

# DECISION AND ORDER

**Decision Issue Date** Monday, November 12, 2018

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

Appellant(s): ANNA BOGYO

Applicant: ARC DESIGN GROUP

Property Address/Description: 103 WESTBOURNE AVE

Committee of Adjustment Case File: 17 263522 ESC 35 CO (B0069/17SC)

TLAB Case File Number: 18 154472 S53 35 TLAB

**Hearing date:** Wednesday, October 24, 2018

**DECISION DELIVERED BY T. YAO**

## APPEARANCES

	<b>Role</b>	<b>Representative</b>
Rabiul Mohammed Ashraf, Rumana Syeda Ashraf	Parties/Owners	Max Laskin
Jonathan Benczkowski	Expert Witness	
Anna Bogyo	Appellant	
Participant	Reka Nicholas	

## INTRODUCTION

This is an appeal by Anno Bogyo from a decision of the Committee of Adjustment of granting the owner Rumana Syeda Ashraf a consent with respect to 103 Westbourne

Ave. Ms. Bogyo lives about three quarters of a block from the Ashrafs. For reasons of cost, Ms. Bogyo did not appeal the variances.

The minor variance decisions for the two proposed lots is now final and binding and Mr. Laskin (lawyer for the owners the Asrafs) argued that the substandard lot frontages and lot areas form part of "the existing character of the neighbourhood". Ms. Bogyo is precluded from raising issues such as whether the variances are minor, or whether the frontage does not comply with the zoning requirement of 12 m vs, the proposed 7.62 m (40 feet vs. 25 feet).

## **THE WITNESSES**

I heard from Jonathan Benczkowski, a planner who testified for the Ashrafs. I qualified Mr. Benczkowski as able to give opinion evidence in the area of land use planning. I heard from both Ms. Bogyo (131 Westbourne) and Ms. Nicolas in opposition. Ms. Bogyo was assisted by Ms. Nicholas, who translated some of the evidence throughout the hearing. Ms. Nicholas is Ms. Bogyo's daughter and lives in the same house.

## **MATTERS IN ISSUE**

I 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 severance meets the other criteria set out in s. 51(24) of the Act:

(c) whether the [severance] conforms to the official plan and adjacent plans of subdivision, if any; and

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

In addition, the decision must be consistent with and conform to higher level Provincial policies.

The Official Plan test is only with respect to the severance; there is no jurisdiction with respect to the variances which also have an Official Plan test.

Conformity with the Official Plan under 51(24) is a different test from s. 45(1); and, there are other matters to consider for a severance such as matters of provincial interest, whether the proposed subdivision is premature or in the public interest and the dimensions and shapes of the lots. In the result, I believe the *Planning Act* directs the approval authority to take a wider view of the words in the Official Plan in 53(24) than for 45(1).<sup>1</sup>

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<sup>1</sup> Section 45(1) states the Committee of Adjustment may authorize such minor variance "from the [zoning by-law] as in its opinion is desirable for the appropriate development

**The test: “respect and reinforce”**

The Official Plan uses the words “respect and reinforce the existing physical character of the neighbourhood” repeatedly. In “Healthy Neighbourhoods”, this test is labelled “a cornerstone”. In section 4, the “Neighbourhoods” land use designation “will help to protect and **reinforce** the existing physical character of these areas.”<sup>2</sup> In s. 4.1.5 of the Official Plan we find the most comprehensive expression of this test:

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

- ...  
b) size and configuration of lots;

The word “stability” is also an important theme. In the preamble to Development Policies for Neighbourhoods, the plan says, “The **stability** of our Neighbourhoods’ physical character is one of the keys to Toronto’s success.”<sup>3</sup> The section further repeats the phrase:

Physical changes to our established Neighbourhoods must be sensitive, gradual and generally “fit” the existing physical character. A key objective of this Plan is that new development **respect and reinforce the general physical patterns in a Neighbourhood**.

In Section 2, after setting out that Downtown, Centres, Avenues and Employment Areas will be the foci of growth, the section title is “2.3 **Stable but not Static: Enhancing Our Neighbourhoods and Green Space**” and the text following says, “these **stable** areas will see little physical change.” And in Policy 4.1.1:

Policies 1. Neighbourhoods are considered **physically stable** areas made up of residential uses in lower scale buildings such as detached houses, semi-detached houses, duplexes, triplexes and townhouses, as well as interspersed walk-up apartments that are no higher than four storeys.

This stability has limits; the word is qualified in the title “Stable but not Static”; and in the words “will not stay frozen in time in the Healthy Neighbourhoods section. But nonetheless that section ends with the “respect and reinforce” obligation.

