Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Monday, December 24, 2018

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

Appellant(s): CITY OF TORONTO

Applicant: ARC DESIGN GROUP

Property Address/Description: 119 HAREWOOD AVE

Committee of Adjustment Case File Number: 17 236315 ESC 36 MV, 17 236319 ESC 36 MV

TLAB Case File Number: **18 167346 S45 36 TLAB, 18 167348 S45 36 TLAB**

Hearing date: Tuesday, September 25, 2018, Friday, Dec 14, 2018

DECISION DELIVERED BY T. Yao

APPEARANCES

Name	Role	Representative
ARC Design Group	Applicant	
Muhmuda Khatun	Owner	
Mamunur Rashid	Party	Amber Stewart
Jonathan Benczkowski	Expert Witness	
City of Toronto	Appellant	Laura Bisset
Cecilia Wong	Expert Witness	

INTRODUCTION

Mamunur Rashid and Muhmuda Khatun own a 15.24 m wide lot containing a bungalow, which they wish to demolish and replace with two new single-family dwellings. They need seven variances:

Table 1. Variances sought for "119B Harewood" or Part 1; In brackets "119A Harewood" or Part 2

		Required	Proposed Part 1 (Part 2) *Italics reflect changes proposed at hearing*
Variances from new city-wide harmonized By-law 569-2013			
1	South (north) side yard setback	0.9 m	0.62 m (0.62 m)
2	Floor Area	0.6 times area of lot	0.64 times area of lot (0.65*), now reduced to .62*
3	Minimum lot area	464 m^2	318.25 m^2 (317.1 m^2)
4	Minimum lot frontage	12 m or 39.36 ft	7.62 m or 25 feet (7.62 m)
5	Lot coverage	33%	36.5% (37.5%) *now reduced to 35.9%*
6	Building Depth (front wall)	17 m	19.17 m (19.17 m), *now reduced to 18.56 m*
7	Building Depth (front setback)	19 m	20.24 m (20.23 m), *now reduced to 19.63 m*

BACKGROUND

There is no request for a severance. Initially the owners thought a severance was needed and so they applied for both a severance and variances Over the course of two hearing dates at the Committee of Adjustment (September and December, 2017), they discovered that they owned two whole lots of record on a Registered Plan of Sub-division. Their **survey** (Diagram 1, next page left) shows 119 Harewood, described by the surveyor as "Lots 297 & 298 on Plan 2541" . At this scale, the survey is hard to read, but it shows the current L-shaped bungalow with the left-hand side facing

Harewood (on the left, out of the picture). Side yard setbacks are an issue, so the reader should note that currently there is a wide south side yard provided by the north neighbour, of 5.83 m (19.1 feet). On the south side the bungalow is tight to the other neighbour's home. Even so, if the variances are granted, the new south side yard setback for 119 A Harewood[1] will be less what the south neighbour currently provides: 1.52 m, more than the minimum.

The owners withdrew the application for consent to sever, reapplied to the Committee of Adjustment on May 10, 2018, and were successful. The City appealed and so this matter comes before the TLAB.

The original application sought 11 variances, based on an examination by Paul Dhir, zoning examiner. He advised them that the proposal did not comply with minimum lot area and frontage requirements. Although these variance requests remain constant, changes to other dimensions, have been made, always downward, in an attempt to minimize the extent of the variances.

