the subject property. No amendment to alter, reduce or eliminate this policy applicable to the subject property has been advanced. I find that it was incumbent on the Applicant to identify this feature of the landscape, not simply deny its existence as a means of dealing with its policy designation recognition.

I find that the subject property contains remnants of an old growth forest, including an apparent cluster of black oak, a species worthy of preservation and protection. It is not essential to the presence of this old growth forest as to whether it is located on part of the Lake Iroquois Shoreline or its Sand Plane. That is something that may be of subsequent interest to academics and other qualified professionals, on further investigation.

I am also not concerned as to whether the presence of these trees are described as clusters, a woodlot, a woodland, a wooded area or a forest, although I feel the descriptor employed of a 'hedgerow' is cavalier and misdirected.

I am content that the subject property contains an amalgam of mature and developing old growth trees of substantial value well within the preserve and protect policies of the City OP and the Urban Forestry mandate. To deny their existence or relegate them somewhat pejoratively to be simply trees on a 'manicured lawn', without differentiation or value, is simply not credible.

I agree with the City witnesses that it was the responsibility of the Applicant to identify, locate and define the feature called the Natural Area. This it did not do.

I find that the staking of the drip line constitutes an adequate and appropriate limitation for the purposes of defining the limit of the Natural Area. On the basis of that delineation, identified in the Addendum Report, Exhibit 4, Tab 2, I accept the application of the OP and find that a study assessing the impact of new development on the natural environment is required.

Only the Applicant conducted a study on the environmental integrity of the site. That study was the subject of much criticism as to its parameters, depth, duration, efficacy and interpretive justification of results.

I find that the Natural Heritage Impact Study was deficient on many of the criticisms leveled at it by Ms. Leadbeater; however, the introduction of parameters addressed by Mr. Stephenson breathed new life into the Addendum Report and I am not prepared to dismiss it out-of-hand.

I find that the Addendum Report and its conclusions are a suitable candidate and benchmark against which fulfillment of the policies of the Natural Environment provisions of the Official Plan can be judged. In that regard, the non-policy language of section 3.4 provides:

"Protecting Toronto's natural environment and urban forest should not be compromised by growth, insensitivity to the needs of the environment, or neglect. To this end, proposals for new development may need to be accompanied by a study assessing their impact on the natural environment. We must also be ready to seize opportunities to restore,

enhance and extend the natural heritage system through new developments or partnerships with other agencies and institutions”

The policy language is more directory:

3.4.1 To support strong communities, a competitive economy and a high quality of life, public and private city-building activities and changes to the built environment, including public works, will be environmentally friendly, based on:

- a) protecting and improving the health of the natural ecosystem, by: ...
- b) protecting, restoring and enhancing the health and integrity of the natural ecosystem, supporting bio-diversity in the City and targeting ecological improvements, paying particular attention to: i. habitat for native flora and fauna and aquatic species...
- d) preserving and enhancing the urban forest by: i. providing suitable growing environments for trees; ii. increasing tree canopy coverage and diversity, especially of long-lived native and large shade trees; and iii. regulating the injury and destruction of trees;

I find that this policy is applicable, that a study is supported by policy 3.4.3 and that development “is generally not permitted in the natural heritage system illustrated on Map 9”; however, the policy text direction is clear in that it continues:

3.4.10 ... Where the underlying land use designation provides for development in or near the natural heritage system, development will: a) recognize natural heritage values and potential impacts on the natural ecosystem as much as is reasonable in the context of other objectives for the area; and b) minimize adverse impacts and when possible, restore and enhance the natural heritage system.

I find that the policy discourages development, including consents, unless an impact assessment has been satisfactorily completed (policy 3.4.11).

The policy is prescriptive:

3.4.13. Areas of land or water within the natural heritage system with any of the following characteristics are particularly sensitive and require additional protection to preserve their environmentally significant qualities:

- a) habitats for vulnerable, rare, threatened or endangered plant and/or animal species and communities that are vulnerable, threatened or endangered within the City or the Greater Toronto Area; or
- b) rare, high quality or unusual landforms created by geomorphological processes within the City or the Greater Toronto Area; or

c) habitats or communities of flora and fauna that are of a large size or have an unusually high diversity of otherwise commonly encountered biological communities and associated plants and animals; or
d) areas where an ecological function contributes appreciably to the healthy maintenance of a natural ecosystem beyond its boundaries, such as serving as a wildlife migratory stopover or concentration point, or serving as a water storage or recharge area.