2.3.1 HEALTHY NEIGHBOURHOODS By focusing most new residential development in the *Centres*, along the *Avenues*, and in other strategic locations, we can **preserve** the

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or use of the land, building or structure, if in the opinion of the committee **the general intent and purpose** of the by-law and of **the official plan**, if any, are maintained.”

<sup>2</sup> Page 4-1

<sup>3</sup> Page 4-3

shape and feel of our neighbourhoods. However, these neighbourhoods **will not stay frozen in time**. The neighbourhoods where we grew up and now raise our children help shape the adults and the society we become. Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites. A cornerstone policy is to ensure that new development in our **neighbourhoods respects the existing physical character of the area, reinforcing the stability of the neighbourhood**. Page 2-22

In short, stability is like gyroscope; while there may be exceptions, the Plan keeps returning again and again to “respecting and reinforcing”.

### **Ms. Bogyo**

Ms. Bogyo’s strongest argument is that the severance does not respect and reinforce the existing lotting pattern and as such, does not conform to the Official Plan as required by s. 51(24)(c) of the *Planning Act*. Her position was largely articulated by Ms. Nicholas, her daughter, who lives with Ms. Bogyo (at 131 Westbourne). However, Ms. Nicholas was not just a translator; she also was a person who lives in and knows the area, has researched the applicable law and obtained informal advice from City Staff.

Ms. Bogyo’s story begins with her moving to the area in 1985. At the time she told the real estate agent, “I don’t care which house this is, I just want this neighbourhood.”

“Lots of space between houses, (Ms. Nicholas speaking), quiet streets, a really nice mix, it was all bungalows, lots of retired people, a few young families, really nice.”

At the time her friends thought moving to beyond Victoria Park subway station “needed a passport.” She then described a history of activist involvement, fighting lot severances:

So, my mom has been going to Committee of Adjustment hearings for about ten years. There was a very active group that went from the neighbourhood. That was the only way they knew how. They didn’t know they could email; they didn’t know they could send letters. They thought they had to figure out when the hearings were, which they would get from whoever got a letter saying that the house next to them was going to be severed. And that person would kinda go and knock on all the other neighbours’ doors and whoever could go, would go and show up at the meeting. And generally, they were successful. . . .But as people aged, like, kind of the neighbourhood group sort of died out, and we just started to see lots being severed. where nobody even knew about them.

And after, maybe about a year or two ago, I realized that when the orange and green signs go up, on the front door, that means there’s going to be a Committee of Adjustment hearing for severance, and as I mentioned, I run the neighbourhood almost every day, I can tell you that there were many, many severed lots where there was no signs, I know we cannot go back [and ask that they be invalidated]. But it’s a fact. I can tell you there are many, many, . . .and this is all irrelevant to you guys but many, many um, where the sign would kinda go up the day before.

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And it was my mom and her elderly neighbours, who were trying to do this. . . . So, a very critical case was 149 Westbourne<sup>4</sup>. . . So 149 Westbourne was the first one that came. . . to the TLAB.

149 was I believe turned down three times by the Committee of Adjustment and twice by the OMB. And the neighbours there showed up at the TLAB hearing, . . . but they were completely unprepared for the formal process that we're experiencing. . . . And although it is clear from the transcript that the panel member gave them a fair bit of latitude, they were unsuccessful.

It is an incredibly sad case.

Ms. Nicholas explained that the next door neighbour to 149 Westbourne had a sun room where, being a teacher, she would sit and mark her students' papers by the natural sunlight. She now has to turn on a light, even on the sunniest of days. She said that 101 Westbourne had received a severance without the proper notice. When the owners of 103 (the subject) put up a sign, the two women learned by Googling that the hearing was the next day, but Ms. Nicholas was occupied by work responsibilities. Ms. Nicholas said:

My mom scrambled to get down. She said, "We can't. . . This is the park. We have to stop this."

In the end, although they indicated that other neighbours were supportive of their position, Ms. Bogyo was the only person to attend and was the only person to testify before the Committee. Nonetheless the Committee approved the severance. Ms. Nicholas emailed her Councillor at the time, Michelle Holland Berardinetti.

I said, "We don't know about it, we have no way to fight it; this has to be shut down on a grand scale, not on an individual basis and what can we do?"

Ms. Berardinetti said they could appeal.

So, how do I appeal? She said just turn the page over. . . . And so, this is how I got involved in all of this. Now, I work full time at quite a demanding job, . . . two small children, and [my mom] is very self-sufficient, but . . . I just didn't have the time. I was literally calling City Planning from the washroom at work. Because City Planning, Forestry, the lovely people at the TLAB - they all work during the day!

So that is how we came here. . . . Then we realized we had to pay [the appeal fee of \$300]. . . We realized we are throwing our own money at this. . . . Nine hundred dollars is a lot of money. Even three hundred dollars is a lot of money. We knew we were not in a good position to win. We were going to do just one [appeal].