Diagram 1.
Survey May 2017

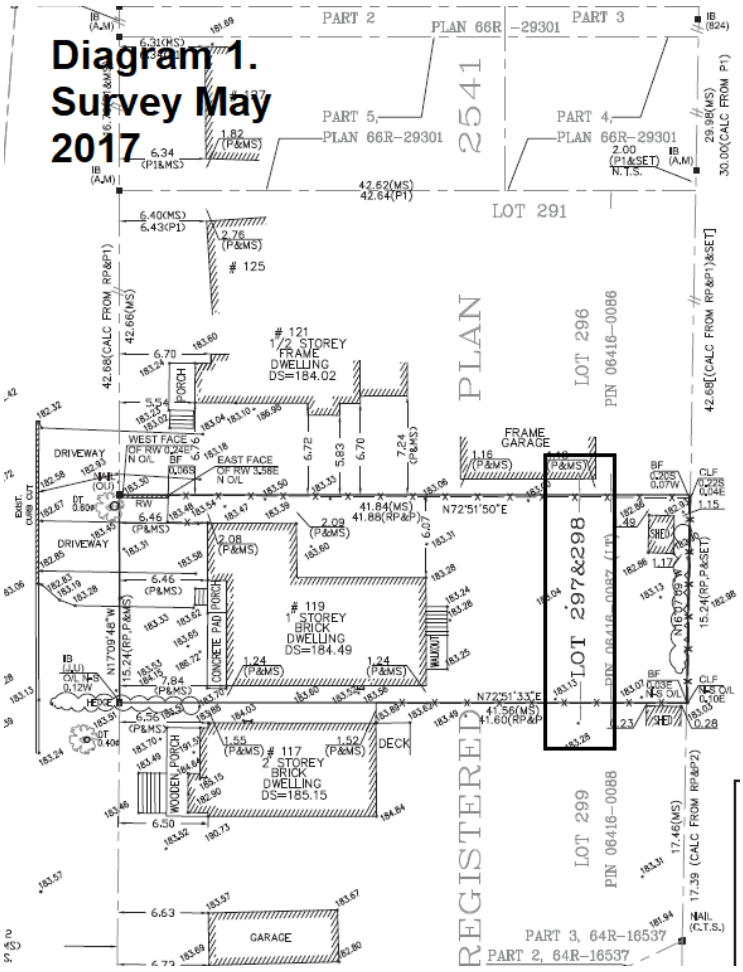


Diagram 1 to the right shows the survey the owners submitted to Mr. Dhir. It described the land as" Lots 297 and 298". But the proposal shows two houses on two 7.62 m lots. Mr. Dhir applied section 50.20.30.20 Minimum Lot Frontage to the proposed 7.62 m lo. Since the frontage requirement is 12 m, the lot does not comply.

EVIDENCE

I heard from Mr. Benczkowski, a planner for the owner and Ms. Wong, a planner for the City. Both were duly qualified to give opinion evidence in the area of land use planning.

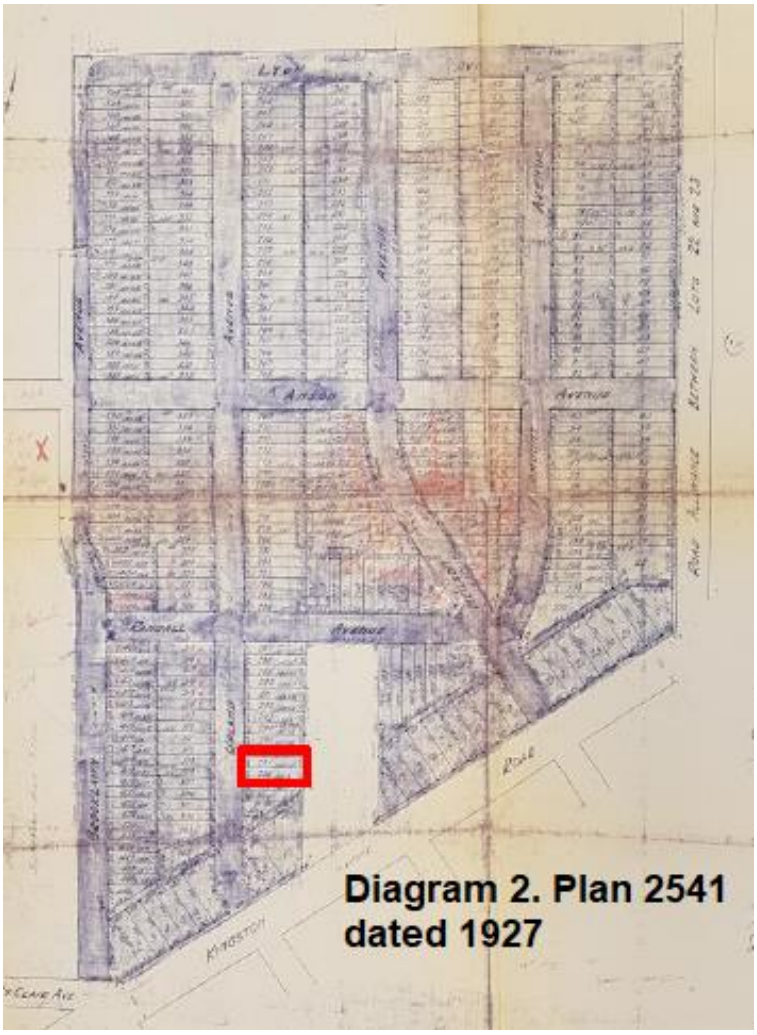
[1] The terminology "119A Harewood" was not used in the hearing, but this seems more comprehensible than "Part 1" and Part 2, which are numbered in the opposite sequence as the street numbers.

