Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, November 20, 2018

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): BABAK ZARGHAMI

Applicant: JANICE ROBINSON

Property Address/Description: 82-84 EMPRESS AVE.

Committee of Adjustment Case File: 17 136483 NNY 23 CO (B0027/17NY), 17 136480 NNY 23 CO (B0028/17NY), 17 136546 NNY 23 MV (A0347/17NY), 17 136833 NNY 23 MV (A0349/17NY), 17 136838 NNY 23 MV (A0350/17NY)

TLAB Case File Number: **17 273216 S53 23 TLAB, 17 273217 S53 23 TLAB, 17 273218 S45 23 TLAB, 17 273219 S45 23 TLAB, 17 273220 S45 23 TLAB**

Hearing date: Tuesday, November 13, 2018

DECISION DELIVERED BY Ian James LORD

APPEARANCES

NAME	ROLE	REPRESENTATIVE
JANICE ROBINSON	Applicant	
BABAK ZARGHAMI	Appellant	AMBER STEWART
		MEHRAN HEYDARI
TJ CIECIURA	Expert Witness	
CITY OF TORONTO	Party (TLAB)	PERSIA ETEMADI
		MATTHEW SCHUMAN
SEANNA KERR	Expert Witness	
XIN ZHOU	Expert Witness	

KIT WAN	**Participant**
MICHAEL JUNG	**Participant**
INSUNG JUNG	**Participant**
HOI YEUNG	**Participant**
LAURIE A RUSCICA	**Participant**
NANCY WILEY	**Participant**
SYLVANA CAPOGRECO	**Participant**

INTRODUCTION

This matter consists of five decisions of the North York Panel of the City of Toronto (City) Committee of Adjustment (COA) refusing two severance applications and three variance applications (Applications) in respect of two properties municipally known as 82-84 Empress Avenue (subject property). As an overall objective, the severance components were in aid of dividing the subject property into portions for the purpose of lot additions to create a new building lot. In effect, three lots would be created from two. The three variance decisions, identified as being applicable to Part 1, Parts 2&3 and Part 4, are in aid of permitting three two-storey detached replacement dwellings, one per lot; the existing dwellings on the subject property would be demolished.

The Appellant appealed each of the refusals. In the time between the COA decision and Toronto Local Appeal Body (TLAB) Hearings, several modifications were made to the Applications. However, the essential character of the overall objective remained.

BACKGROUND

The TLAB had the benefit of two full days of evidence on the Application, both running well past 5 pm. In that process, it heard from two professional land use planners who were qualified to give expert opinion evidence, and five residents opposed to the approvals sought. While several other Participants registered and attended, those that spoke and who attended, virtually throughout both long sittings, were: Hoi Yeung; Laurie Ruscica; Insung Yung; and Kit Wan. These residents spoke on May 6, 2018. The Hearing was unable to reassemble until November 13, 2018, for the continuation and consideration of the evidence of the City planning witness, and extensive closing argument.

The subject property is situated east of Yonge Street between controlled intersections at Yonge Street and Willowdale Avenue (and, ultimately, Bayview Avenue), in the east. While the subject property is located more proximate to Yonge Street, Empress Avenue is divided roughly in half by Willowdale Avenue, running north

south. The subject property is roughly mid-block between the north/south more local roads, Doris Avenue on the west and Kenneth Avenue on the east.

While the lands west of Willowdale Avenue were described by both planners as a component of their respective study areas, Empress Avenue, perhaps as its name acknowledges, is the only substantive east/west collector street accessing from the east the central hub of the former North York City Centre, a dense concentration of high rise business, commercial, institutional, residential, civic and entertainment district buildings.

The role of Empress Avenue in recent years has been underscored by the local road pattern. A planned and constructed ring road system, encircling the City Centre node and to the west of the subject property, has seen the termination of multiple access points isolating the lands north and south of Empress Avenue from serving as access points to the neighbourhood, however defined. Very restrictive parking standards apply on Empress Avenue and on all or most of the local streets within several blocks of the subject lands and east of the City Centre node.