I note that there is no confirming evidence that some severances were approved through faulty notice or were granted after one or more attempts to obtain the same severance. I note as well that neither Ms. Bogyo nor Ms. Nicholas was a professional

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<sup>4</sup> This was a 2017 TLAB decision overturning a refusal by the Committee of Adjustment. Four residents appeared at the TLAB against the owner, Damanullah Dorani.

planner and indeed Ms. Nicholas admitted this was her first foray into the planning litigation process. However, she correctly identifies the test and it is up to Mr. Ashraf, to convince me, meet that test. The test is to respect and reinforce the existing physical pattern — a more difficult test than to simply replicate or mimic other severances.

In response to Mr. Benczkowski's observation that Ms. Nicholas and Ms. Bogyo were the only ones to appear, she replied her neighbours did not understand the planning process, the TLAB procedures or computers or all three. Ms. Nicholas ended up taking down statements from the persons who elected to become participants, typing them herself and forwarding signed copies "after I confirmed with them what they wanted to say, of course."<sup>5</sup>

There were many who said, "Oh we'll do it and they didn't. There were several people who said, and it was really sort of disappointing, you're wasting your time you will never win against the City. . . It's a tragic comment against a loss of faith in our rights as citizens to speak up and be heard.

This concludes the main elements of Ms. Nicholas's testimony.

There does seem other evidence of those other residents coming to appeals. In (32 Bexhill, *Chan*) Jim Barnes appeared to object to a severance that also involved a reverse slope driveway (presumably permitted at the time). His assertion of a "trampling of regulations" was rejected. In 2016, (31 Westbourne, *Arzu*) Mr. Barnes again appeared, to object to a consent granted to Jahanara Arzu. It was noted by the OMB member that he did not live on Westbourne. The member rejected and his concern that a consent on Westbourne would add to the list of properties used as "precedents" was rejected:

The City has not appeared, nor have any other neighbours. Nevertheless, Mr. Barnes has indicated a concern and the potential precedent created by this application. In considering applications such this, the Board looks at the facts associated with the application before it. Precedent plays little, if any role in deciding the outcome.

Ms. Nicholas noted that previous severances are invariably used to justify each successive severance. There is an element of truth in this. However, it is also the case that any individual case will differ from another both in time and geographic location, even if it is in a similar study area. So, while "precedents", may be relevant, they are not determinative.

### **Mr. Benczkowski**

Mr. Benczkowski's evidence can be summarized as follows:

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<sup>5</sup> Bingyong Jiao, Kathleen Moore, Benjamin Moore, Rakiba Amin, Evda Gushevski, Sonia Perrin, Paul Davison

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1. The severance is consistent with and conforms to Provincial intensification policy because it is an increase in density; two families will live where one family lived previously. Intensification makes better use of transit, such as the Victoria Park 24 bus line which is about a 6-minute ride to the Victoria Park subway station.
2. The study area has a pattern of pre-existing undersized lots, that is smaller lots have been there for many years.
3. This is an infill situation.
4. There are many recent severances in the area. Since we evaluate “physical character” as of today, that they become part of the existing physical character, thus meeting the test for severances, irrespective of the preexisting number of small lots.

Since I recounted Ms. Nicholas’s evidence in her own words, I think it is only fair to also transcribe some of Mr. Benczkowski’s evidence. The following is part of his testimony in reply to Ms. Nicholas’s question as to whether the severance is “sensitive, gradual and generally fits in”.

There’s three points to that. First of all, when we examine the Official Plan as a whole, we look at what’s gradual, what’s sensitive and how it fits in, OK? . . . In terms of what’s sensitive and how it fits in, that’s what leads to the development.

So, it’s kinda like being the first to the party. If you’re the first to the party, you’re the first one severing, well now you can walk around and go hmmm, well it’s not sensitive and it doesn’t fit in, OK? So what leads to development are these policies that allow us to take that existing fabric and allow us to evaluate the proposal based on that. So that through the development that’s how we interpret the Official Plan; we look and say this is a typology that is found in the neighbourhood, this lot sizes, this frontages, this lot depths, OK? The built form is a typology that is found throughout the neighbourhood itself. Through there we come to the intensification targets, OK, we have this existing fabric. This is an area that supports that existing fabric, OK? So, if you look , we see an increase through what’s happening steadily throughout.

. . . Ms. Nicholas: . . . So those people who bought, they would disagree with your character of the neighbourhood.

Mr. Benczkowski: Well, if we go back to one of the policies of the Official Plan that say neighbourhoods will not stay frozen in time, right? Neighbourhoods evolve, . . .

Ms. Nicholas: Yes.