Development will not occur on lands within the natural heritage system that exhibit any of these characteristics. Activities will be limited to those that are compatible with the preservation of the natural features and ecological functions attributed to the areas. An impact study, as referred to in Policy 12, will be required for any proposed undertaking in those areas not already the subject of an Environmental Assessment under the Environmental Assessment Act. Known areas exhibiting these environmentally significant characteristics will be shown on Map 12.

I accept the critique of Ms. Leadbeater and the admission by Mr. Stephenson that the presence of black oak on the subject property is a species identified locally as vulnerable, ranked L2 by the TRCA. L2 is defined to mean as above described in the Reply evidence of Mr. Stephenson. Black oaks warrant special attention in preservation.

I find that the Natural Area descriptor found on the subject property constitutes an alert that should have been recognized at the outset of the consent application. Its slow appreciation and disjointed and bifurcated assessment by an arborist and ecologist working at different time periods and with inadequate assessment tools, both temporal and in depth, leave me with little assurance that that the policy intent for the maintenance of the Natural Area and the obligation to have only minimal adverse impact on its natural features and functions, have been adequately addressed.

I accept that the land use designation shown as Other Open Space Areas (including Natural Areas, policy 4.3.1) obligates “development to protect, enhance or restore trees, vegetation or other natural features (4.6 a))”.

I am not convinced by the Addendum Report that the level of protection envisaged by the policy has been satisfactorily addressed by the level of impact measures (and suggested remedial efforts required) identified by the Applicant and augmented by the evidence of Mr. Bostock so as to warrant the development proposed by the Applications.

This is not to say that the assessment provided in the Addendum Report holds no value. I have found that the work of Mssrs. Spencley and Stephenson is to be respected as a credible effort that falls short of full confidence. It is the only on-site assessment, apart from the staking of the drip line. I am satisfied that, taken together, these contribute sufficiently to confirm an area of non-interference where development

will not be allowed to occur. I am equally confident that, working co-operatively, the use of regulatory controls can operate to achieve the essence of environmental protection goals and, to a large degree, the mandate of Urban Forestry.

The weight of the evidence does not support allowing the Applications and dismissing the appeal. I have considered the Decision of the COA and the materials before it, being far fewer than those placed before me over 6 days of Hearing.

On the evidence I heard, the Committee did not have before it certain information tendered by Urban Forestry and Ms. Russell; moreover, its consideration and deliberation time was said to be scant. No reasons are provided; however, an extensive set of conditions are repeated, as detailed above.

I can place little weight in the COA decision based on the foregoing.

I accept much of the evidence of Ms. Jones on the issue of intensification; and I accept much of the evidence of Mssrs. Bostock and Young on the importance of the environmental policies in the Official Plan and their application.

I find that on balance, a severance of the subject property into two (three?) lots offends the Official Plan and does not meet the criteria in section 51 (24) of the Planning Act in important ways, notably the provisions of considerations: (a), (b), (c), (f), (g) and (h).

In like manner, the variance criteria are also offended in terms of non-conformity with environmental OP policies, contravention of the 'bones', being the intent and purpose of the zoning by-laws, and the evidence, which I accept, that the nature and degree of multiple adverse impacts, both on the environment and the neighbour, is neither desirable nor minor.

I also find that much is now known about the site, as derived from the work of Mssrs. Spencley and Stevenson. I believe their work, with conscientious review of Mr. Bostock and Urban Forestry can yield a proposal that corrects many of the cumulative inherent deficiencies of the 3 lot proposal.

I recognize the practical reality of the inappropriateness of the existing property continuing on any reasonable appreciation of scale and proportion. I believe, with the central area described as relatively 'clear' by Ms. Jones, that an additional dwelling unit, generally compliant with existing zoning, is appropriate if approached with the knowledge gained in this Hearing.

To sentence the subject property to the status quo is not consistent with standards of good community planning and, in my opinion, is not necessary to protect the integrity of the City OP, the 'Natural Area' designation or to the maintenance of area physical character.