MATTERS IN ISSUE

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.

I must also be satisfied that the variances are consistent with the Provincial Policy Statement and conform to the Growth Plan. I do not find these policies applicable to this case.



The true purpose of this application is to create two *buildable* 25 foot lots from a 50-foot lot despite the fact that there is no severance being applied for. The owners deposited an R-Plan 66R-29875 dated Feb 26, 2018 and applied for separate pins, now granted. Although the owners can convey the lands separately today, the Buildings Department requires that lot area and frontage restrictions apply, which I think the owners do not dispute. However, the owners suggest that in making any finding, I take into consideration a **threshold legal argument** that because there are two separate lots of record, the frontages and areas are "lawfully existing". By this argument, in the opinion of the owners, those variance requirements should be ignored.

The threshold issue

This threshold issue requires some factual background, which was introduced through Ms. Wong's research and is relied on by the owners. **Diagram 2** (next page) is

Registered Plan 2541 was registered in 1927. The lands covered were roughly Horfield on the north (then called Eaton) to Kingston Road to the south. The west boundary was present day Randall Crescent (then called Brooklawn) to McCowan (which did not exist and is labelled "road allowance between Lots 22 and 23"). Randall has a north-south segment and an east-west segment. It is on this latter segment that 10A and 10B Randall were created by a 2016 OMB decision, to be discussed on page 8.

The subdivider envisioned that Brooklawn/Randall would continue south to Kingston Road from the point where the two segments turn the corner. Instead, residential lands backing on the even numbered Harewood lots (extreme lower left corner of Diagram 2) became incorporated into R. H. King Academy, presumably still as separate lots of record. The rest of the Plan developed as a residential subdivision with many if not most owners taking up **double** lots of record.

The Plan contained and contains 450 **single** lots of record, including lots fronting on Kingston Road. Ms. Wong found that of these, 97 are composed of double lots of record, like 119 Harewood. Each contains only one detached house.

The history of restrictions is as follows:

1945 An early by-law of the Township of Scarborough required that lots on both sides of Harewood (then called Upland) required a minimum frontage of 35 feet.

1960 The next zoning by-law is by-law 9396 (Cliffcrest Community), which states:

> Intensity of Use
> 4. one single-family dwelling per parcel having a minimum frontage of 12 m (40 feet) on a public street and a minimum area of 464 m^2.