Mr. Benczkowski: Built forms evolve. Lot sizes evolve. All of this is the evolution of the neighbourhood. and the policies we went through. OK? So, what I see, is a neighbourhood that is undergoing reinvestment. It’s rampant throughout the area. There’s numerous dwellings being built, that are approved and are existing. This is a neighbourhood that’s undergoing change. You said it yourself, “There’s a lot of change.” Whether you live there for thirty years or one month, that’s irrelevant to the feel of the

neighbourhood; the feel of the neighbourhood is what's there today. We're not evaluating it twenty years ago, ten years ago, we're evaluating based on what's there today.

## **ANALYSIS, FINDINGS, REASONS**

### **Scenario A and Scenario B**

The "respect and reinforce" test requires more than simply quantifying other recent severances ; they must be considering in a spatial and policy context. The applicant is starting with a 50 foot "parent" lot and creating two 25 "offspring" lots, so I am restricting my analysis for simplicity to just these numbers.

From this, we can make up two thought experiments. Scenario A is a subdivision in which all the lots are 25-feet, and only one is 50 feet. If the owner of the 50-foot lot then seeks a severance, the justification would be the removing of the atypical large lot (plus the not frozen in time policy) and the two new small lots would "respect and reinforce" the existing physical pattern. Such a circumstance occurred at 65 to 57 Westbourne, below.

Scenario B would be the opposite situation; all 50-foot lots, but perhaps a "smattering" of 25-foot lots. If one of the 50-foot lots sought a severance, this would be presumptively destabilizing, the other 50- foot lots would be open to invoke the same argument that is being used here and I have already agreed that such other severances are relevant. Nonetheless, the onus would be on the owner to justify that the severance would respect and reinforce a pattern of "all" 50-foot lots. The proposal would be the opposite of A: that is, is removal of a "frequently occurring" lot and the creation of an "atypical" lot.

In reality, most situations would fall somewhere between Scenarios A and B. and a decision maker would have to decide whether the situation more closely resembles one or the other or neither. The exercise would not just be "pattern matching", but a multi-dimensional analysis that would take into consideration all of the factors in s. 51(24) of the *Planning Act*.

I note as well, that all of the key words: "respect", "reinforce", "stable" and "stability", "pattern", "sensitive", "gradual", and "fit in" are undefined, and are open-ended terms. "Frozen" is about the clearest, it implies **some** change, but even so, the Plan is silent as to what level of change is sufficient.

Before we consider whether the physical character in today's study area is closer to Scenario A or B, we have to establish some raw numbers. Mr. Benczkowski obtained the Structural and Property Data base from Beverly Thomas, City planner. This is a list of all properties arranged by address, lot area, frontage, and year of construction of the house. Although It has errors, it is still very useful. I will refer to this data base as "the spreadsheet".



Mr. Benczkowski then created the two tables below.

<b>Table 1. Mr. Benczkowski's inventory</b>			
Row	Lot Frontage Range (m)	Total Number of Lots	Percentage
1	7.5 – 7.62 (24.6 – 25 ft)	58 <sup>6</sup>	10.23%
2	7.74 – 11.91 (25.4 – 39.1 ft)	101	17.81%
3	12.17 – 13.41 (39.9 – 43.9 ft)	148	26.10%
4	13.69 – 27.13 (44.9 – 89 ft)	261	46.56%
	<b>TOTAL</b>	<b>567</b>	

<b>Table 2. Mr. Benczkowski's percentage of non-compliant lots</b>		
Total Lots in Study Area	Lots Frontage < 12 m (40 ft)	Percentage of Lot Frontages in Non-Compliance [with the zoning by-law]
567	159	28.04%

### **Adjustments to the inventory**

While I do not suggest that the following adjustments are critical, I wanted to refine the spreadsheet data as best I could.

I first sorted the lots by frontage and year of construction. This gave me 26 “original” 25-foot lots and about 33 new ones. When I say “about”, I noted the following

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<sup>6</sup> The audio recording shows Mr. Benczkowski said 66 lots were in this category; I assume he must have misspoke,

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- I include 7.60 m properties as 25 feet; 2 cm seems to be within surveying error;
- Some addresses are duplicated in the spread sheet;
- Usually both halves of a severance are listed; e.g., 70A and 70B Westbourne, 46A and 46B Maybourne; however, for 85B Maybourne, only one half was listed;
- The spreadsheet only is up to date as far as 2017; thus, the three known TLAB severances are not listed;
- Similarly, it appears recent OMB cases are not incorporated. Mr. Laskin handed up nine recent mostly OMB cases.

30 and 30B Maybourne, *Katsis*, 2013;  
32A and 32B Bexhill, *Chan*, 2015;  
101A and 101B Westbourne, *Dincer*, (COA), 2015;  
28A and 28B Bexhill, *Hazianfoniou*; 2015;  
31A and 32B Westbourne, *Arzu* 2015  
85A and 85B Westbourne Ave, *Trklja*; 2017;  
149A and 149B Westbourne, *Dorani*, 2017;  
59A and 59B Bexhill Ave, 2017, *Petrijaj*, 2017;  
28A and 28B Pitt Ave; *Yasmin*, 2018,  
94A and 94B Pitt Ave; *Chowdhury*, 2018.

Only *Katsis* and *Chan* are updated in the spreadsheet.

Also, Ms. Nicholas supplied new information: an Excel table and photographs taken from her daily jogging in the study area. She supplied the addresses of four new severances: 29 Westbourne, 28, 60 and 106 Pitt, none of which are correct in the spreadsheet. I rejected some of the properties Ms. Nichola put forward because they did not fall into the 25 foot/ 50-foot lot typology, or because deficiencies in the spreadsheet data did not allow me to make any reliable inference.<sup>7</sup>

After all of these adjustments, my best estimate is that there are 21 “modern”, (since 2009 ) severances, and this number is probably low by 10 or 15%, and this underestimation favours the Asrafs’ case.

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<sup>7</sup> I rejected some of her properties for the following reasons: 51 Pitt – missing completely from the spread sheet; so, I am unable to ascertain frontage; 23 Pitt – zeroes shown for data; 5, 7, and 9 Donside – 9 (presumably the parent lot but statistics are not up to date) is shown as having started with a frontage of 27.13 m. Since the application is for severing one 50-foot lot into two 25-foot lots I am eliminating this comparable. I should add that 47A and 47B Donside are also slightly larger than 25 feet, so I am not considering these as part of the “25foot/50 foot” analysis, although they are 2017 severances.

I want to comment a little more on the raw data before considering the arguments advanced by Mr. Benczkowski.

### **There is only one 7.5 m lot**

25 feet is 7.62 metres and this forms the lower limit of Mr. Benczkowski's inventory, Table 1. When the spreadsheet is sorted by frontage, it shows only one lot whose frontage is less than 7.62 m: — 60A Maybourne, at 7.5 m (24.6 ft). This lot seems to have an unusual history. 60A has a construction date of 2004 and the adjacent property, number 60 Maybourne has a frontage of 7.74 m (25.4 ft) and a construction date 1927. When the frontages for the two are added together they total exactly 50 feet.

I think there is a strong inference that 60 Maybourne was a house with a wide side lot, a frequent occurrence in many older neighbourhoods. The zoning map shows a lot line between the two, so I am assuming the owner of 60 obtained a severance in 2004 to convert the wide side yard to a newly slightly undersized, (i.e. smaller than 25 feet) lot, which became 60A Maybourne. Or perhaps no Committee of Adjustment severance was needed as the two halves might have been lots of record. In any case 25-feet and not anything smaller seems to have been the smallest "historic" lot frontage.

With all the above information, I conclude that the 58 lots in Row 1 should be 71 lots in total, as follows:

- 60A Maybourne,
- 26 older 25-foot lots;
- 44 new lots created by 22 severances.

### **Contiguous 25-foot lots.**

Mr. Benczkowski did not make the argument that a pure Scenario A ever existed; he argued that examples of contiguous pairs of 25-foot lots have occurred from the outset, which later severances could "mimic". Thus, new pairs of 25 foot lots would **not** be atypical (my words, not his), and this would be a refutation of the Scenario B model. Even if his client is not "the first one to the party", I take it that he was arguing in the alternative. While his strongest argument is based on recent severances, his client would also be entitled to a severance based on the existence of preexisting undersized lots (Proposition 2).

Mr. Laskin's submission was

Mr. Benczkowski demonstrated through his lot study that the neighbourhood is composed of a variety of lot frontages and lot sizes that includes, lots almost identical to what are proposed before you that have existed seamlessly for 90 plus years at this point.

Mr. Benczkowski mentioned and photographed three pairs of 25-foot lots:

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63A - 63 Westbourne;

63 - 61 Westbourne; and

195- 7 Pitt (construction dates of 1914 and 1917).



<p align="center"><b>65</b> (partly shown) 12.19 m 1957</p>	<p align="center"><b>63A</b> 7.62 m 1983</p>	<p align="center"><b>63</b> 7.62 m 1930</p>	<p align="center"><b>61</b> 7.62 m 1917</p>	<p align="center"><b>59A</b> 15.14 m 1954</p>
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<p align="center"><b>59A</b> 15.14 m 1954</p>	<p align="center"><b>59</b> 7.62 m 2014</p>	<p align="center"><b>57B</b> 7.62 m 2014</p>	<p align="center"><b>57</b> 7.62 m 1989</p>
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I also found a fourth pair: 133-135 Pitt for which the construction dates are 1944 and 1932 (not in the photobook). Do these four pairs support for the “seamless” argument?

