

DECISION AND ORDER

Decision Issue Date Tuesday, October 09, 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): BARBARA BRADLEY

Applicant: FELIX LEICHER

Property Address/Description: 79 EATON AVE

Committee of Adjustment Case File Number: 17 262105 STE 29 MV

TLAB Case File Number: **18 167506 S45 29 TLAB**

Hearing date: Tuesday, September 18, 2018 and Monday, Oct 1, 2018

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Felix Leicher	Applicant/Party	Marc Kemerer
Paul Johnston	Expert Witness	
City of Toronto	Party	Aderinsola Abimbola, Lauren Pinder
Barbara Bradley, 77 Eaton Ave	Appellant	
Martin Scarce, 77 Eaton Ave	Party	
Issam Shukor	Expert Witness	

INTRODUCTION

Baukultrica Incorporated (whom I shall refer to as Mr. Leicher, consistent with his party status) wishes to demolish 79 Eaton Ave and build a duplex — two dwelling units in one building. He needs two variances: floor space index and duplex building depth.

EVIDENCE

I heard from Paul Johnston, planner for Mr. Leicher and Issam Shukor, architect for Barbara Bradley and Martin Searce, who are immediate neighbours to the south (at 77 Eaton). Mr. Johnston and Mr. Shukor were qualified to give opinion evidence in their respective professional fields: Mr. Johnston in urban planning and Mr. Shukor in architecture and urban design. Ms. Bradley and Mr. Searce also testified as neighbour-appellants.

BACKGROUND

The physical context

Eaton Avenue is a north-south street; one way northbound, just east of the “Welcome to Greektown” sign on the Danforth. This is a walkable, livable older community one block from a walkway leading to the Pape Subway station.

Ms. Bradley’s residence was constructed in 1906. Her grandmother was born in 1910 and lived there after it was purchased by Ms. Bradley’s 2nd great-grandfather. It was built in 1906 by Mr. George Hall. In 1924 and 1929, it was surveyed by Baird & Mucklestone. Frank Mucklestone was Ms. Bradley’s great-grandmother’s brother, and there were many surveyors in the family. Thus her family has owned 77 Eaton for five generations, and she is adamantly opposed to Mr. Leicher’s proposal.

The plan examination history

Table 1. Variances sought for 79 Eaton Ave			
From Toronto-wide By-law 569-2013			
		Required/permitted	Proposed
1	Floor space index	0.6 times lot area	0.97 times lot area
2	Duplex building depth	14.0 m	17.0 m

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

Because of the appeals of the more recent zoning by-law were disposed of in the middle of the Committee of Adjustment process, Ms. Bradley was faced with “moving goal posts”. My understanding is that the chronology is:

- Feb 24, 2018 First plan examination¹, concludes seven variances are needed: two from the new zoning by-law (569-2013) and five from the old by-law (438-86).
- March 1, 2018 I am inserting this date in response to Ms. Bradley’s comment: “Show me the document where this was changed”. This is the date of the LPAT (formerly OMB) Order in which Member Mr. Conti approved most of the new by-law, including the provisions on setbacks.² However, it appears that no-one told the Committee of Adjustment or the parties of Mr. Conti’s decision.³
- The result is that five variances are no longer needed because the old by-law no longer is in force. There is, understandably, no process for plan examiners to recall notices where they have asked for variances that are no longer needed because of the LPAT decision.
- May 9, 2018, The Committee of Adjustment approved the seven variances identified in the first zoning examination, even though the five variances under the old by-law are not needed.
- May 29, 2018 Barbara Bradley appeals, unaware that only two variances are in issue.
- June 5, 2018 TLAB sends both parties a Notice of Hearing advising that document disclosure deadline is July 5, 2018 and Expert Witness Statements due by July 20, 2018. By and large both parties comply with these deadlines.⁴
- July 24, 2018 Patrick Karremans, the City’s plan examiner issues a revised zoning notice. I did not hear how this happened, but I surmise it was at Mr. Leicher’s request.

¹ Mr. Leicher did his own plan examination (called a “waiver”).

² PL130592, cited as *Bahardoust v Toronto (City)*, 2018 CanLII 10567 (ON LPAT). Neither party submitted this evidence. It would be difficult for an ordinary citizen to find this information without professional assistance.

³ To be fair, the City Solicitor reported this approval to the City Clerk, who issued an office consolidation of the new by-law on the City’s web site, with the **approved** sections unmarked, and the **still-to-be approved** sections in yellow.

⁴ At the first day of this hearing, Ms. Bradley brought a motion to declare Baukultrica and/or Mr. Kemerer in breach of the rules for filing the Baukultrica Document Book after July 5, 2018. I rejected this motion.