I have examined with care the issues of lot size, spacing, amenity areas, the drip line (as a definition of the protected components of the Natural Area) and the potential injury to trees by the addition of a dwelling unit fronting on Edenbridge Drive.

I am satisfied that a dwelling of sufficient size and stature can harness the acknowledged reputation of the Applicant and be added to the property. I will provide a period of time for that to be advanced.

In this regard, I would expect that the drip line found in the Addendum, Exhibit 4, Tab 2, must be substantially respected to preclude development, and that site plan, driveway plan, building elevation plans, landscape plan, and draft plan of survey can be prepared that will minimize by more than half the potential for removal and injury to trees.

I would also expect these could be accomplished with minimal variance to the new and existing zoning.

I provide somewhat greater clarity, below.

I find it unnecessary to detail the evidence accepted and rejected. The witnesses in this Hearing acted responsibly and identified a real and present difference to arguably competing public and private objectives. In broad terms, I accept the respect for longstanding zoning and the physical character of the neighbourhood it reflects as expressed by Mr. Young and the residents. I am not prepared, in the setting provided, to import different standards for the sake of justifying change. I believe one appropriate new dwelling can be accommodated on site.

Similarly, I accept the mandate of Urban Forestry as expressed by Council through various vehicles, including the OP and OPA 262. In this circumstance, many contributions to the urban forest were threatened by the Applications and an appropriate response has been mounted, mostly successfully.

I recognize that this decision will likely result in the removal of trees identified on Exhibit 10 as numbers 11 (dwelling) and street side, either trees 6 or 7, depending on the ultimate driveway location, site plan and landscaping plan that need to be settled, for access. While there may be others, removed or injured, I leave that consideration to the professionals to work together co-operatively to minimize.

I accept the concern of Ms. Russell for the white oak in her rear yard, Tree 14A on Exhibit 10. If development is to proceed as hereinafter provided, a Tree Preservation Zone of 8.43 m radius is to be provided for protection around that tree. I also agree with her that any second storey balcony or platform be on the opposite side of the dwelling from her residence, given the expected angle of incidence.

I thank counsel for their diligence and courtesy throughout and for their provision of case authorities. I have read these with interest on such diverse issues as the role of precedent, study areas, 'ecosystem planning', the 'Clergy Principle' and its evolution, the attitudinal approach to development affecting 'Natural Areas' and the role evidence plays in decision making. The authorities have been of general assistance.

With the direction provided in the following section, I do not think further engagement by the TLAB is necessary. I leave it to the Applicant to reject or pursue the direction suggested and to the approval authorities to work co-operatively to resolve impediments.

Of course, if an issue arises requiring direction or further relief, the TLAB may be spoken to.

DECISION AND ORDER

1. The consent appeal is allowed, in part, and provisional consent is given for the division of 405 The Kingsway into two parts identified as follows:

Part A, being the retained lot, including the existing residence as at the date hereof. Assuming Part A fronts on The Kingsway, it shall have both side lot lines of approximately 33 m in length so as to provide a substantial rear yard and zoning by law compliance and except as hereinafter varied. In the event Part A is held to front on Edenbridge Drive, its front and rear lot lines shall both be approximately 33 m in length.

Part B, being the remainder lands. Part B shall be a candidate lot for one single detached dwelling unit compliant with all zoning by-laws except as hereinafter varied.

2. The provisional consent provided for in paragraph 1 hereof shall have the boundary line between Part A and Part B determined by the owner in consultation with the Executive Director, City Planning and the General Manager of Parks Forestry and Recreation or their designate in accordance with the direction therein.
3. The variance appeal is allowed, in part, and minor variances are approved as follows:

Part A: in the event only that Edenbridge Drive is determined to be the frontage, the minimum required rear yard for the maintained dwelling will be located 5.89 m from the rear lot line.

Decision of Toronto Local Appeal Body Panel Member: I. LORD
TLAB Case File Number: 17 164539 S53 04 TLAB, 17 164540 S45 04 TLAB,
17 164541 S45 04 TLAB, 17 164542 S45 04 TLAB

Part B: i) the minimum required front yard setback will be located 9 m from the front lot line;

ii) the maximum permitted area of a platform at or above a second storey will have an area of 9.75 square meters located at the rear south easterly portion of any dwelling.