Mr. Benczkowski’s photobook contains by my count, 20 photos of severed lots (there are two 85A and 51 Pitt photos, but they show different houses) and 11 photos of older lots. A casual reader of the photobook will get the impression that there are more recent severances than older lots, even though they are 44 out of 572 total properties. Similarly, assuming we have caught all of the contiguous pairs (up to nine or so) there are many hundreds of possible contiguous other pairs which are not side by side 25-foot lots. Of course, Mr. Benczkowski has not attempted to hide the total numbers; but it is incumbent upon me to take more than a casual glance at the numbers in coming to any conclusion.

On the previous page I have put together the photographs, frontages and year of construction of all houses on the east side of Westbourne between 65 and 57 (left to right). The photo of 59 A Westbourne is repeated to help the reader situate the sequence . The photomontages show:

- a strip of 3 25-foot lots (63A, 63 and 61);
- two” large” (50-foot) lots; (59 B, and the precursor lot for 59-57B);
- then one 25-foot lot (57).

These in my opinion **do** create a sort of “sub-neighbourhood” in which it could be said that a severance “respected and reinforced the existing physical character”. The removal of the atypical precursor lot (59-57B) and the creation of two 25-foot new frontages similar to the bookending lots “reinforced” the prevailing pattern of 25-foot lots. However, such reinforcing is limited to these 7 lots and does not occur “all along Westbourne” in Mr. Benczkowski’s words. There are no other examples of two contiguous 25-foot lots in the neighbourhood except for the four listed, and I find that these naturally occurring pairs are too few and too isolated to form an “existing character” of the neighbourhood.

While 25-foot lots today are obviously identically sized to those of 90 years ago; the creation of new 25 foot lots is hardly “seamless”. A new severance creates two new lots side by side where one existed before. The original 25 foot lots are scattered amongst all the blocks in the study area. So, the creation of two new lots side by side creates a new pattern; it does not replicate an existing pattern. Moreover, in all the cases given to me by Mr. Laskin, the applicants have also asked for minor variances so that the new buildings on the newly created lots tend to be higher, longer and have higher main walls than the by-law permits.

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In my opinion, to describe the 22 modern severances as building on the severance at 59-57B “seamlessly” is an overstatement and fails to meet the respect and reinforce test.

**Evaluating based on what’s there today**

The spreadsheet, as corrected, shows the following year by year counts:

Table 3. Breakdown of 25 foot lots by year of house construction		
	Lots	Number of severances
1914-1989 (75 yr.)	26	
1990-2009 (19 yr.)	7 lots	3 severances
2010	0	0 severances
2011	2 lots	1 severance
2012	0	0 severances
2013	2	1 severance
2014	6 lots	3 severances
2015	14 lots	7 severances
2016	2 lots	1 severance
2017	8 lots	4 severances
2018	4 lots	2 severances
totals	71 lots	22 of which 19 are in the last 8 years

In making up this chart I noted that information is becoming available at a rapid pace, too rapid for the spreadsheet to keep up to date, but both Mr. Benczkowski and Ms. Nicholas have given the more recent corrections.

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In 28 Pitt (*Yasmin*, 2018), Mr. Benczkowski was the sole witness and TLAB Member Burton noted “His chart does not illustrate approvals for the last two years, not yet available from the City in this format.” She reported that Mr. Benczkowski’s study area contained 546 lots (March 2018) for presumably the same study area and in my hearing (October 2018) the number is now 572. This is an increase of some 4.8% in six months suggesting that the data base is very dynamic and needs constant refinement.

In *Yasmin*, Mr. Benczkowski found 8.79% of the total were 25-foot lots (para. 23). In this case he found 10.23%. Since the only way there could be an increase in percentage of 25 foot lots is by severance, this suggests an accelerating trend over the over a six-month period.

I have looked at 25-foot lots and now I want to look at a at the other side of Scenario B: the number and distribution of candidate lots, that is, 50-foot lots. In Table 4, I recast Table 1 (Mr. Benczkowski’s inventory) showing lots with exact frontages.

Table 4 Inventory of exact frontages			
Exactly 25 feet		26	4.5%
	25-30 feet	6	1%
Exactly 30 feet		24	4.2%
	30-35 feet	15	2.6%
Exactly 35 feet		47	8.2%
	35-37.5 feet	5	0.9%
Exactly 37.5 feet		47	8.2%
	37.5-40 feet	2	0.3%
Exactly 40 feet		107	18.7%
	40-45 feet	41	7.2%
Exactly 45 feet		24	4.2%
	45 -50 feet	10	1.7%
<b>Exactly 50 feet</b>		<b>208</b>	<b>36.4%</b>
	50 plus	21	3.7%

Table 4 Inventory of exact frontages		
Total of 4 largest categories (exactly 50, 40, 37.5, 35 ft)	409	71.5%%

From Table 4 I infer there was a deliberate intention to create a mix of exactly 25, 30, 35, 37.5, 40, 45 and 50-foot lots, with the preponderant size being 50 (bold) and 40-foot lots. Of these 50 feet form the largest minority and it is concerning to Ms. Nicholas that it is these lots that seem to be the applicants for severances.

Table 4 shows 208 50-foot lots, and from Ms. Nicholas’s photographs, 8 have been redeveloped as tear downs creating new large homes. (51, 135, and 137 Westbourne, 121 and 135 Bexhill, 30, 52, and 138 Maybourne), which still leaves 200 candidate lots for severing. On numbers alone, this looks much more like a Scenario B than Scenario A.

Let’s move away from a pure analysis of 25 and 50-foot lots to try to be real-world November 2018. Let’s add in the larger lots to the candidate base and ignore the difference between historic and new 25-foot lots. Let’s also add in another 6 severances or 12 new lots to reflect the 15% underestimation, we get 83 small lots. This is 14.5%, a large number to be sure, but not sufficient for me to find Official Plan conformity. The test is not whether there are new severances to be “mimicked”, **but whether the proposed severance respects and reinforces a pattern of 14.5% small lots and 40% candidate lots**. In short, I would place this as more similar to Scenario B than Scenario A and I find the severance does not respect and reinforce such existing physical character or pattern.

**The Infill” argument**

Mr. Benczkowski justified the proposed severance on the basis that it was “infill” (Second proposition, page 7). I do not agree with Mr. Benczkowski. The Plan states:

Scattered throughout many Neighbourhoods are properties that differ from the prevailing patterns of lot size, configuration and orientation. Typically, these lots are sites of former non-residential uses such as an industry, institution, retail stores, a utility corridor, or are lots that were passed over in the first wave of urbanization

The proposals is to divide a 50-foot lot. These lots are not “scattered throughout the neighbourhood”; they are 37% of all lots and there are whole swaths of 50-foot lots, particularly around Regents Park, on the west side of Maybourne and on Pitt from Conroy to Bolster. The Plan goes on to say

In converting these sites to residential uses, there is a genuine opportunity to add to the quality of Neighbourhood life by filling in the “gaps” and extending streets and paths.

This is not a conversion to residential use. Nor is it filling in a gap. Nor is there an extension of a street or path.



Due to the site configuration and orientation, it is often not possible or desirable to provide the same site standards and pattern of development in these infill projects as in the surrounding Neighbourhood. Special infill criteria are provided for dealing with the integration of new development for these sites, and for intensification on existing apartment sites in Neighbourhoods.

## **Intensification**

Paragraphs 19 and 20 of Mr. Benczkowski's witness statement say:

19. The proposed consent is consistent with the policy direction in the PPS, as they facilitate a modest level of intensification in a compact form while promoting the efficient use of existing transit infrastructure.

Part IV Vision for Ontario's Land Use Planning System (Growth Plan) states:

Efficient development patterns optimize the use of land, resources and public investment in infrastructure and public service facilities. These land use patterns **promote a mix of housing, including affordable housing, employment, recreation, parks and open spaces, and transportation choices that increase the use of active transportation and transit before other modes of travel.**

The policy promotes a "mix" of housing, and the word "promotes" means that intensification is but one goal among many.

I am not convinced that one additional single freehold detached housing unit is a "mix", as the term is used in the Official Plan. The words "health, safety, convenience, accessibility for persons with **disabilities** and welfare of the **present and future inhabitants** of the municipality" are intended to "nudge" the approval authority, when possible, toward housing which the market doesn't or isn't willing to supply. It seems to me that a triplex, or rental units in a house form building or a granny suite could be "non-market" candidates. While 103 Westbourne is within a couple of blocks of the Victoria Park 24 bus line, I do not see why the future owners of the two proposed houses, with integral garages, will necessarily "increase" the use of transit before other modes of travel. They might or might not have children, who in their tween and teenage years would use transit. The adult owners might drive to work or take transit.

Mr. Benczkowski's paragraph 20 states:

20. The proposed consent conforms to the Growth Plan, which promotes intensification and the achievement of complete communities with a mix of housing options to accommodate households of different sizes.

"Complete communities" denotes housing for people of all ages. I have no evidence that the proposed housing will be but another offering to the most fortunate citizens of Toronto, in their peak earning years, and probably not accessible for persons with disabilities, or "households of different sizes", for example single persons. It might be an offering for multi-generational families.

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As a TLAB member, I approved a basement apartments in *15 Alma* and *12 Montrose*, 3 dwelling units in *1258 Broadview* and two dwelling units with separate doors in a tear-down at *79 Eaton*. These seem to be more clearly what the Growth Plan has in mind.