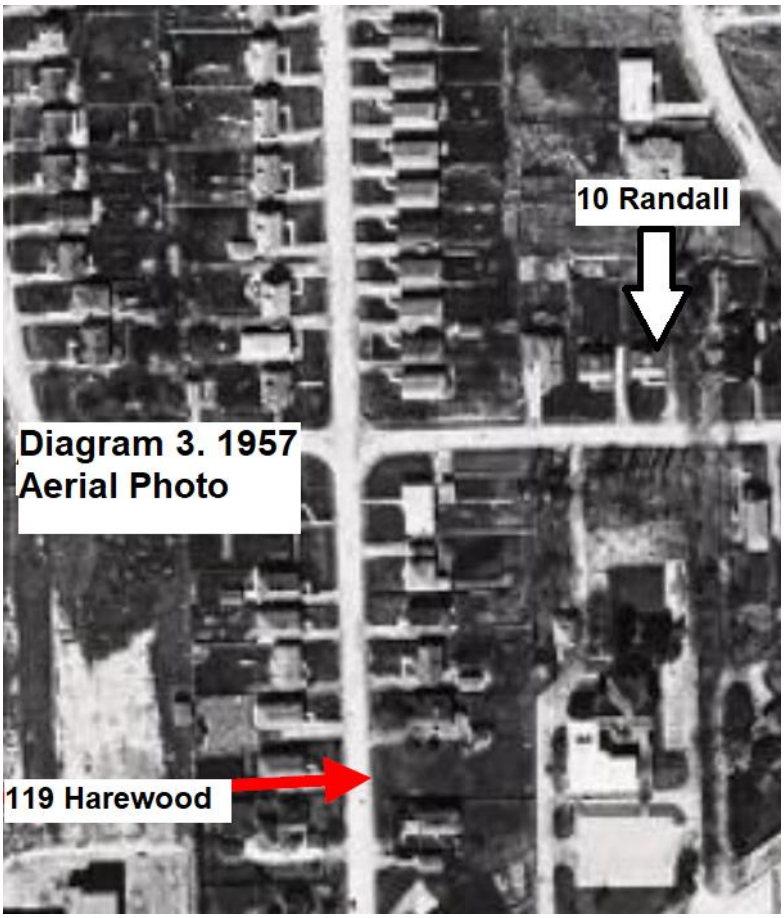
2013 Section 10.20.30.20 of zoning By-law 569-2013 states:

> In the RD zone. . .the required front lot frontage is 12.0 meters.

Plan 2541 was registered two years before the financial crash of 1929. The makers of the Registered Plan hoped to take advantage of an electric rail line along Kingston Road[2], which never materialized. (The lands are also in the vicinity of the present Scarborough and Eglinton GO stations.) From Ms. Wong's air photos, the most active phase of the buildout was 1950 onward, with the car-based expansion of this and other Toronto suburbs.

[2] As set out by OMB Member in the *10A-B Randall Crescent* case, describing the evidence of John O'Reilly, City of Toronto planner. PL150973 (page 8.)

This portion of the **1957 aerial photo** (Diagram 3 right), shows the block of Harewood just north of Randall Crescent. The regular spacing of driveways on both sides of Harewood north of Randall is evident. These later developed as uniform 11.3 m (37 feet) lots. The arrow points to 119 Harewood, as yet undeveloped, and to 10 Randall the site of the 2016 OMB decision.



The "lawfully" argument

Ms. Stewart (the owners' lawyer) argues that each of the lots of record can fall under exemptions as to lot frontage and lot area. Since they are both similar arguments, we will examine only the frontage exemption, which reads:

> 10.530.21 (1) Permitted Lot Frontage for Lawfully Existing Lots In the Residential Zone category, if the lawful lot frontage of a lawfully existing lot is less than the minimum lot frontage required by this By-law, that lawful lot frontage is the minimum lot frontage for that lawfully existing lot. (bolding left out)

There are two propositions to be proved to make this exemption work for Ms. Stewart: The first is that each lot has a "lawful lot frontage" under branch (A) of the definition of "lawful" in 800.50(405), in bold below:

> 800.50(405) Lawful and Lawfully means:
>
> **(A) authorized or permitted before a zoning or restrictive by-law applied;**
> (B) in compliance with the provisions of the applicable former general zoning by-law; or
> (C) authorized pursuant to a Section 45 Planning Act minor variance.

In reply to Ms. Stewart, Ms. Bisset argues that "authorized" has a precise meaning under s. 45(1) of the *Planning Act*, meaning authorized by a minor variance

given by the Committee of Adjustment. "Permitted" means permitted under a zoning by-law. "Restrictive" must refer to "restrictive area by-law", which is what zoning by-laws used to be called.

I agree with Ms. Bisset. There is a maxim in statutory interpretation that same words have the same meaning and different words have a different meaning. "Authorized" has the meaning she suggests, and this is made clear in branch (C), where the minor variance authorization is repeated. Going back to the word "permitted", this does not mean "unregulated", like pre-1945 Township of Scarborough days, but means "permitted" by something. The scheme of 569-2013 is to list under each of the zones "Permitted uses", see for example s. 10.5.20 "Permitted uses for the Residential Zone." There is no authorization or permission before 569-2013's adoption — lot 297's frontage of 7.62 m was not "permitted" under the Cliffcrest by-law nor under the 1945 by-law; both had minimum lot frontage requirements greater than 25 feet.

Ms. Stewart's second argument is that each lot is a "lawfully existing lot" under the definition of "lawfully existing" in

> 800.50(405) Lawfully Existing means:
>
> (A) existing **lawfully** on May 9, 2013;
> (B) for which a building permit was **lawfully** issued before May 9, 2013; or
> (C) for which a building permit was **lawfully** issued within three years of May 9, 2013 pursuant to Article 2.1.3, Transition Clauses.

Again, Ms. Stewart has to fit herself into branch (A), lawfully existing on May 9, 2013, which was the date of adoption of Zoning By-Law 569-2013. This returns us to "lawfully", just discussed. Lot 297 was not "existing lawfully on May 9, 2013" on the same reasoning. To take advantage of the exemption, both the "lawful frontage" and "lawfully existing lot" propositions have to be met and I find neither is.

There are two more aspects to this threshold argument. Ms. Stewart fairly conceded that the relevant provisions of By-law 569-2013 (defining "lawful" and "lawfully") are under appeal (marked in yellow in the Clerk's copy) and will not have the effect claimed until all appeals are disposed of. So, in December 2018, when the case before me was heard, it is not operative. Even if I were persuaded as to the "lawfully" argument, this appeal seems premature. The fact of these words being in yellow does not seem to have been drawn to the OMB Member's attention in the 1*0A-B Randall* case.

Finally, if Ms. Stewart has a dispute with the way Mr. Dhir has interpreted the zoning by-law, the proper course of action was to have brought an originating notice under the *Building Code Act* with the owners as persons aggrieved by a decision of the

Chief Building Official, where Mr. Dhir will have an opportunity to explain his position, instead of criticizing his conclusions collaterally in this forum.

To return to the issue of the relevant sections being marked in yellow, Ms. Stewart argued forcefully that in the event of a refusal, her clients could demolish the bungalow and reapply when the provisions under appeal are operative.

> Let me tell you another option that my client has. My client could demolish the house that sits there today, that could be done, with a building permit for a new house, demolition control, the *Planning Act* says you have to issue a demo permit. My client could demolish the house. Or even not demolish the house. **There's nothing that says you can't convey a lot with half a house on it**. Let's talk about a vacant lot, two vacant lots. My client could take and sell them on the open market, as a vacant lot, to whoever, unrelated arm's length third party, and what you would have then, sir, is two vacant 25 foot lots within the built boundary of the City of Toronto, and that is no different in my submission to you than 194 Randall, which is one existing 25-foot lot. My client would own one existing 25-foot lot and that other owner would own one existing 25-foot lot and it would be within their rights to apply to develop that lot without having a second minor variance application before you. The only difference we have today is that we have two applications coming before you jointly.

Ms. Stewart made this submission in closing argument after she had obtained the admission from Ms. Wong that the Planning Department would likely not oppose a lot frontage variance for 194 Randall, an existing 25-foot lot. (page 12). In this hypothetical future case, where the owner of 194 demolished her home and sought to replace it with a new dwelling, she (the owner) would need to show that lot frontage met the Official Plan tests. 194 Randall's owner would have a far easier time than the owner of 119A Harewood, since the existing pattern of lot frontages in this section of Scarborough has grown up around 194 Randall. Number 119A Harewood's 25-foot lot frontage is imposed on this existing pattern, after almost every other owner has bought a double lot and erected one house per parcel. (This is a very instructive example of how a small width lot, which predated the others, can reinforce the pattern of large widths.) But Ms. Stewart is correct, there is nothing in the *Planning Act* that prohibits a fresh application on possibly different facts.

The respect and reinforce test

The owners bear the onus to demonstrate they meet the "respect and reinforce" test in the Official Plan:

> 4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular:
> . . .
> b) **size** and configuration of lots;

> c) heights, **massing, scale** and dwelling type of nearby residential properties; (my bold)
>
> 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.