4. In all other respects, the appeal is allowed and the decisions of the Committee of Adjustment on files: B0012/17EYK; A0110/17EYK; A0109/17EYK; and A0111/17EYK, are not approved.
5. The severance in paragraph 1 and the variances identified in paragraph 3 hereof shall be subject to the conditions below listed.
6. **Provisional Consent Approval Conditions** 405 The Kingsway – TLAB Case No. 17 164540 S45 04
 - (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 the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services.
 - (3) The applicant shall demonstrate that servicing arrangements are to the satisfaction of the Executive Director, Engineering and Construction Services and Transportation Services, including the submission of one revised site plan (scale of 1:200 or 1:250) illustrating the requirements specified in the following points, at no cost to the City: a. Illustrate a positive slope from the roadway to the garage and have a minimum driveway slope of 2% and a maximum driveway slope of 8%. Driveway slopes should be identified on all lots; and b. Illustrate existing structures (ie driveway etc) to be demolished; and c. Illustrate distance of proposed building from all lot lines; and d. The portion of the driveway, along with the associated curb cut, must be explicitly dimensioned and illustrated; and e. The portions of any existing driveways and associated curb cuts that are to be closed as a result of the proposal must be explicitly dimensioned and illustrated; and f. Include the following notation “All existing redundant curb cuts that are no longer required will be restored to the satisfaction of the City of Toronto at no cost to the municipality”; and g. Include the following notation “Any proposed new curb cut shall comply with all applicable City of Toronto Design Standards and requirements, and must be constructed at no cost to the municipality” and h. Include the following notation “The applicant must submit a Municipal Road Damage Deposit (MRDD) for the proposed new driveway and any sidewalk/curb construction within the municipal boulevard.” The applicant must contact Ms. Joanne Vecchiarelli of the Right-of-Way Management Section at (416)

338-1045 in order to obtain all requirements related to the MRDD; and i. Include the following notation "The applicant must obtain all required permits from the Right of Way Management Section of Transportation Services".

(4) The applicant shall submit an application for permit to injure or remove trees to Urban Forestry, as per City of Toronto Municipal Code Chapter 813, Article 111.

(5) Two copies of the registered reference plan of survey integrated to NAD 83 CSRS (3 degree Modified Transverse Mercator projection), delineating by separate Parts the lands and their respective areas, shall be filed with the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services.

(6) Three copies of the registered reference plan of survey satisfying the requirements of the Manager of Land and Property Surveys, Engineering Services, Engineering and Construction Services.

(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. 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.

7. Additional Provisional Consent Conditions

(8) The owner shall have a period of 8 months from the date of this Decision and Order to obtain a draft survey plan for the lot division authorized herein, a site plan for the location of any new construction, driveway location, elevation plans and a landscape plan for any works in respect of Part A or Part B, all to the satisfaction of the Executive Director, City Planning and the General Manager, Parks, Forestry and Recreation, or their designate. For greater certainty, such plans shall provide for:

- a. No significant construction in the Natural Area on the subject property defined as the area thereof east of the drip line staked and found in the Addendum Report of Central Tree Care Ltd., Exhibit 4 Tab 2 to this TLAB File.
- b. No construction or excavation a distance of 8.43 m from Tree 14A as defined in Drawing A-01 of Central Tree Care Ltd. Dated February 3, 2017, Exhibit 10 to this TLAB File.
- c. The dwelling be constructed substantially in accordance with the approved plans identified in this paragraph 8.
- d. For greater certainty, applicable to Parts A and B, the applicant enter into a consent agreement agreeing to submit a landscape plan, including any patio, stairs, and irrigation system, prepared by a qualified landscape architect, implementing the mitigation

recommendations contained in the applicant's arborist report, for approval by the Chief Planner and Executive Director, City Planning, in consultation with the General Manager of Parks, Forestry and Recreation, prior to the issuance of a building permit and agreeing to provide a security deposit equivalent to the value of the landscaping works, to be refunded upon completion of the works to the satisfaction of the Chief Planner and Executive Director, City Planning.