When the housing sections are read in their entirety, this becomes a complex exercise and is more than just a checkmark on a list.

The Growth Plan requires “housing strategy”. Whether or not Toronto has such housing strategy was not revealed in the evidence. Furthermore, Toronto must set intensification and density targets<sup>8</sup>. While I assume that a severance would assist, I have no idea whether these targets are being or have already been met. The onus is on the applicant to prove its case. If I am in doubt, I should not grant the severance.

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<sup>8</sup> Upper- and single-tier municipalities, in consultation with lower-tier municipalities, the Province, and other appropriate stakeholders, will each develop a housing strategy that:

- a. supports the achievement of the minimum intensification and density targets in this Plan, as well as the other policies of this Plan by:
    - i. identifying a diverse range and mix of housing options and densities, including second units and *affordable* housing to meet projected needs of current and future residents; and
    - ii. establishing targets for *affordable* ownership housing and rental housing;
  - b. identifies mechanisms, including the use of land use planning and financial tools, to support the implementation of policy 2.2.6.1 a);
  - c. aligns with applicable housing and homelessness plans required under the Housing Services Act, 2011; and
  - d. will be implemented through official plan policies and designations and zoning by-laws.
2. Notwithstanding policy 1.4.1 of the PPS, 2014, in preparing a housing strategy in accordance with policy 2.2.6.1, municipalities will support the achievement of *complete communities* by:
    - a. planning to accommodate forecasted growth to the horizon of this Plan;
    - b. planning to achieve the minimum intensification and density targets in this Plan;
    - c. considering the range and mix of housing options and densities of the existing housing stock; and
    - d. planning to diversify their overall housing stock across the municipality.
  3. To support the achievement of *complete communities*, municipalities will consider the use of available tools to require that multi-unit residential developments incorporate a mix of unit sizes to accommodate a diverse range of household sizes and incomes.
  4. Municipalities will maintain at all times where development is to occur, land with servicing capacity sufficient to provide at least a three-year supply of residential units. This supply will include, and may exclusively consist of, lands suitably zoned for *intensification* and *redevelopment*.
  5. When a *settlement area* boundary has been expanded through a *municipal comprehensive review* in accordance with the policies in subsection 2.2.8, the new *designated greenfield area* will be planned based on the housing strategy developed in accordance with policies 2.2.6.1 and 2.2.6.2.

### **The public interest, prematurity and other similar concepts**

Although the variances are not before me, Mr. Benczkowski forthrightly agreed that there seems to be some issue with lack of variance for building height variance; the plans show 9.11 m building height and the Committee gave permission for only 8.31 or 8.81m. Mr. Benczkowski was not retained for the minor variance application nor was he instructed to defend the minor variances, so he was not able to explain this apparent discrepancy.

While a granted severance forms part of the existing character, I have to be careful to read each decision to weigh whether my thinking is consistent with the previous decision-maker's findings. In *Katsis*, the OMB allowed Mr. Katsis to be granted a half year adjournment, once four residents appeared. The reason for the adjournment, which appears to be contrary to the OMB rules, was to retain counsel and a planner to "deal more efficiently with planning matters regarding the consent application".

In my own case of 94 Pitt, *Chowdhury*, I granted a consent on an ex parte basis by telephone at the request of Mr. Chowdhury's solicitor, who seeing no opposition, saw no point in waiting for the hearing date. Like the OMB member in *Katsis*, efficiency was privileged at the expense of other considerations.

A final issue is Mr. Benczkowski's evidence on section 2(r) of the *Planning Act*, matters of provincial interest, which directs me to examine whether development promotes a built form that

- (i) is well-designed,
- (ii) encourages a sense of place,

I am not sure that the integral garage plus two stories above is "well designed"; Mr. Benczkowski criticized this design in another severance case I decided, 50 Presley, *Khan*, on the other side of Pharmacy. Again, different time and different place. But the plans show many windows on the north elevation, facing the park, "eyes on the street and a sense of place." The Committee did not impose any conditions on Mr. Ashraf to require these windows.

This is clearly not Mr. Ashraf's or Mr. Benczkowski's fault and had the variances come before me along with the severance, these irregularities could be corrected. But this does not help me conclude that this is a proper and orderly development of the municipality (s. 53(1)).

### **Conclusion**

I am unable in all the circumstances of this case to find the core test of respecting and reinforcing the existing physical character of the streetscape, pattern of buildings and pattern of open spaces is met. The consent would be destabilizing and

would be poor planning. Since it does not conform to the Official Plan, it should not be granted.

**DECISION AND ORDER**

The appeal is allowed; a consent to sever 103 Westbourne Avenue is refused.

X



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