In addition to the east west boundaries of the ring road and Willowdale Avenue, a central feature of lands in proximity to the subject property is the presence of Earl Haig Secondary School (aka Earl Haig Collegiate Institute), a prominent, land extensive facility notable for its scale, parking and sports facilities and large student population.

In terms of the setting, the effect of the above attributes is to create a residential enclave of local streets with limited accessibility, in close proximity to major facilities. Fanning out from the central school are blocks of primarily single detached residential dwellings, which, on the evidence of the planners, contains a variety of one storey and low rise residential structures of varied architectural design, some age distinctions and parking solutions. More distant, the area, particularly to the south and west and blocks distant, is replete with higher density forms of residential and office buildings, including low, medium and high rise apartment rental and condominium buildings. These latter conditions played no part in the evidence presented at the Hearing.

The Applications entail a somewhat novel but by no means exceptional consideration and variation on the more common division of a single lot. Engaged, is said to be a more ‘gentle’ form of intensification: the provision of three lots from two.

MATTERS IN ISSUE

Consent applications coupled with multiple variances invoke all the statutory directions listed below, under ‘Jurisdiction’. The proponent, and in this case the Appellant, is called upon to demonstrate to the satisfaction of the TLAB that these elements have been satisfactorily addressed. In this case, that focus was sharpened by the role of the City which called evidence and argument generally in respect of several matters but in the main focused on the resultant effect of the Applications on the ‘size and configuration’ of the lots and their consequence, particularly in relation to the goals and policy of the City Official Plan. Multiple related measures were directed towards the statutory considerations applicable to both the consent and variance jurisdictions.

The evidence on all matters is canvassed below, noting areas of agreement and essential differences in land use planning opinion.

For the Participants, the policy debate was largely left alone. Their appreciation of impact and area character was routed in their experience with their properties, living environment, attributes and individual concerns.

None of the evidence, respectfully, was novel or unique. Its application, however, was put to a high standard of distinction, word parsing, policy and interpretation principles and references to jurisprudence.

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

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

EVIDENCE

Two senior planners were qualified as described: Mr. Cieciura for the Appellant; Ms. Kerr for the City. Neither were challenged as to their credentials and nothing ensued other than to consider their evidence as equal professionals, each of which had comprehensively address their minds and professional capabilities to the Applications in formulating their opinions.

It would be a tautology to relay that those opinions differed, in opposites, in their recommendations. It is therefore instructive to identify areas of agreement as between

them, both on matters of fact and approach. This permits a consideration of their differing advice.

In reciting areas of agreement, there is no intent to diminish the scope of research and preparation undertaken in the preparation of their respective opinions. Both delivered thorough and creditable assessments and support rationales, as might be expected from well-established members of the planning profession.

Substantive areas of accord in no particular order of weight included the following:

1. Provincial policy supports 'intensification' in built-up areas, subject to the qualifier that it is the City Official Plan that is directory to establishing the qualifying areas for residential intensification. The City Official Plan has designated such areas by land use classifications that does not include designating 'Neighbourhoods', in which the subject property is located. That said, Neighbourhoods do not preclude forms of intensification 'where appropriate' in conformity with the policies of the Official Plan.

   Caveat: Ms. Stewart argues that in the event of a 'draw' in the opinion evidence, provincial policy cannot be 'brushed off' by deferring to the Official Plan. In that circumstance, the decision should follow the evidence of Mr. Cieciura, namely that the Applications further provincial policy directives for intensification and that should be preferred and given effect.

2. The revisions to the Applications, including the list of revised variances (Exhibit 1) and as codified in the Plans (revision 7) attached to and as detailed in Ms. Stewart's covering letter dated May 7, 2018, all filed as Exhibit 2, are minor, constitute 'improvements' to the Applications, and do not require further notification or circulation pursuant to the relief available in section 45 (18.1.1) of the *Planning Act.* No resident Participant raised any contrary position. The Hearings proceeded on this basis.

3. The variances (Exhibit 1). Apart from the issue of Official Plan conformity raised by aspects of the severance and overlapping considerations of the variances, primarily for relief from a reduction in lot frontage and lot area, no serious challenge, as between the planners, was mounted in respect of: side yard setbacks; lot coverage; and building height in respect of any of the Parts, or in relation to either applicable zoning by-law (New -569-2013; old-7625). It was acknowledged that the proposed dwellings are otherwise within their by-laws building envelopes and that the proposed west lot had a reconfigured driveway, to avoid tree impact.

4. Their respective Study Areas, to identify neighbourhood character, while different, had no compelling distinctions as to identified attributes, that influenced their respective opinions. Mr. Cieciura's Study Area comprised

672 lots, and incorporated more lands to the north; Ms. Kerr's Study Area included 410 lots. Both included modest pockets of a zone category of lesser frontage and lot area standards, identified in the evidence and discussed differently. The majority of the Study Areas consisted of the zoning applicable to the subject property requiring a 15 m frontage and lot area of 550 m2. The Applications proposed 10.16 m frontages and lot areas of 387.95 m2.

5. Statistical measures of lot frontage and lot areas were provided by both planners for their respective Study Areas. While in substantial agreement, the numbers are instructive in assessing these singular measurements of area character:

By Study Area	Cieciura	Kerr
Lots at 10.16m or less	9.4%	12%
Average Lot Frontage	13.94 m	14.2 m
Zoning Frontage Met	64%	77%
Lots at 388m2 or less	11.9%	
Zoning Area Met	63.5%	82%
Empress Compliance	Majority	92%
Potential Precedent	17 pairs; 10 on Empress	Examples

6. There are multiple examples on the Study Areas of the proposed built form in respect of attributes of two storeys above an integral garage, with access driveway and side entrance above grade. The proposed size of dwelling, at 2571 ft2 was not in issue as between the planners, beyond its building envelope placement.

7. Conditions of provisional consent and variances were agreed, including the TLAB Practice Direction 2, a road widening on Empress Avenue to 23 m, requirement of City Departments, Engineering Services, Urban Forestry and including Exhibit 5.

Mr. Cieciura, in addition to the above, supported the applications addressing provincial policy, the statutory considerations in section 51(24) of the Planning Act and the traditional tests identified for each variance, individually and collectively identified under section 45 (1) of the Act. He left no stone unturned in support of the revised plans, Exhibit 2. His Witness Statement was filed as Exhibit 3.

Through a photographic study, lot area, lot frontage and severance analysis mapping aids, he concluded that: the proposal was not without precedent in his Study Area; the variances and their dimensions were "within the range" of existing and prior approvals; further, the resulting built form would be characteristic of multiple images presented. He noted a similar assembly not far distant at 76, 78 and 80 Kingsdale Avenue, creating lots of a lesser frontage and area than that proposed.

He freely acknowledged that on Empress Avenue "there were no aberrations from the new zoning by-law standards", but that the creation of three lots from two was a form of 'gentle intensification', the modest addition of one family to the neighbourhood. It was his opinion that the new RD zoning standards for lot frontage, area and other performance standards were reflecting existing conditions and were not "intentionally promoting lots of those sizes".

He felt that there were precedents for the Applications and that although he had looked at other pairs of original housing and lots capable of assembly (17 in the Study Area; 10 on Empress), he felt the rigidities to assembly could take years, if not decades, to unfold and that they would not constitute a flood or destabilize the community.

In cross examination, Mr. Cieciura acknowledged that the streets around Earl Haig Collegiate, namely Empress, Princess and Hillcrest Avenues, exhibited zoning compliance for lot frontage and area, consisted of larger lots uniformly in the biggest category. He agreed that the Official Plan did not direct intensifications to the Neighbourhood designation and that a 'higher standard' applied to the severance application as against Official Plan conformity than that for the variances; and that adding a new house constituted physical change, including agreeing that there is a distinguishable difference between 10 and 15 m lot frontages.

He acknowledged that the approval of the Applications on Empress Avenue would be used in the same manner as his reference to the project referenced on Kingsdale Avenue, under construction: it would be part of the existing physical character and to that extent, constitute a precedent.

The local area residents spoke to matters of concern to them personally, their experience and their perception of their environment, not planning policy or regulation.

Hoi Yeung (78 Empress Avenue) rejected the reference to Kingsdale Avenue, citing it not being the main corridor and of a different lot character. The concerns were safety arising from increased intensification, a 'big wall' adjacent, loss of privacy, sunlight, views and similar "human issues".

Laurie Ruscica (67 Kingsdale) read a joint statement from her neighbour as both back onto the subject property and the proposed three lots. Citing similar concerns, she went on to describe traffic congestion and deficient parking associated with the Collegiate, the dwarfing of adjacent housing and she lamented the loss of open space by the proposed increased coverage from the existing norms.

Insung Jung (86 Empress Avenue) spoke to the environmental and conservation degradation to the area stemming from increased housing density and larger houses. In his view "more is too much"; that the 'special area' around the Collegiate demonstrates a stability of a large lot environment , unlike the diverse variety of lot sizes on Kingsdale, that, on the submission made, warrants the School area being given 'people consideration'.

Kit Wan (78 Empress Avenue) spoke as a 20 year resident describing the area character as one of 'spacious, older trees'. Actual lots were noted as large and effectively perceived as 50 foot lots without being distinguishable and 'other streets' were not felt relevant. Similar concerns for traffic, loss of sun and sky view and potential damage to an existing carport were listed as impacts suffered from extremely high, narrow houses from which continued by law protection was felt owed.

Seanna Kerr, in addition to the above listed areas of general consensus, challenged the Applications with reference to the City Document Book, Exhibit 5 and her Witness Statement, Exhibit 6.

Her thesis of emphasis centred on the severance considerations, identified above as section 51(24) c) and f):

> '(c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
>
> (f) the dimensions and shapes of the proposed lots.'

These considerations in her evidence were transferred as well to the variance tests and a failure to meet each.

Using mapping, photography and summaries, Ms. Kerr made the following evidentiary findings and her opinions thereon:

1. The smaller lots that figure into the percentages above noted, are located in the periphery or 'edges' to her Study Area where the zone category R6 is located, involving a lot frontage standard of 12 m and a lot area requirement of 370m2. She asserted that 88% of the lots in her study area exceeded the lot frontage standard for the proposed lots. Further that of 22 severances in her study area, all typically were located outside her central area.

2. She described her Study Area as having two area character components: a central area, being centred two streets from Earl Haig Collegiate and including the streets of Empress, Princess and Hillcrest, and the balance being the periphery. Nothing, according to her, turned on the nomenclature used to describe this differential, including reference to 'interior' and 'edge' conditions. On Empress, she observed all lots complied with their applicable zone categories, RD (and R4 old), and R6, and that all lots on Empress Avenue complied with or exceed the minimum lot frontage requirement of 15 m (and 12 m near the Willowdale Avenue intersection). Conversely, all lots created by severance (24 in total) have occurred outside of her central area.

3. The Applications would constitute the smallest lots on the block fronting Empress, the street of Empress Avenue (within the Study Area) and in all of her central area. She said that majority of the lots on Empress Avenue (93 of 115 lots) are greater than 15 m in lot frontage and none are under 12 m. The approval of the Applications would introduce a new lot pattern.

4. She identified her central area as having readily visible 'on the ground' character identifying elements: significant frontages (12-24m); large lawns, green space, landscaped open space; principle rooms at grade; narrow drives. In contrast, citing a smaller lot frontage pattern on Kingsdale Avenue, especially with new builds, she observed narrow frontages, reduced lawns and minimal landscaped open space, pronounced drives and elevated principle rooms, being a distinctly observable physical character despite some built form descriptors.

5. She attributed this distinction to the twin measures of reduced lot frontage and, less prominently, lot area, both components of the 'dimension and shape of lots'.

6. From the distinction observed, she opined that the introduction by the Applications of three contiguous lots with 10.61 m frontages in the location proposed mid-block on Empress Avenue would be contrary to the Official Plan objectives, disrupt neighbourhood stability (section 2.3.1), fail to respect and reinforce the established lot pattern and physical character of lots and open space, contrary to the obligation (section 4.1) to 'fit' into the physical pattern and reflect sensitive and gradual change. She noted the criteria for compatibility in section 4.1.5 of the Official Plan includes consideration of 'b) size and configuration of lots' and is accompanied with the admonition that "no changes" are to occur through public action, including severances and variances, that are out of keeping with the established physical character of the area.

The section reference (excerpted) of 4.1.5 reads as follows:

> "5. Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular:
>
> b) size and configuration of lots;
> f) prevailing patterns of rear and side yard setbacks and landscaped open space;

g) continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood; and

No changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood."

7. In her opinion, the Applications in the central area, where large lots and lot frontages greater than 12 m and are consistent, do not meet the intent and purpose of the Official Plan to be in keeping with the physical character of the neighbourhood. It could precipitate applications and could destabilize the neighbourhood in a manner not in conformity with Section 51 (24) f). The Applications constitute the first consents to be sought on Empress Avenue that do not conform to the standards of the applicable zoning by-law. In her opinion, they fail to respect and reinforce area physical character experienced to conform with, 'f) the dimensions and shapes of the proposed lots.'

8. As well, the Applications fail 'the general intent and purpose of the Official Plan', the test for the variances seeking lot frontage and lot area reductions. Substandard lot areas and frontages, in her view, do not respect and reinforce 87% of the lots that are larger, offer identified attributes of character distinction and are part of the established physical character of the subdivision lot pattern. They represent a loss of character of open space, trees, large lawns, and settings for homes with principle rooms having eyes of the street.

9. In a similar way, she provided the opinion that varying the longstanding and re-affirmed zoning standards for frontage and area, erodes the character elements that the zoning by-law maintains of larger frontages, areas, lawns that today demonstrates an "overwhelming similarity" within the central area. She did not rely on OPA 320 to support her consideration of the character distinction of the central area, but noted that Council's adoption supported the direction focusing the lens of consideration more succinctly to the location of the subject property. As such, it was her opinion that the relief sought from the prevailing zoning standards did not meet its general intent and purpose and was neither appropriate nor minor given the adversity of impact on lot pattern and character.

In cross-examination, Mr. Kerr readily acknowledged that the variances requested flowed from the proposal to sever to create the smaller lots and that her principle focus was lot frontage. She did not concede that the lot area reductions sought were unimportant. Nor that her failure to dwell on other relevant considerations

such as provincial policy, built form policies and Application specific variances was anything other than to focus the issues.

Her evidence demonstrated those 'other matters' were not ignored; a consequence is, however, that except where she noted to the contrary, tacit consent to the evidence of the Appellant is given.

On balance, while it is troubling that no oral assessment is given of the 'other matters' from the perspective of how they affect her opinion, there was nothing elicited in the evidence or cross-examination that she was not alert to her role as a planner or that she had not performed it diligently.

She acknowledged the need for a comprehensive reading of all policy and documentation and to balance and reconcile it in its entirety and resolve a planning opinion. The fact that she came down to one or two principle implications, with offshoots, is not counterproductive to this process. Indeed, neither planner demonstrated any particular policy that 'overrode' the application of a principled analysis.

In an extensive and well organized cross-examination, Ms. Kerr was forthright and agreed the province mandates an intensification strategy for 'built-up areas'. Ms. Kerr said the City has a strategy that did not direct, generally or specifically, intensification by way of severances to the Neighbourhood Official Plan designation.

She acknowledged that a severance was not prohibited in a Neighbourhood and that such can be appropriate if it complies with policy criteria and does not destabilize the physical character attributes of a neighbourhood. She felt the lot pattern is basic to a consideration of change and needed to be considered 'first and foremost' and prior to testing compliance to the built form policies applicable to proposed buildings.

Ms. Kerr was taken to the following passage in Chapter 4.1 of the City Official Plan:

> "While communities experience constant social and demographic change, the <u>general</u> physical character of Toronto's residential Neighbourhoods endures. Physical changes to our established Neighbourhoods must be sensitive, gradual and <u>generally</u> "fit" the existing physical character. A key objective of this Plan is that new development respect and reinforce the <u>general</u> physical patterns in a Neighbourhood." (emphasis added)

She was asked to acknowledge that a rigid representation of neighbourhood character was not mandated given the three fold use of the word "generally".

The quotation is part of the preamble, not the policy wherein the 'existing physical character of the area, is the descriptor (see: *Bahman-Bijari v. Toronto (City)*, OMB (PL140943) and *Cai v.Toronto (City)* OMB (PL151262)) where the distinction was

avoided). She replied that Neighbourhoods had diverse patterns, as was her opinion here and the reason for her identification of its consistent lot pattern. She responded as well that she had looked at near and far patterns and that neither was precluded by the Official Plan. In assessing whether the Applications respected and reinforced the physical character of the area, she agreed replication was not required and a test was compatibility; she found that the proposal was not found at all in her central area, a common sense interpretation of the combination of her statistical measurement and 'on the ground' observations, to achieve the existing physical character.

She preferred consistency in the lot pattern to maintain a stable environment.

She acknowledged that the Official Plan did not emphasize 'lot frontage' but said frontage is a factor in 'size and configuration of lots', and a noticeable physical characteristic in this circumstance with uniformity and a presence of large lots demonstrated on Empress Avenue, Hillcrest and Princess Avenues.

She agreed that there was a variety of (larger) lot frontages on the streets named but also smaller lots in an undefined circle around the subject property, some demonstrating adjacent differences of several metres.

She felt the Applications would break the physical character and pattern of lots and the physical character of their development would change the characteristics experienced and described earlier: the expansive feeling of landscaping and open lawns, different house forms and room to vary plantings and driveway width.

No reply evidence was called.

ANALYSIS, FINDINGS, REASONS

I agree with the statement made by Ms. Stewart that in this case, 'not much turns on the Study Areas chosen by the planners'. The City Study Area is smaller, but the statistical measures yield roughly similar results.

A Study Area and its analysis performs a role rarely canvassed by lay citizen evidence. It permits the planner to identify the features and functions of an area, describe them with precision, including statistics, and draw comparisons with similar fact situations or applications under review.

Here, while not completely interchangeable, the planners did their respective examinations. Mr. Cieciura was frank to acknowledge characteristic variations in the Study Area going to character; Mr. Kerr focused on those variations to define two 'character areas' and apply conclusions to both, inclusive of her focused opinion of the applicability within her more 'central area' of the Applications and their consistency.

Ms. Stewart provided a case law compilation of 13 pages and submitted full copies that followed. Her purpose was to show excerpts of decisions as to what the Official Plan policies employed in this Hearing say and mean. Mr. Schuman provided three tribunal case references he felt germane to the determination of the issues narrowed in the Hearing.

I find that I must first deal with the suggestion that the Study Area is the 'neighbourhood', for the purposes of applying Official Plan policies of Chapter 2 (Shaping the City – including 'Stable but not Static/Healthy Neighbourhoods), Chapter 3 (Building a Successful City – including Built Form (3.1.2), and Chapter 4 (Land Use Designations – including Neighbourhoods (4.1).

In reviewing these provisions, I agree with the evidence of the witnesses and the argument of counsel that a 'Neighbourhood' used as a land use designation, and a neighbourhood, as used in the policy language, can have more than one existing physical pattern.

I agree that neighbourhoods need to be comprehensively evaluated and that some character attributes lend themselves to statistical description. Policy language effectively directs that something more that opinion is required to measure the descriptors such as 'prevailing'. Statistical assessments can be helpful but elementary mathematics suggests that statistics on their own do not 'prove' anything.

And I agree that even dramatic statistics ought not to be automatically substituted to establish a hierarchy for the consideration of criteria or validate a propensity to weigh assessment criteria disproportionately. In every circumstance, the planner, assessor and trier of fact must stand back and apply reality and common sense to the information presented.

In accepting that a neighbourhood can exhibit one or more character attributes, what then is the appropriate scale of the character area and the relevance of the attributes? Can they be singular? Must they be of a type listed by reference or inference in section 4.1.5 of the Official Plan? Must it have a geography that meets a particular scale, neither too small nor too large?

Across the City, the TLAB has dealt with applications requesting the recognition of a multitude of 'features' or 'attributes': environmental; built form; heritage; accessibility; irregular residual parcels; districts; topography; views; architectural design; materials; even 'legitimate expectations'.