- e. For greater certainty, applicable to Part B, the applicant enter into a consent agreement agreeing to install or maintain the paved areas of the driveway and walkway that are to be located in the front yard as shown on the submitted plans, and not to enlarge the paved area where such enlargement would encroach into the Tree Protection Zone of any tree that is protected under Chapter 658 or 813 of the Municipal Code.
- f. For greater certainty, applicable to Part B, the applicant will enter into a consent agreement agreeing that the location of services and utilities will be approved by the by the Chief Planner and Executive Director, City Planning, in consultation with the General Manager of Parks, Forestry and Recreation.
- g. For greater certainty, allocable to Part A, the applicant enter into a consent agreement agreeing to retain the existing house on Part A and not to construct any additions to, or otherwise alter the two sides facing public streets and to generally maintain the character of the existing north and west sides including the stone façade and cedar shake roof.
- h. For greater certainty applicable to Part A and B, the applicant enter into a consent agreement agreeing not to construct any structures or install any paving, retaining walls, pools or similar features that are to be located in the rear yard or any yard and that would encroach into the Tree Protection Zone of any tree that is protected under Chapter 658 of the Municipal Code

(9) In the event that the owner is unable to achieve compliance within the time requirement in paragraph (8) hereof, the TLAB may be spoken to **but failing which the appeal is allowed and provisional consent and associated variances provided for herein are refused.**

8. Conditions of Variance Approval

I. The applicant shall comply with the conditions imposed in the TLAB consent file above listed.

2. Submission of a complete application for a permit to injure or destroy a City-owned tree(s). A Contractor's Agreement to Perform Work on City-owned Trees will be required prior to the removal/injure of the subject tree(s). Form located at www.toronto.ca/trees/pdfs/contractor_services_agreement_information.pdf.

Submission of a tree protection guarantee security deposit to guarantee the protection of City-owned trees according to the Tree Protection Policy and Specifications for Construction Near Trees or as otherwise approved by Urban Forestry. Accepted methods of payment include debit or card, certified cheque or money order payable to the Treasurer of the City of Toronto, or Letter of Credit.

3. Submission of a complete application, to the satisfaction of Urban Forestry Ravine and Natural Feature Protection, for permit to injure or remove privately owned trees to Urban Forestry, as per City of Toronto Municipal Code Chapter 658.

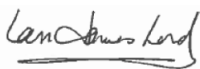
4. The applicant shall submit one revised site plan (scale of 1 :200 or 1 :250) illustrating the requirements specified in the following points to the satisfaction of Engineering and Construction Services and Transportation Services, at no cost to the City:

- a. Illustrate a positive slope from the roadway to the garage and have a minimum driveway slope of 2% and maximum driveway slope of 8%. Driveway slopes should be identified on all proposed lots; and,
- b. Illustrate existing structures (i.e. driveway, etc.) to be demolished; and,
- c. Illustrate distance of proposed building from all lot lines; and,
- d. The portions of the driveway for each lot, along with the associated curb cut, must be explicitly dimensioned and illustrated; and,
- e. The portions of any existing driveways and associated curb cuts that are to be closed as a result of the proposal must be explicitly dimensioned and illustrated; and,
- f. Include the following notation: "All existing redundant curb cuts that are no longer required will be restored to the satisfaction of the City of Toronto at no cost to the municipality"; and,
- g. Include the following notation: "All proposed new curb cuts shall comply with all applicable City of Toronto Design Standards and requirements, and must be constructed at no cost to the municipality"; and,
- h. Include the following notation: "The applicant must submit a Municipal Road Damage Deposit (MRDD) for the proposed new driveway and sidewalk/curb construction within the municipal boulevard." The applicant must contact Ms. Joanne Vecchiarelli of

Decision of Toronto Local Appeal Body Panel Member: I. LORD
TLAB Case File Number: 17 164539 S53 04 TLAB, 17 164540 S45 04 TLAB,
17 164541 S45 04 TLAB, 17 164542 S45 04 TLAB

the Right-of-Way Management Section at 416-338-1045 in order to obtain all requirements related to the MRDD; and,

1. Include the following notation: "The applicant must obtain all required permits from the Right-of-Way Management Section of Transportation Services".

X 

Ian James Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord