Toronto Local Appeal Body

40 Orchard View Blvd, Suite 253
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

DECISION AND ORDER

Decision Issue Date Wednesday, November 07, 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): MICHAEL CORREIA

Applicant: MPLAN INC

Property Address/Description: 112 JAY ST

Committee of Adjustment Case File Number: 18 114990 WET 12 CO, 18 114994 WET 12 MV, 18 114995 WET 12 MV

TLAB Case File Number: **18 184880 S53 12 TLAB, 18 184881 S45 12 TLAB, 18 184882 S45 12 TLAB**

Hearing date: Wednesday, October 31, 2018

DECISION DELIVERED BY Ian James LORD

APPEARANCES

Name	Role	Representative
MPlan Inc	Applicant	
Caterina Correia	Owner	
Michael Correia	Appellant	Joshua Chitiz
Michael Manett	Expert Witness	

INTRODUCTION

These matters are appeals from refusals by the Etobicoke and York Panel of the City of Toronto (City) Committee of Adjustment (COA) for severance and minor variance approvals (Applications) related to 112 Jay Street (subject property).

The Appellant was represented and called one witness, Mr. Michael Manett, a Registered Professional Planner, whom I qualified to give expert opinion testimony on land use planning matters.

There were no residents present, the City did not appear and there were no other Parties, Participants or Persons in attendance, apart from the Appellant, who did not speak.

In the normal manner, I advised I had attended the site as per the direction of City Council and had read the file material. However, evidentiary matters felt of importance were needed to be brought to my attention to form part of the deliberations.

BACKGROUND

Mr. Manett provided the sole basis of viva-voce evidence. He had been retained prior to the COA disposition forwarded on the files but could add nothing of its deliberations. He advised that: the five (5) minute presentation allowance did not match the opportunity provided by the Toronto Local Appeal Body (TLAB); and, that the COA tended to follow the recommendations of City Planning Staff where they have reported

The Planning Staff Report recommended against approval; on June 7, 2018 the COA five member panel unanimously refused all three of the Applications with the standard skeletal references.

On the consent refusal, the COA did note in bold the following:

> "**The suitability of the dimensions and shapes of the proposed lots has not been demonstrated."**

The full record of the COA filings is brought forward to the TLAB file, including the submissions of the survey, elevation plans, staff reports, correspondence in support and opposition and related administrative and procedural filings some of which are referred to below, under 'Evidence'.

The Appellant sought leave to introduce two documents prepared by Mr. Manett and filed the day of the Hearing. In the absence of any concerns being expressed, both were admitted:

Exhibit 5: Neighbourhood Map, Property Data Map - Frontages.

Exhibit 6: Neighbourhood Map, Property Data Map - Lot Area.

No changes occurred with the Applications between the COA decisions and the hearing of the appeals.

MATTERS IN ISSUE

On these appeals, the Appellant carries the obligation to demonstrate to the satisfaction of the TLAB that all the statutory considerations identified below under 'Jurisdiction' have been met. That consideration is on an individual and collective basis.

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 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 form 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

The evidence of Mr. Manett in support of the 'requested' approvals was fulsome and responsive. He addressed both the severance and the individual variances and it was his collective appreciation that the Applications, in his opinion, met all relevant tests.

It is instructive to review that evidence in some detail. I include in that review the additional exhibits, above, that he referenced in the formulation and expression of his evidence and the following:

Exhibit 1: Witness Statement of Michael Manett.

Exhibit 2: Neighbourhood Study Area Map, described as similar to the areal extend of the RD Zone category in which the subject property is located.

Exhibit 3: Photographic Study by MPLAN, Mr. Manett's company.

Exhibit 4: Site Plan and Elevations..

Although the consideration of the Applications (severance and variances) was somewhat mixed, Mr. Manett was thorough in addressing the elements of the applicable statutory regimes. He identified, over the course of his evidence, what he felt to be the 'key' issues/considerations. I list these below as I find they are an appropriate and balanced focus and framework in the consideration of the Applications:

1. The neighbourhood

2. Proposed lot size and frontages

Mr. Manett provided this factual description of the neighbourhood:

i) There are some 441 lots in the Study Area chosen, being the applicable zone category, and these are improved with two (2) storey and low rise bungalow detached dwelling units;

ii) Built form consists of a variety of front yard setbacks, lot sizes, house types, ages and parking solutions generally depicting open, spacious housing without significant old growth vegetation but occasional grape arbours;

iii) Older homes provide side driveways (often paved together in a broad expanse) while newer homes are two storey and demonstrate integral garages;

iv) The Study Area consists of post WWII housing on large lots.

He indicated from Exhibit 4 that the Applications propose reduced lot sizes of 402.82m2 (north parcel) and 402.74 m2 (south parcel), respectively. The by-laws standard set is 550 m2 (both the new City By-law 569-2013 and By-law 7625, the North York By-law).

The Applications propose reduced lot widths of 9.52 m. The By-laws standard is 15 m (both By-laws).

Mr. Manett noted that the Staff Report, recommending refusal, commented that the 'shape and size' and configuration of the proposed lots were of concern as not respecting and reinforcing the existing physical character of the area. He disagreed, noting that of the 441 lots in the Study Area, 168 or 38% have frontages below the By-law standard for frontage of 15 m. Further, there are 135 lots or 35% that are below the lot area zoning by-law requirement of 550m2.

He stated his opinion that the neighbourhood does not reflect what the By-laws require.

Further, from this, he stated factually that the proposed lots were 'within the range of lot sizes and frontages' in the neighbourhood.

In his Witness Statement, Exhibit 1 at page 5, he describes these ranges as follows:

Lot frontage range: 8.61m to 38.22 m

Lot size range: 202.35 m2 to 2627 m2

The Witness Statement also reveals that on both measures, lot frontage and lot area, the proposed lots on the subject property comparatively would have only 5 properties (i.e., @1% of the sample) in the Study Area at or less than the dimensions proposed.

In this regard, he produced and spoke to the maps in Exhibit 5 (lot frontage distribution) and Exhibit 6 (lot area distribution). The five properties are not the same.

He noted the subject property is located mid-way between two examples of comparable lots: at 72-74 Jay Street and the corner property to the north, at 135 Jay Street.

In addressing the criteria of sections 51 (24) and 45 (1) of the Planning Act, the planner noted:

1. No relief was being sought for: dwelling type; building length; building depth; front or rear yard setbacks, coverage, or fsi. He saw these as principle indicators of site massing and that since the applicable by-law regulations were being met, there could be in his opinion no issue with impact, massing, or being excessive in bulk or built form.

2. He felt that the variances related to side yard setbacks met or exceeded the standards of the by-law set for equivalent frontage lots, thus providing ample spacing on the lot albeit not to the standard set for the existing frontage of 19+ m.

3. The measures of height for which relief was claimed reflected characteristic roof forms in the neighbourhood and were caused by the integral garages having positive slopes. The elevation and the perspective drawings provided in Exhibit 4, he believed, demonstrated compatible spacing and streetscape retention that 'fit with the character of new development' in the area.

4. He felt that the proposed buildings at around 2600 square feet with spatial setbacks and separation between the two dwellings would better ameliorate streetscape impact than an as-of-right structure of 5200 square feet built to the setback lines, with no visual 'see-through' space.

5. That the modest intensification proposed reinforced the provincial direction of the Provincial Policy Statements (PPS) and the Growth Plan encouraging intensification, new housing stock, efficiency standards and the accommodation of an additional family at a more affordable price.

6. The proposed lots were reasonable in size and the dwellings proposed on them are compatible and a good 'fit' on their lots without significant compromise or any undue adverse impact. He felt any shadow impact would be similar to as-of-right construction impacts and that the placement of opaque railings on the proposed oversized rear decks would protect against privacy impacts from persons seated thereon.

7. In noting the two proposed houses were identical in design and form (providing construction savings), they did not, in his opinion constitute overdevelopment or 'sameness' but rather were compatible on house form, massing and on a house type basis to the neighbourhood.

8. In his view, the proposed dwellings would 'sit comfortably' on their lots, that the variances were minor, suitable and appropriate and provided needed single detached housing.

As Chair I raised two questions to further explore the issues raised in the Staff Report and letters of objection to the COA, for response.

The first related to the further potential for block splitting (of lots) and the precedent that might set, with the requested reduced frontage and lot area regulations. There is some evidence in Exhibit 1, not referenced, of two severances having been granted in the area but their date, and the relevance of their location, if any, was not described. Although the example at 72-74 Jay Street, built in 1990, and having comparable 9+ m frontages might have been precipitated by a severance, no information was described sufficient to draw a comprehensive comparison.

Mr. Manett did not explain that he had considered the issue of precedent; he responded by indicating that on the immediate block of Jay Street in proximity to the subject property, there were 10 identified parcels which he listed from Exhibit 5 that had lot frontages at 19 m or more, analogous to the subject property.

He also noted some 11 parcels in the same area that were closer to 11 m in width, as opposed to the By-law standard of 15m.

Despite comments in the Staff Report, he claimed he saw no evidence to demonstrate that the approval of the Applications can lead to the destabilization of the character of the street. And despite suggesting that the Staff Report held nothing to explain its concern for the Applications "weakening the character of the neighbourhood", a comment with which he said he did not agree, he offered no contrary evidence.

Second, in my prompting to address conditions, Mr. Manett agreed to a standard Urban Forestry condition and to the TLAB Practice Direction for standard conditions on severance approval.

Mr. Chitiz had no clarification questions and made no submissions in argument other than to suggest that Mr. Manette had stated why he supported the Applications as appropriate and good planning. Mr. Chitiz asked that those recommendation and requests be endorsed.

ANALYSIS, FINDINGS, REASONS

The consent to sever a parcel and authorize associated variances is accompanied by significant statutory direction. Not only are the grounds above noted under 'Jurisdiction' applicable, but regard is to be had to the decision of the COA and the materials before the COA.

What presents a difficulty here is that the COA, and City Planning Staff, did not support any of the relief cited in the Applications. Further, neither the residents who appeared in opposition nor the City sought Party or Participant status on the appeal. While the Applications did not change, it can be presumed that their respective positions in opposition did not change, there being no evidence to the contrary. However, the TLAB had no person appear in support or opposition to the appeals, other than the Applicant.

In the normal course, the absence of opposition should make the decision easier and more succinct. In addition, Mr. Manett, who appeared in support of the Applications is a senior practitioner in the Province, well reputed and fully conversant with the relevant principles of good community planning.

The difficulty that has presented itself in this case is not so much the process or the thorough evidentiary base laid, but the facts as they present themselves 'on the ground'.

Planning in Ontario has been said to be led as a 'top down' policy led system. Namely, provincial policy and legal direction are followed by duly enacted and approved municipal instruments.

As to Provincial policy, I accept Mr. Manett's characterization of it being, among other matters, supportive of intensification of residential accommodation (and other uses), the efficient use of land and infrastructure and the improvement and upgrade of property.

While the City has amplified and implemented this provincial policy direction found in both the PPS and the Growth Plan, including in its Official Plan, neither government has expressed in the area of the subject property any specific housing intensification initiative. I therefore treat with some skepticism the suggestion in the oral evidence that provincial policy, per se, "looks to these (residential neighbourhoods) to consider intensification".

More properly put, the province has not precluded the intensification of neighbourhoods and the City in turn has developed an elaborate web of considerations, land use, policy, environmental, built form, housing and others, by which intensification initiatives, including consents, severances and variances from zoning as here, are to be adjudged when engaged in City defined 'Neighbourhoods'.

Central to that consideration and relevant equally to the 'Jurisdiction' above noted, is the issue of the intent and purpose expressed in the City Official Plan, for its 'Neighbourhoods'.

Customarily, it is the planning profession that ascribes an appropriate Study Area sufficient to define the characteristics of the neighbourhood attendant a set of site Applications. Currently, that discretion is a judgment call based upon the planner's ability to articulate, draw, assess and conclude an opinion on an appropriate area for consideration. The evaluation is not unidimensional, but is obliged to consider a host of relevant considerations focused on answering the policy directions and criteria, above, afforded the Applications, including those found in the Official Plan.

For the subject property and its Applications, Mr. Manett chose a Study Area, Exhibit 3, bounded by principal roads, similar uses, the same zone category and some 441 lots of record. There was no dispute to this choice of area and I accept it, not only its description but its appropriateness to assess the multi-faceted elements of its character.

I accept his description that the neighbourhood is one of large lot, post war detached housing and of varied age, design, lot characteristics, parking solutions and limited landscape/urban forest character. It is a neighbourhood that is well kept, with a variety of bungalow and two storey housing and clear evidence of regeneration on lots of record with no significant history of consent approvals.

The subject property is located between two bungalows of likely original construction on what was described as generous lot sizes consistent with the street and community within which it is found.

Remarkably, everything about the subject property seems completely in line with the neighbourhood as described by the planner. There is nothing to suggest that the subject property differs in topography, description, building deterioration, or other measure that places it in a different realm than many other parcels both on Jay Street itself, or in the larger Study Area. It shares, with at least 10 other properties in the immediate vicinity, the distinguishing characteristic that it has a frontage of 19.05 m and an area 813.05 m2, both measures in excess of the required by-law minimums of 15m and 550 m2, respectively and characteristic of the majority of the lots in the Study Area.

The planner filed Exhibits 5 and 6 which describe two aspects of the neighbourhood Study Area for which he acknowledged the Official Plan policy obligation to 'respect and reinforce the physical character of' through approvals to, inter alia, consent and minor variance requests (Chapters 2,3 and 4, including section 4.1.8).

Having close regard to these exhibits demonstrates that a component of the physical character of the neighbourhood are lots with frontages and areas that consistently demonstrate a similarity of scale, 'dimensions' and shape.

The Applications propose for the subject property a lot division, both in frontage and area (9.5m frontage and approximately 403 m2 area) that is not replicated in close proximity or indeed to any compelling degree throughout the entirety of the Study Area.

Exhibit 1, page 5 attests to the fact that on both measures, frontage and lot area, only 5 lots of 441 m2 are of comparable or lesser size that those lots proposed. In reviewing this information, of those lots and in each category, they are distant from the subject property, or on the periphery of the neighbourhood, or are on curves of streets providing an inapplicable measure of relevance.

I find that on the measures of lot size and area, there is not a qualifying sufficiency of comparables. Rather, I am unable to accept that the lot division of the subject property, central as its location is to the planned subdivision, street network and lot pattern, has any support base in the area's existing physical character. There are an insufficient number and location of lots of the character proposed that could be considered similar, compatible, respectful or reinforcing of these two neighbourhood physical characteristics.

Mr. Manett provided two fundamental propositions in support of his recommendation that the severance and variances be approved.

This is not to suggest that his individual and cumulative review of aspects of the consent considerations and variances were not convincing and compelling. However, the propositions employed were, I find, insufficient to dislodge the Official Plan tests applicable to section 51 (24) and 45 (1) of the Planning Act, above recited, especially Official Plan elements and the dimension and shape of the proposed lots.

The first evidentiary proposition, repeated on several occasions in oral testimony and written twice in bold ink the Witness Statement, Exhibit 1, page five, is the following:

> "**The lot frontage, lot area, side yard setbacks, height and second floor balcony as proposed are within the range of other lots within the neighbourhood."**

I find I cannot rely on this statement for two reasons: first, there is no policy, planning principle or other direction that was pointed to, that allows this assessment to be of relevance. Something more is needed to afford this conclusion with the mantel of weight.

As well, a 'range' will vary with the choice of area in a manner that can render the statistical derivative of the exercise meaningless. As in this case, without the detailed analysis of the distribution of the measures, the range itself has no bearing on the job of assessing area character, its physical composition and distribution for comparison purposes to the Applications.

In this circumstance, the planner asserted the character measures of lot size and area fell within the range of the geographic area selected. He did not go beyond that to provide an opinion that the statement was worthy to support an opinion of Official Plan compliance, conformity, or that these measures for which approval is sought, met its specific or general intent and purpose.

I find that I have an insufficient basis, either on fact or opinion, to find conformity with the Official Plan, section 4.1.5. and section 51 (24) c) and f). I find the evidence does not overcome the factual reality of the established and planned area character, including in force and pending zoning by-law 569-2013, so as to warrant approval of the creation of two undersized lots with frontages that are inconsistent with the physical character of the area.

The second evidentiary proposition in the oral testimony is to how to properly weigh the uncontested evidence that the severance and the variances, if granted, would permit the construction of modest sized homes that would sit 'comfortably' on their lots, without negative impact.

Mr. Manett did provide and supported his opinion that, assuming the severance, the variances are minor and appropriate. They would yield two houses, identical in virtually all respects that would provide housing for two families as a better, more efficient use of the subject property.

I find that on the assumption of the severance, a proper foundation has been laid to individually support many of the separate variances sought - to the end that construction could occur on the lots and the resultant houses would function.

With respect, I cannot, however, accept that two houses of functional utility and well suited for areas of more compact forms of development can be justified on the thin ground of intensification and augmented housing supply alone.

The Applications, if built, would see the first of two identical dwellings with undersized lots and frontages created north of Rustic Avenue. Two identical taller dwellings on much reduced frontages that are juxtaposed between traditional large lot bungalows and which draw on variances that augment height, reduced side yards, and which add four large elevated rear yard balconies present an abrupt change to neighbourhood built form.

While the evidence demonstrates that a two storey house can be built on the subject property, the severance and built form standards proposed and combined are without contemporary precedent. They would form an abrupt and highly visible mid-block aberration to the streetscape.

I agree as well with the Staff Report and the decision of the COA that they would stand as a stark catalyst to spur other applications. On the evidence heard, the surrounding lot pattern and age of buildings are such as to lend themselves to a destabilizing, piecemeal trend to this different pattern and form of housing.

The Applications, if approved, would generate a built form of a distinctly different street scape appearance: taller, narrower houses, more driveways and the removal of the one tree of significance both on and near the subject property. Section 4.1.5 establishes criteria for the protection of built form characteristics in a manner that permits change and which respects and reinforces the existing and planned physical character of the neighbourhood. I find that the proposal cannot be said to do that where the result is such a stark contrast to existing and evolving improvements to the neighbourhood.

I have given careful consideration to Mr. Manett's advice that new housing stock is desirable and that these houses are characteristically similar to thousands of others in different parts of the City that sit on even smaller lots or have smaller yard spaces than that proposed. I do not dispute the physical examples referenced, but I find the rationale of 'intensification' and 'lot self-sufficiency' as comments applicable generally across the City. They are not helpful to judge 'fit', 'character' and streetscape impact in this particular circumstance.

I heard the planner's comparative that one larger dwelling could be built on the subject property with a built form, scale and massing appearing not materially different from that of the two proposed identical dwellings sitting side by side. He suggested that the physical appearance on the streetscape would be similar. However, it is exactly this form of redevelopment that has and is occurring across this neighbourhood: large, single detached houses of varied architectural and parking solutions on large lots affording design flexibility.

I do not agree that the obligation in section 4.1.8 of the Official Plan (to ensure 'compatibility' standards) is met by the collective application of these variances to the subject property. I agree that the 'neighbourhood' is the key issue.

I find that this is not the setting or the streetscape that warrants either the assumption that the severance is justified by provincial and City policy support for intensification or that the parallel approval of variances would allow these proposed dwelling units to sit comfortably and function admirably on their own lots. The subject property is not alone or an island unto itself. It must be considered in its context.

I find that the intent and purpose of the Official Plan is not met by the requested severance and associated cumulative variances. Similarly, I find that the intent and purpose of both by-laws to recognize and maintain the historical lot pattern and built form is not met by the cumulative effect of the variances which, in their application to the subject property, I find to be neither minor nor desirable.

In the result, it is unnecessary to examine each variance to a further, finer degree.

DECISION AND ORDER

The appeals are dismissed, the severance and variances are refused and the decision of the Committee of Adjustment is confirmed.

X 

Ian J. Lord
Chair, Toronto Local Appeal Body
Signed by: ilord