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

August 2, 2018 Mr. Kemerer (lawyer for Mr. Leicher) forwards the revised notice to Ms. Bradley with the following explanation

“Buildings staff now do not review applications against the provisions of former City of Toronto Zoning By-law 438-86 where the similar provisions of Zoning bylaw 569-2013 are no longer under appeal. As a result, only 2 variances are required for this application.”

While this is sufficient explanation to an insider or expert in the planning area it is rather opaque for the lay person. The timing gave Ms. Bradley approximately seven weeks to address only the two variances.

The deletion of variances related only to the former zoning by-law was a surprise for Ms. Bradley as she had devoted a large amount of time to research a pattern of “alleys” between buildings on both sides of Eaton Ave to investigate side yard setback rules that are no longer in force. She asked that I continue to apply the requirements for the former by-law relating to north and south side yard setbacks. As a legal matter, I do not have the power to interfere with or override a decision of the chief building official because of s. 25 of the *Building Code Act*:

Appeal to court

25 (1) A person who considers themselves aggrieved by an order or decision made by the chief building official, . . . under this Act (except a decision under subsection 8 (3) not to issue a conditional permit) may appeal the order or decision to the Superior Court of Justice within 20 days after the order or decision is made. 2002, c. 9, s. 40 (2).

In short, any appeal goes to the courts.

MATTERS IN ISSUE

Ms. Bradley’s position is that the distance between her house and Mr. Leicher’s is too narrow and will create problems of construction and maintenance for her. Construction problems are not a planning issue, where a long-term view must be taken. This will be further discussed in the analysis section.

Her second argument is that the three-storey duplex is too imposing for her and other immediate neighbours, especially with respect to her planned but as yet unbuilt modest rear addition

The test is whether the two variances meet the tests under s. 45(1) of the *Planning Act*; whether they:

- 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.

I must also be satisfied that the variances are consistent with the Provincial Policy Statement and conform to the Growth Plan.

ANALYSIS, FINDINGS, REASONS

The “narrow alley” argument

As I set out in the section “Plan examination history”, the Committee of Adjustment granted unneeded variances under the old by-law. The old by-law required 1.2 m building-wall to building-wall. The new by-law requires Mr. Leicher to be .45 m to the lot line. As set out previously, any non-compliance with the 1.2 m is now irrelevant because of the LPAT decision of March 1, 2018.

Factually the distances in question can be illustrated in the following diagram:

Diagram 1: Building wall distances from the common lot line	
77 Eaton (Ms. Bradley)	79 Eaton (Mr. Leicher)
←	→
6.75 -9.25 inches or 22.1 - 23.5 cm (legal nonconforming)	45 cm (new by-law requirement)

This will create an overall distance of 68.5 cm, (2.25 feet). If this number is constrained, it is caused by Ms. Bradley’s non-conforming setback.

I looked at Mr. Scarce’s research. A very large proportion of his “alley” widths are less than the former by-law requirement of 1.2 m. This tells me that there is already a pattern of tight building to building distances. Even if the old by-law were still in force, the decision of the Committee to grant variances from it was not unreasonable.

Ms. Bradley’s own actions may be relevant. On January 24, 2018 she and her architect Mr. Shukor obtained a minor variance to extend the north wall for her own rear

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

addition (as yet unbuilt). The Committee of Adjustment granted her a variance of 0.158 north side yard setback m where 0.9 m is required⁵. Mr. Shukor wrote, “Note the distance between the two exterior walls is 7.5 feet. The 7.5 feet is being practically utilized by neighbour at 79 Eaton.” (That is, fences eliminate Ms. Bradley’s ability to access her 6-9-inch strip.)

At the time, Mr. Shukor offered to close off the small window facing Mr. Leicher, so Mr. Shukor wrote:

This was a goodwill gesture to satisfy the zoning requirement and to be able to negotiate the issue of having to setback by 3 feet. In the case of closing off the window, the bylaw requires a minimum setback of 18” (sic). But leaving 18” to the north of the property would be a complete waste valuable (sic) land. A quick calculation shows the loss to be 2’ x 18’ = 36 sf (area lost). Considering that the square foot in that part of the City is around \$1,000 /sf, the total loss would be around \$36,000. That area would be practically useless instead of being added to the interior of the intended additional room. Furthermore this 18” setback will go to the neighbors at 79 Eaton Ave. (references to diagrams omitted). We think that instead this precious 18” should be utilized by the owners of 77 Eaton to be included in the new addition as the width to the room is mostly needed. The addition would be a continuation of the north wall and will not impact negatively the density or appearance of the properties in the neighbourhood.