In my view, the diversity of the City is such that the assessor of character must not only be alert to local conditions but cannot allow a single measure to cloud a balance assessment of all relevant considerations.

I do not read the present City Official Plan to create any hierarchy or method of assessment. Nor do I see it confining the assessment to a discrete list of relevant criteria or focus the assessment on any minimum standard of proximity or distance.

Both planners and counsel indicated that OPA 320, now the product of a settlement agreement in an as-yet unreleased decision of the Local Planning Appeal Tribunal (LPAT), may contain further direction as to the specificity of areas of analysis concentration. That document is not yet an approved policy guide, although, as Ms. Kerr said, its adoption by Council suggests – as the Planning Act does elsewhere (section 34) – that 'areas' large and small may be appropriate for consideration.

I find that the Official Plan, in its use of language and in its plain and ordinary meaning, does not mandate any definitive scale of 'study area' to assess the 'physical character of an area'. I find that the Official Plan identifies certain obvious physical characteristics for consideration in section 4.1.5 but that that list is not closed. The reference to "including in particular" suggests that City policy is to remain open to elements of established physical character that warrant considerations of 'fit', 'consistency', 'stable' and 'respect and reinforce'.

I find that those attributes may be singular (St. James Cathedral; a place of worship; Casa Loma) and their geographic extent may be large or small.

It is this fluidity that places the planning profession as the first line of assessment. It is that cadre that must examine the circumstances, sort the variables, assess their relative merit, weight or balance, and draw informed planning opinions. This is not to say that a lay citizen cannot spot or is unable to appreciate a feature of physical character warranting preservation, enhancement or respect. Rather, it places the planner in the role of a trained appraiser, setting aside personal biases and conducting a balanced assessment supportable for rendering an independent professional opinion, within the context of policy direction and the application of accepted principles of good community planning.

In my view, that process, perhaps unique from what a concerned neighbour may be able to apply, allows the planner to sort from all the relevant variables those that constitute a compelling rationale for the foundation of their opinion. I find there is nothing inherently wrong in the planning profession curtailing the description of their assessment to the recognition to a few variables, or even one, where circumstances warrant, and it can be demonstrated that an open, inclusive process had been followed.

I find that where an attribute of physical character is identified and acknowledged, the more difficult task is to provide it a proper, fulsome assessment. Inevitably, this requires 'on the ground' observation. It should also benefit from a plan, program or undertaking to ensure its observation is neither casual nor superficial.

An aspect of that evaluation, often employed, is the decision to construct a 'study area' or areas and apply, via data sets, statistical measures of description. In this case, both planners have done so and, to a significant degree, express consensus on those statistical measures. What I find not acceptable, is the justification of an application based on large study area statistics that present a range of findings: heights; lot areas;

frontages; setbacks; character attributes, followed by the conclusion that the application 'falls within the range experienced in the study area' (i.e., neighbourhood).

In my view, such an approach is unhelpful unless further refined to articulate relevance to the subject site. In a City as diverse and with the longevity of its neighbourhoods, such ranges can be meaningless, an abuse and do a disservice to the policy intent directive to assess the 'physical character of the area' in the context of that application.

In the circumstance here, I find that both planners acknowledge there is a geographic area, described by Ms. Kerr as her 'interior' or central area and possessing an individuality and character of its own. I find that it is not 'too small' to warrant consideration, being described as a three block radius around the neighbourhood focus, Earl Haig Secondary School. I find that this area, including the study areas of both planners, is an appropriate geography of a neighbourhood consisting of bounded streets, the central school and developed by registered plans of subdivision within the past 50-75 years of modern land use planning practices.

I find that the more recent planning priorities of the former City of North York have 'walled off' this neighbourhood from the development of the City Centre, in an effort that has both protected it from traffic infiltration, but also reconfirmed its role as an established neighbourhood of, predominantly, single detached dwellings.