The test of respecting and reinforcing the existing physical character of the streetscape and open space pattern is repeated in policies 2.3.1.1 and 3.1.2.3 of the Official Plan[3].

The Study Area

First, I must ascertain the physical character. To this end, both planners have to establish and comment on a circumscribed study area. The evidence of Mr. Benczkowski was very limited, as he appeared to rely on Ms. Stewart's legal argument to support the requested reduction in lot area and frontage. By contrast the evidence of Ms. Wong was extremely thorough. Mr. Benczkowski said:

> In this case I didn't find it to be appropriate to do a lot study, . . . because the lots are existing within the area itself. They are registered lots, they are numbered lots.

33

•**Official Plan Section 2.3.1:**

By focusing most new residential development in the Centres, along the Avenues and in other strategic locations we can preserve the shape and feel of our neighbourhoods. However, these neighbourhoods will not stay frozen in time. 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.

•**Official Plan Policy 2.3.1.1**

"*Neighbourhoods* and *Apartment Neighbourhoods* are considered to be physically stable areas. Development within *Neighbourhoods* and *Apartment Neighbourhoods* will be consistent with this objective and will respect and reinforce the existing physical character of buildings, streetscapes and open space patterns in these areas."

•**Official Plan Policy 3.1.2.3:**

"New development will be massed and its exterior façade will be designed to fit harmoniously into its existing and/or planned context, and will limit its impact on neighbouring streets, parks, open spaces and properties by: a) massing new buildings to frame adjacent streets and open spaces in a way that respects the existing and/or planned street proportion; b) incorporating exterior design elements, their form, scale, proportion, pattern and materials, and their sustainable design, to influence the character, scale and appearance of the development;

I do not accept Mr. Benczkowski's excuse for not performing a lot study. People looking for a neighbourhood to raise their children, motorists passing through, or city planners asked to ascertain what is the existing physical character of the neighbourhood do not travel with a copy of Plan 2541, with one finger on s. 50 of the *Planning Act.* They assume that the lot line is somewhere between the built forms of residences. They do not assume that a seller will sell them half of their house.

Nonetheless Mr. Benczkowski did demarcate a study area —from Oakridge Drive to Kingston Road, Randall Crescent to McCowan Road, about half the size of Ms. Wong's study area. Ms. Wong's study area extends west to Midland Avenue. She states it has the same RD zoning, is "walkable interior neighbourhood", and has clear geographical boundaries. She stated that residents of Harewood would reasonably be expected to go to Anson Park or R.H. King Academy, steps from Randall Crescent. These places are in Ms. Wong's study area, but not Mr. Benczkowski's.

A study area is accepted methodology toward a finding of the character of the area and hence for Official Plan compliance. I accept that Ms. Wong's neighbourhood should be used,

The physical character of the neighbourhood

Mr. Benczkowski's description of the physical character of the study area was that it was "fractured":

> The general character really is a mix of architectural styles, built forms, and really a mix of one and two storey detached dwellings; there really is no uniform look to the dwellings
>
> What is the built form there? There really isn't a consistent one. Fractured I mean, we don't have that look of - even a subdivision where we may have three different styles of homes intermingled throughout a larger contextual area. Here there's a mixture of newer homes, of older one storey bungalows, some two storey, a little bit of everything. There is no built form throughout the area that you can drive through. It's not like driving through Leaside where you have that look that may be consistent or Lawrence Park where you have the centre hall homes. Here you have a little bit of everything, and even in term of the parking situation, where . . .some homes have a garage at the rear, some have an attached garage, some don't have a garage.

I do not feel it is helpful to stop the analysis once considerable diversity of built form is apparent. Particularly since the air photos show some regularity, there is an obligation to discern what common features remain, or if nothing remains, to explain how the proposal still meets the Official Plan tests notwithstanding the fractured neighbourhood. To conclude otherwise would suggest any built form is permitted, and this cannot be the intent of the Official Plan and I do not accept that this can be the case.

Ms. Wong's opinion was measured and concise:

> I think that this particular neighbourhood has a character of wide lots, generous side yard setbacks, landscaped open spaces, so I would say that is the character of the neighbourhood.

Wide lots are an obvious characteristic. Ms. Wong's written presentation include 24 photos of lots in her study area. Most are frontage 15.24 m (50 feet). Not all lots are 50-feet; for example, Ms. Wong shows 85 and 87 Oakridge Drive, frontage 11.85 m (38.9 feet) and 12 Nicolan Rd (12 m or 40 feet). There are only four properties in her study area of 682 properties whose frontages are close to what is proposed.

192 Randall	7.62 m
194 Randall	9.14 m
10A Randall	7.62 m
10B Randall	7.62 m

Of the three that are 7.62 m (25 feet), 192 and 194 were among the earliest developed —prior to 1947, when the rest of the subdivision was basically a farmer's field abutting Kingston Road. The other two were created by the OMB in 2016 (10A and 10B Randall). The following is an excerpt of Ms. Wong's final tabulation:

Table 1. Ms. Wong's (City planner's) lot frontage study

street	No. of lots	7.62 – 9 m (25 to 29.5 ft)	9.1 to 11.9 m (29.8 – 39 ft)	>12 m (39.4 ft)
Oakridge	102	zero	3	99
Randall	68	3	4	61
Allister	66	Zero	Zero	66
Harewood	63	Zero	13	50
19 streets in neighbourhood	682	3 (0.4%)	32 (4.7%)	647 (94.9%)

Table 1 shows 95% are 50-foot lots. Thus, "wide lots" are demonstrated in Table 1. "Generous side yards" and "landscaped open spaces" may also be seen, even from Mr. Benczkowski's photos:

118 Harewood, see both sides of home shown;

Harewood just north of Annison (I believe Mr. Benczkowski means Anson Ave in his photo caption referring to the house second from right);

158-160 Harewood (driveway between two houses leading to detached garage);

54-58 Allister Ave (driveway between properties)

I find the character is as stated by Ms. Wong.

The previous OMB decision

Before discussing the specifics of this case, I wish to set out the provisions of the *Planning Act* that give permission to convey separately two whole lots of record.

Section 50(3)[4] of the *Planning Act* forbids the conveyance of land unless it is described in accordance with a registered plan of subdivision. A plan of subdivision is a survey indicating lots and public roads. Section 50(5)[5] "part lot control" forbids the selling of land where the seller retains an interest in abutting lands, unless the sale falls within a number of exceptions, of which the two most important are:

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[4] *Subdivision control*
(3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless, (a) the land is described in accordance with and is within a registered plan of subdivision;

[5] *Part-lot control*
(5) Where land is within a plan of subdivision registered . . . no person shall convey a part of any **lot or block of the land by way of a deed, . . in respect of a part of any lot or block of the land, . . .unless,**

(a) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision;

(f) a consent is given to convey, . . .

> in 50(5)(a) the retained land consists of the whole of one or more lots in a plan of subdivision, or
>
> in 50(5)(f) the retained and conveyed lands have a consent under the *Planning Act.*

Thus Ms. Stewart is correct that the lots can be separately conveyed under exception (a) above. I now turn to *10A-B Randall*, the OMB case which became the key evidence for Ms. Stewart's advocacy.

In June 2016, the OMB was faced with an application identical to this one. Numbers 10A and 10B Randall Crescent are just around the corner from 119 Harewood. The owner's lawyer, Mr. Rouleau, and planner, Mr. Christou[6], made the same argument that Ms. Stewart does here; that no lot area and frontage requirements are required. The OMB Member did not agree, but nonetheless went on to authorize the variances. In effect, she did not accept the legal argument, but made a finding of fact that allowed the project to go ahead. Obviously, the Member had the right to make findings based on the evidence before her. However, her finding has the following comment, predicated on the concept of "reduced frontage":

> Therefore, with respect to the critical issue of lot frontage, the Board finds that a lot frontage **reduced from what is required by the zoning by-law**, in this instance, maintains the general intent and purpose of the OP and the zoning by-law. (my bold)

This can only be interpreted as a consequence of the "lawfully" argument, which the member had rejected.

Ms. Wong produced a chart showing that virtually every lot south of Horfield consists of two whole lots of record. (Please see **Diagram 4**, next page). The OMB Member stated her subject property was an "unusual situation" which should not have precedential value for the neighbourhood. She stated

> [53] Each application is assessed on its own merit, and this holds particularly true in this case. There is a concern that because of the unusual situation in this neighbourhood where there are numerous homes built on double lots, that with approval of this

6 [11] It is Mr. Christou's opinion that the lot frontages and lot areas for lots A and B are "lawful" and should be noted as such for the variances which relate to frontage and area. His position is that these variances are not required.

application, there will be a flood of requests to demolish existing homes and build two new homes where there currently is one. However, as is described in this decision, the reason for the authorization of the variances in this case **relates to the specific conditions that occur at this address** and on this section of Randall Crescent, and should not be construed as applying whole scale to the neighbourhood. This approval will not destabilize the neighbourhood and should not lead to the assumption by other property owners that similar circumstances exist for their properties. (my bold)

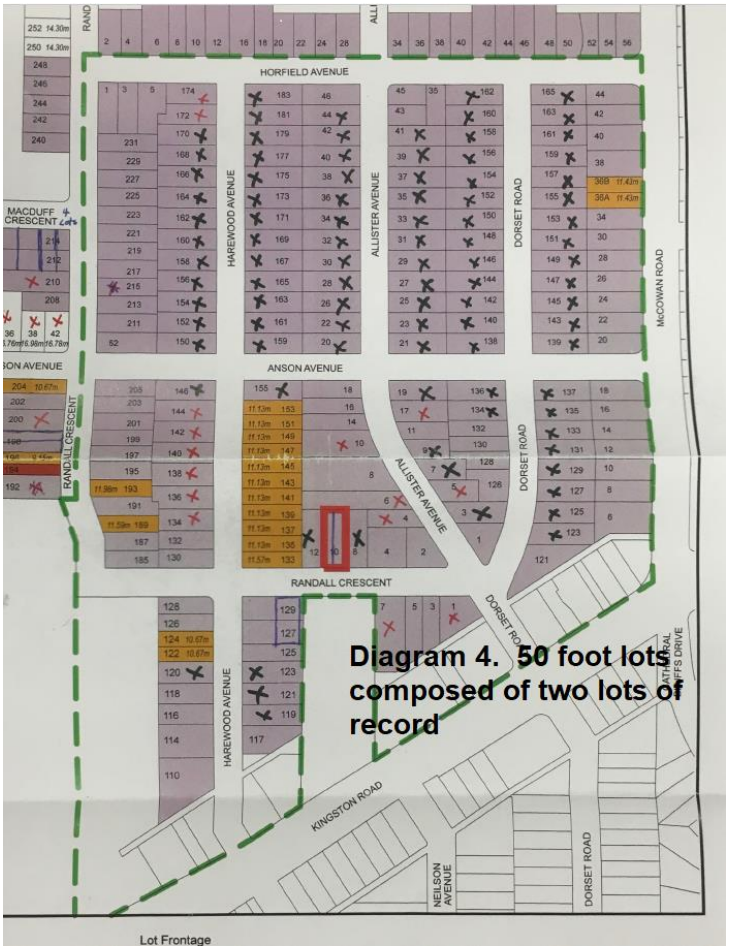

Diagram 4. 50 foot lots composed of two lots of record

With respect, I feel the OMB Member's statement of uniqueness was incorrect; had she had the evidence that I had, including Diagram 4, she would not have used this wording. Because of the almost universal distribution of double lots, it is my view that properties 10A and 10B Randall are outlier contributors to the physical character of this neighbourhood.

Conclusion

All the variances should be considered together. The Official Plan and zoning variances tests fail and given this finding, I find that the variances are not minor nor desirable for the appropriate development of the land. The variances do not meet the statutory tests.

DECISION AND ORDER

The appeal is allowed, and the decision of the Committee of Adjustment is set aside. The minor variances are not authorized.

X Ted Yao

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