At the risk of repeating myself, the old standard of 1.2 m is now not applicable because of Council’s decision in enacting the new Toronto-wide By-law 569-2018 and this was approved by the LPAT.

Duplex depth

There are two variances for the duplex: FSI and building depth. Mr. Johnston (Mr. Leicher’s planner) submitted that the maximum depth of a detached house is 17 m and it is only the fact that Mr. Leicher has chosen to build a “duplex” instead of a “detached house” that triggers this variance. He said that the special requirement for duplexes, apparently counter-intuitive, was probably a roll-over from the previous regulation without a great deal of thought.

The relevant provision of the zoning by-law is:

10.10.40.30 Building Depth

(1) Maximum Building Depth In the R zone, the permitted maximum building depth is:

(A) 17.0 metres for a detached house or semi-detached house; and

⁵ The difference is because there is a window in Ms. Bradley’s wall, which she offered to close and so was entitled to a lower setback requirement.

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

(B) 14.0 metres for a duplex, triplex, fourplex, townhouse or apartment building.

The fact that all multiple dwelling buildings have the same building depth limit suggests to me that the intent is to force a closer examination of these buildings because they are likely to be subject to more complicated zoning and building code requirements. For example, multi-dwellings may need special garbage handling, bicycle storage or parking requirements that single detached and semis do not.

Thus, I don't find the variance for a 17 m building depth, which is no different from a detached house, an indication of overdevelopment nor should it be viewed sceptically. Accordingly, I find this meets the intent of the zoning by-law, is modest intensification and desirable for the appropriate development of the land. Since the resultant depth is no different from a detached or semi, it is minor.

Policy arguments in favour of rental housing.

I now turn to my finding that the policy documents favour rental housing. During the "qualification phase", Mr. Shukor talked about the equal importance of neighbours and soft landscaping, and said they are related to the well-being of the community. This is a very good "short hand term" for ascertaining whether the variances are consistent with the higher-level provincial documents and the Official Plan.

However, Mr. Shukor did not do this in his evidence. He was especially critical of the third-floor rear balcony which does creating the opportunity for overlook. However, he based his objection on the ground that the people who might overlook were **tenants**, instead of homeowners. He posited that tenants have less of stake in the community.

This is unreasonable as well as being contrary to the Official Plan, which says:

More than half of Toronto households **rent**, yet no new **rental** housing is being built in quantity.

A full range of housing, in terms of form, **tenure** and affordability, across the City and within neighbourhoods, will be provided and maintained to meet the current and future needs of residents. A full range of housing includes: ownership and **rental** housing, affordable and mid-range rental and ownership housing, social housing, shared and/or congregate-living housing arrangements, supportive housing, emergency and transitional housing for homeless people and at-risk groups, housing that meets the needs of people with physical disabilities and housing that makes more efficient use of the existing housing stock. (3.2.1 Housing) (my bold)

These are three-bedroom, three-bathroom dwelling units. As "rental" as opposed to "ownership", these dwelling units augment "the full range of housing" in terms of tenure, and thus I find that the proposed duplex will assist in meeting "the current and future

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

needs of (Toronto) residents”. While they are probably not “affordable”, (defined in the Official Plan as the average Toronto rent as reported by Canada Mortgage and Housing Corporation), they may possibly be “mid-range”, defined in the Official Plan as 150% of the average if shared by unrelated persons.

The increase in FSI

I have discussed building to building distances, which I have found is not an issue. I have also discussed variance #2, duplex length. I now turn to the last issue, that of FSI.

The City controls interior space by regulating external dimensions: height, length and width, as well as counting overall interior space. Overall interior space is measured from exterior wall to exterior wall, above and below grade. While these are to work together, the overall building envelope may be generous, to allow for some flexibility. In this case each level of the Leicher duplex will consume about 29% of the lot area. The third floor consumes the remainder, to bring the index up to 97% of lot area.

Mr. Johnston gave testimony that all exterior dimensions are within zoning compliance and that the counting of total interior space (floor space index or FSI) is **in line** with other buildings on Eaton that fall in the same circumstances; for example, 11 Eaton (.97), 36 Eaton (.97), 23 Eaton (.98), 38 Eaton (.81), 76 Eaton (.73). The



Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

townhouse development 100 m to the south is at FSI of 1.0. As far as I can tell, these are not duplexes.

Ms. Bradley filed an aerial photo of the rear yards (her property has a large columnar conifer in the rear yard). The line I added represents the location of the proposed new rear wall of the proposal; it will extend an additional 0.53 m farther back than the existing rear wall of an addition at 79 Eaton. This is the white square roof shape to the right of the Ms. Bradley's residence.

The City was also concerned about this issue. Stephanie Hong, the City planner wrote:

[Community Planning] Staff have reviewed the application and do not object to the variances as represented. . . . However, staff are concerned that if the application is unconditionally approved, the applicant could potentially build a building to fill the entire zoning envelope, as varied, which would result in a much larger, and more imposing building than the built form proposed in this application. To mitigate this concern, staff recommend that the Committee impose a condition on the maximum allowable building length for the third floor.

Accordingly, the City took off about 30% of the third-floor gross floor area, which Mr. Leicher has agreed to if he can convert the removed space to third floor balcony space, one at the front and one at the rear.

Mr. Shukor said in criticism:

So, from the architectural point of view, this architectural mass is way bigger and more pompous, than then the smaller grained . . . , and I'm talking about here the streetscape, so the streetscape you see, nice, smaller houses, probably conventional, probably built eighty years ago, with very certain architectural characteristics, and suddenly, you see this giant sitting there, and I believe this is not to the benefit of the streetscape.

What is missing from Mr. Shukor's exposition is an awareness that the tests under the *Planning Act* require an appreciation of the policy context of the Official Plan and higher order documents that favour rental housing and density in close proximity to transit⁶. I

⁶ Guiding Principles in s. 1.2.1 Growth Plan: Support the achievement of **complete communities** that are designed to support healthy and active living and meet people's needs for daily living throughout an entire lifetime.

Prioritize intensification and higher densities to make efficient use of land and infrastructure and support transit viability.

Support a range and mix of **housing options**, including second units and affordable housing, to serve all sizes, incomes, and ages of households.

The definition of "complete communities": places that offer and support opportunities for people of all ages and abilities to conveniently access most of the necessities for daily

reject Mr. Shukor's evidence that this proposal is a "giant"; it is within the exterior envelope permitted by the zoning and has been modified at the suggestion of the City consistent with the intent of the zoning by-law and the Committee of Adjustment, which has great experience, found that it met the four tests. The proposal must be measured according to the "planned context", which means we measure the proposal with what may be built in the future under the current legal permissions. In the photograph on page 8, the line demarcates the permitted 17 m building length. Few of the properties have built to this line except the building on the extreme left and Mr. Leicher's current building.

This is a neighbourhood where a frequent building form is two stories plus attic and thus the zoning permits a height of 10 m as of right. Even Mr. Shukor said he had difficulty in judging FSI from the street. I find that this increase in FSI is modest and respects and reinforces the existing physical pattern of the neighbourhood. It is minor and is not out of scale. It meets the intent of the zoning by-law in that all the exterior envelope measurements are obeyed and that a duplex in this location is "appropriate to its context" (footnote 4) and is desirable for the appropriate development of the land and meets policy objectives for the reasons already mentioned.

DECISION AND ORDER

I authorize the two variances in Table 1 on the following conditions.

- (1) The Owner/Applicant shall build the proposed dwelling substantially in accordance with the plans for 79 Eaton Avenue received by the Committee of Adjustment on April 4, 2018 *and substantial compliance includes the italicized words in Condition (2). (italics indicate changes from draft supplied by Ms. Abimbola.)*
- (2) The Owner/Applicant shall install a permanent opaque screening or fencing along the north and south edges of the rear third storey deck of the proposed dwelling to a minimum height of 1.5 metres from the floor of the deck *and set back 1.5 m from the south wall of the building.*
- (3) The third floor of the proposed dwelling shall have a maximum building length of 16.96 metres inclusive of the balcony, and 14 metres exclusive of the balcony, as per the third-

living, including an appropriate mix of jobs, local stores, and services, **a full range of housing**, transportation options and public service facilities. Compete communities are age-friendly and may take different shapes and forms **appropriate to their contexts.**
(my bold)

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Number: 18 167506 S45 29 TLAB

floor plan shown on drawing A-02.2.3.4 received by the Committee of Adjustment on April 4, 2018.

- (4) Prior to the issuance of a Building Permit, the Owner/Applicant shall submit a complete application for a permit to injure or remove City owned trees under *Municipal Code* Chapter 813 Article II, Street trees to the satisfaction of the General Manager, Parks, Forestry and Recreation.

- (5) The Owner/Applicant shall submit to the Chief Engineer and Executive Director, Engineering and Construction Services an application for revised municipal numbering. The Owner/Applicant shall contact John House, Supervisor, Land and Property Surveys at 416-392-8338 for further information in this regard or submit the application to municipaladdress@toronto.ca.

X



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