I accept Ms. Kerr's finding that there are different character attributes identified that distinguish the subject property and its surroundings from a broader assessment of 'ranges' of performance standards and statistical measures. I find that this assessment and its description by Ms. Kerr was not unduly focused on lot frontage and area to the exclusion of other relevant considerations. I accept her appreciation of an 'on-the-ground distinction of area character, worthy of consideration.

I have considered the language employed by Member McKenzie of the LPAT, formerly the Ontario Municipal Board, that there is no policy basis for 'anatomization' or the separating out of a policy basis or measure or break out of a neighborhood for differing considerations on that basis (see: *Mahmoudi v. Toronto (City)* OMB (PL120799)). I saw nothing in the evidence or cross-examination of the witness Kerr that suggested that had occurred. To do so would be '*reductio ad absurdum'*. She was frank in her consideration of all relevant criteria not just visual observation; none were found to have been ignored, not the 'Built Form' criteria or the more visceral components of the potential for impact of the variances on the neighbours. The focus of evidence ('surgical evidence', to use Mr. Schuman's term) on the assessment criteria sorted as determinative of an opinion is a far different matter than closing one's mind to anything but those identified assessment criteria. Both planners used 'percentages and majorities', even predominance in some categories, but not to the exclusion of other character attributes.

I find Ms. Kerr had experienced and intimate knowledge of the area, performed the on-the-ground observations necessary, properly identified a character area with

discernable and distinct attributes of sufficient scale and provided an assessment of the consistency of that pattern that can be relied upon. Namely, that the permission to sever and build three uniform dwellings on undersized frontages (on average, almost five metres narrower than reconfirmed zoning requires, at 15 m) of the scale and massing proposed, and with undersized lot area, presents an observable character change that is abrupt, unprecedented, not compatible and inconsistent with the 'front rooms' of detached dwellings over a significant geographic area represented by Empress Avenue, Princess and Hillcrest Avenues – not just one street or part thereof.

As in *105-107 Churchill Avenue,* TLAB (17-196095-99), I agree with the findings therein of Member McPherson. Here, the introduction of three 10.16 m lots on a block (including Empress and Princess Avenues) where substantively all lots have a frontage of 15 m or greater, does not respect and reinforce the existing physical character of the neighbourhood. The frontages are not common in the study areas with only 12% of the lots having equal or smaller lots. On Empress Avenue, there are no groupings of three small lots; approval of the Applications would be the first severance of two lots into three within the interior or central area, as defined by Ms. Kerr.

This is not to say that I have not considered the severance and assembly around the corner on Kingsdale, the examples of lots having variations, lesser and greater than 15 m in the immediate context, or the severance and construction under the R6 zoning standards at Empress Avenue and Willowdale. I simply do not find these (anatomizing) examples, or the consistency (predominance) of dwelling type, or being within the 'ranges' of measures presented, as being as convincing and compelling as the evidence of the Participants and the assessments of Ms. Kerr.

I find that the latter evidence was the surgical derivative of a fair consideration of all aspects of the Applications on their merits.

I have reached this conclusion without the need to employ the fear of precedent. Precedent and its potential is not an irrelevant consideration and both planners acknowledged that, to differing degrees.

I find that the test of conformity with Official Plan has not been met, particularly in the criteria enunciated by statute on the severance appeals respecting consideration of the 'shape and configuration' of the lots. This conclusion carries forward to the less strict 'general conformity' direction respecting the variance appeals. For the above reasons, I find that that the Applications, collectively, individually and cumulatively to not represent an assembly that would result in a product that fits, respects, reinforces or constitutes gradual change for the physical character of the neighbourhood. As well, for these reasons the variances do not meet the intent of the new zoning, are not desirable for the appropriate development of the subject property and, cumulatively, are not minor.

As such, I do not find it necessary to address each criteria or its application to the various elements of the Applications. I agree with the decision of the COA, albeit a rejection of an earlier version of the Applications. Correspondingly, there is no need to address agreed conditions.

In the result, I find it unnecessary to weigh further whether the thrust of provincial policy, generally supportive of intensification in built-up areas, need play any role here.

DECISION AND ORDER

The Applications and appeals are dismissed. The decision of the Committee of Adjustment is confirmed.

X 

Ian James Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord