

# DECISION AND ORDER

**Decision Issue Date**      Friday, February 22, 2019

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): XHENI XHAFERI

Applicant: XHENI XHAFERI

Property Address/Description: 148 TIAGO AVE

Committee of Adjustment Case File Number: 17 203319 STE 31 CO, 17 203329 STE 31 MV, 17 203330 STE 31 MV

TLAB Case File Number: **17 269655 S53 31 TLAB, 17 269656 S45 31 TLAB, 17 269657 S45 31 TLAB**

Hearing date:            Tuesday, October 11, 2018, Tuesday January 22, and Thursday, January 31, 2019

<b>Name</b>	<b>Role</b>	<b>Representative</b>
Xheni Xhaferi	Appellant	A. Milliken Heisey
Christian Chan	Expert witness	
City of Toronto	Party	Daniel Elmadany
Derek Wong	Expert Witness	
Eva Pardalis	Party	
Rita Pacitto	Participant	

**DECISION DELIVERED BY T. Yao**

## INTRODUCTION

The Xhaferis wish to sever their 50-foot lot into two 25-foot lots, demolish the existing bungalow and construct two homes. They need a severance and numerous

**Decision of Toronto Local Appeal Body Panel Member: T. Yao**  
**TLAB Case File Number: 17 269655 S53 31 TLAB,**  
**17 269656 S45 31 TLAB,**  
**17 269657 S45 31 TLAB**

variances to accomplish this goal. In November 2017, the Committee of Adjustment refused this application. The Xhaferis appealed to the TLAB, and the City of Toronto became a party before the TLAB in their appeal.

After appealing, they retained Mr. Chan, a planner, who is their witness in this hearing. Upon being retained Mr. Chan found errors in the Xhaferis' plans and brought a motion before TLAB Member Burton to defer the hearing from the original April 10, 2018 date to June 7, 2018. Member Burton granted this request. The plans examination process is not instantaneous, and the parties were unable to get results in time for the new pre-filing deadline. The Xhaferis then retained Mr. Heisey (their lawyer for the appeal in this TLAB hearing), who brought a second adjournment motion. Initially I refused to adjourn the June date, but the parties convinced me that the June date was indeed untenable, and I set Sept 12, 2018 as the second new hearing date. In August 2018, the City's planner incurred a medical condition and the City requested permission to further adjourn the hearing to October 11, 2018, and the Xhaferis did not oppose this request. This brings us to the first hearing date of October 2018. Because of the length of hearing, two additional days were scheduled.

I will not attempt to follow all the revisions in the plans. Table 2 below, is based on the May 7, 2018 zoning notice.

<b>Table 1. Variances sought for 148 Tiago, Part 1 or House 1(Part 2 of house 2)</b>			
From City wide zoning By-law 569-2013			
		Required	Proposed
1	A severance is required		
2	Lot area	370 m <sup>2</sup>	232 m <sup>2</sup> (232 m <sup>2</sup> )
3	Lot frontage	12 m	7.62 m (7.62 m)
4	Lot coverage	35% of lot area	43.1% of lot area
5	Building height	8.5 m	9.0 m (9.0 m)
6	Exterior main walls	7.0 m	8.57 m (8.57 m)
7	Floor space index	0.6	0.827 (0.827)
8	Side Yard setbacks	1.2 m	East 0.61 m (west 0.61 m)
9	Front yard landscaping	50% of front yard	48.26 % (48.26 %)

From former East York Zoning By-law 6752			
	A severance is required		
10	Building height (different from #5 because of a different method in establishing grade)	8.5 m	9.12 m (9.12 m)
11	Floor space index	0.6	0.827 (0.827)
12	Front yard setback	6.0 m	4.18 m (4.18 m)
13	Lot area	370 m <sup>2</sup>	232 m <sup>2</sup> (232 m <sup>2</sup> )
14	Lot coverage	35% of lot area	43.1% of lot area
15	Lot frontage	12 m	7.62 m (7.62 m)
16	Side Yard setbacks	0.9 m	East 0.61 m (west 0.61 m)
17		Below grade garage prohibited <sup>1</sup>	Will have a below grade garage
18	Front yard landscaping	50% of front yard	48.26 % (48.26 %)

The present City-wide zoning by-law was adopted in 2013 and because appeals are still being resolved, the City's zoning examiners require two sets of zoning compliance (testing for any variances from 2013 zoning by-law and previous East York Zoning By-law 6752.) There is considerable overlap between the new and previous by-law, for example frontage, lot area and floor space index are the same.

## **MATTERS IN ISSUE**

In my view, the severance is the most important issue. The key variances relate to lot frontage (slightly under 40 feet is the standard) and lot area. The major policies for undersized frontages and lot areas are found in the Official Plan, which is a test for both the severance and the variances:

A partial list of the applicable *Planning Act* tests would include:

---

<sup>1</sup> This is a technical variance as the driveway does have a positive slope and does not have the typical below grade appearance when viewed from the street.

- adherence to higher level Provincial Policies;
- matters of provincial interest as referred to in section 2 of the *Planning Act*;
- the size of the lots; and
- Official Plan conformity.

Specific matters of provincial interest in s. 2 would include the location of growth and promotion of development designed to support public transit. The minor variances require a different test, namely that the variances must meet all the four tests under s. 45(1) of the *Planning 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.

Part of this decision is concerned with the Mr. Chan's justification of the severance based on the policies favouring compact development and support of transit (148 Tiago being only three houses from Victoria Park Ave., which is well served by an express bus service and soon-to-be-built light rail stop. Mr. Wong (the City's planner) took the position that two 25 foot lots with close building-to-building distances do not conform to the Official Plan because they do not meet the test of respecting and reinforcing the existing physical character of the neighbourhood.

## **EVIDENCE**

I heard from Christian Chan, Ms. Xhaferi's planner, and Derek Wong, the City's planner, both of whom I qualified as able to give opinion evidence in the area of land use planning. I heard as well from Eva Pardalis who gave evidence on her own behalf as well as reading a statement from Rita Pacitto. Both Ms. Pardalis and Ms. Pacitto are next door neighbours of the Xhaferis.

### **The Official Plan "Respect" test**

Chief amongst the factors to be considered is the Official Plan, particularly section 4.1.5, which is often summarized as the "respect and reinforce" test:

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

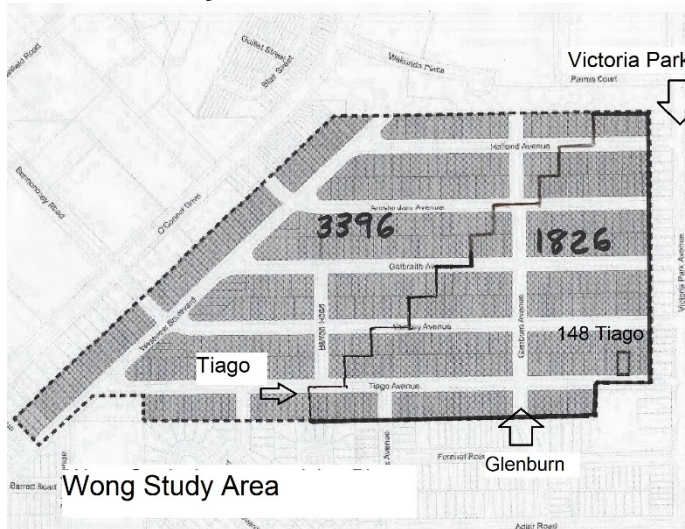
...

- b) **size** and configuration of lots;
- c) heights, **massing**, **scale** and dwelling type of nearby residential properties;

f) prevailing patterns of **side yard setbacks** and landscaped open space (my bold)

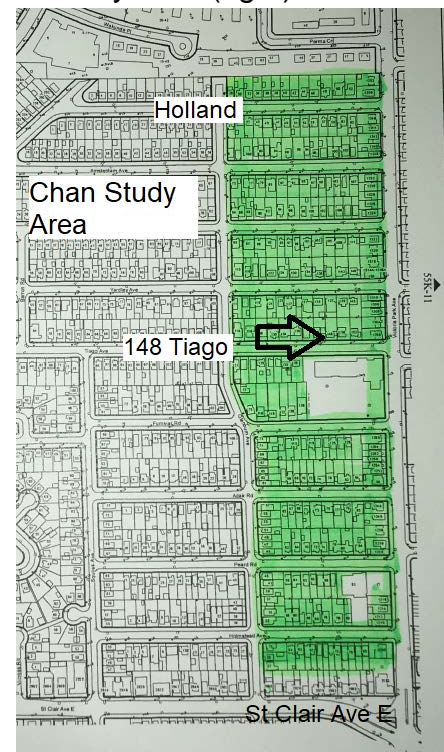
No changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood.

### The two study areas



The two planners used different study areas. Mr. Wong used the subject lot's plan of subdivision, Plan 1826 (202 parcels, registered February 21, 1913), and the contiguous Plan of Subdivision 3396 (286 parcels<sup>2</sup>, registered Feb 11, 1947), shown in the diagram to the left).

Mr. Chan's study area (right) is a one block strip from



Holland to St Clair Ave E, eight blocks long by one block wide, and about a half the size of Mr. Wong's. His rationale was to provide "sensitivity" to the presence of Victoria Park, a major arterial.

The first north-south street west of Victoria Park is Glenburn Road, which is an important street in these proceedings. If Mr. Chan's study area is chosen, Glenburn forms the western boundary.

For Mr. Wong, Glenburn has a different significance, indicating a different physical character than Mr. Chan's study area. Lots in Mr. Wong's area that flank Glenburn are oriented **north south**; and have street addresses like Tiago, Yardley, Amsterdam etc. Similarly situated lots in Mr. Chan's area are oriented **east west** and have Glenburn addresses. He also noted that Glenburn was probably

<sup>2</sup> My count shows only 431 properties as opposed to 202 + 286 = 488.

widened after the deposition of the plans of subdivision so road widenings and the jog south of Tiago created some irregular frontages for Glenburn lots in both study areas.

From these and other factors, Mr. Wong deduced that the adjacent plan of subdivision to the south, (never identified in the hearing by either party), should not be included in his study area. Mr. Wong also suggested that the area south of Tiago was a little more topographically varied, another factor in his choice of study area.

The ideal study area is probably Mr. Wong’s plus some portion of the neighbourhood south of Tiago, but this was not the evidence I was given. I prefer Mr. Wong’s study area, but I looked at both. It seems consistent with everyday life that people travel in all directions from their homes, so a resident of 148 Tiago would travel into western Plan1826 and Plan 3396. There is no reason for this resident to only walk north and south along the west side of Victoria Park. The Topham Park neighbourhood is architecturally more interesting; there are schools to the south west (Gordon A Brown Middle School and Selwyn Elementary School), public parks and shopping on O’Connor Drive. Plans of subdivision are also a logical starting point for the study of lotting patterns and the fact that both were built out in the years from 1950 to 1952 suggest the same planning intention subsumes both.

**The statistical distribution of exact size lots**

The frontages in the two study areas are shown in Table 2 (immediately following).

<b>Table 2. Frontages in the two planners’ study areas</b>				
Frontage	Wong study area Combined Plans of Subdivisions 3396 and 1826		Chan study area One block strip west of Victoria Park, Holland to St Clair Av E	
Less or equal to 25 feet	24	5.5%	32	12.21%
25.1– 29.9 feet	6	1.39%	23	8.78%
30 -33 feet,	147	34.03%	36	7.32%

**Decision of Toronto Local Appeal Body Panel Member: T. Yao**  
**TLAB Case File Number: 17 269655 S53 31 TLAB,**  
**17 269656 S45 31 TLAB,**  
**17 269657 S45 31 TLAB**

33.1-35 feet	51	11.81%	33	7.04%
35.1 to 39.9 feet	20	4.63%	18	4.16%
Exactly 40 feet	87	20.14%	32	8.00%
40.1 to 49.9 feet	25	5.79%	22	5.76%
Exactly 50 feet	68	15.74%	63	18.00%
50.1 + feet	5	1.16%	3	0.91%
total	432	100.00%	262	100.00%
Percentage below 12 m		57.36%		39.51%

Both planners' study areas contain many undersized lots. (57% for Mr. Wong's area and 39% for Mr. Chan's). This suggests that a significant portion of the neighbourhood is predates any zoning by-law. In submissions, Mr. Heisey relied on this measure, using the more judgement-laden term "substandard":

Under either study area, you can come to the conclusion that these lots and frontages are appropriate. If you go west on Tiago, the vast majority of the homes are substandard to the zoning by-law standard of 12 m. If you stick to the block of Tiago from Glenburn to Victoria Park Avenue, five out of eight homes on the south side are substandard, by reference to frontage.

Plainly these homes are not "substandard" in terms of livability; they simply fall on one side of a limit for which a minor variance is required.

Both study areas contain a great many "exact number" frontage lots, but Mr. Wong's area contains more 33-foot (29.4%), 40-foot (21.8%) and 50-foot (15.7%) than Mr. Chan's study area. The difference is notable for lots with a frontage of exactly 33 feet, which are practically non-existent in Mr. Chan's study area. (The 12 m standard is 39.37 feet) The great number of contiguous and similarly sized lots in the Wong study area confirms to me the suitability of Mr. Wong's choice of plans of subdivision as a basis for a study area.

The history of Toronto's development must also be considered. This area is at the north east corner of the former Borough of East York. On the other side of Victoria Park is the former City of Scarborough and north of Eglinton Avenue East is the former

City of North York. All three municipalities were responding to the need for quickly erected post WW2 housing, particularly for veterans returning to civilian life.

In my view, the important question for consideration is not whether the proposed frontages are over or under the 12 m minimum frontage (just under 40 feet) in the zoning by-law, but whether new 25 foot lots **do or do not** respect and reinforce the spatial distribution of lots, which includes 25-foot and 50-foot lots

### **Discussion of 25-foot lots**

25 foot lots are important, since this seems to be the minimum size for a new detached home. 50 foot lots are also important as being the minimum lot size to create two 25-foot lots. I will first look at the 25-foot lots. Neither planner purported identified every recent severance and I got different results depending on which data source was used.

Mr. Wong showed fewer 25-foot lots (5.3% versus 10.6%)<sup>3</sup>, which suggests his area is less diverse than Mr. Chan's. I wished first to examine how many of these 25 lots were formed by recent severances. In submissions, Mr. Heisey stated

If you go to the rear of the subject property, there are two 7.62 m homes located on the same block. There's one 7.62 m house located on the south side of Tiago right beside. Just because they are lots of record in my respectful submission, does not change the fact that the lots exist and form part of the character of the neighbourhood.

So, are there enough recent severances to form "part of the character of the neighbourhood"? Mr. Wong's photo study shows three pairs on pages 7 and 8 (all three with an arrow but he did not include their addresses) and his colored map of frontages shows possibly five or six pairs, including the three in the photo study. His excel spread sheet shows 24 25-foot lots, of which I find three pairs; one which can be identified as recent severances from its "A and B" addresses (98A and B Galbraith, 2017-8); and two that are probably severances: (80-82 Amsterdam, 1999; and 79 and 81 Galbraith, 2009). Mixing data sources, we have at best six pairs, i.e., 12 lots out of 24 25-foot lots. This is a considerable number, but is still small compared to 432 lots, most of which being from 25.1 to 49.9 feet could never be severed.

Mr. Chan's excel spreadsheet shows seven pairs of recent severances:

78A and B Peard (2018)  
80A and B Peard (2018)

---

<sup>3</sup> I am aware that the data contains numerous errors and is not updated.



76A and B Amsterdam<sup>4</sup>,  
 88A and B Amsterdam,  
 98A and B Galbraith;  
 67-69 Holmstead,  
 1322A and B Victoria Park.

His photos show an additional four pairs

95 A and B Galbraith  
 80-82 Amsterdam;  
 5A and B Adair;  
 92-94 Furnival.

I conclude that in the context of hundreds of lots in each study area the number of recently created 25 lots are not sufficiently widespread to be considered part of the physical character of the neighbourhood.

I will now deal with the other part of Mr. Heisey’s quote: “There are two 7.62 m homes located on the same block” at the rear of 148 Tiago. The 25 foot two houses to the rear are 105 and 29 Yardley, and they are not adjacent. The frontages on the south side of Yardley to the rear of the subject property are as follows:

Yardley									
105	111	119	121	123	127	129	131	135	137
25 ft	42 ft	50 ft	40 ft	35 ft	50 ft	25 ft	50 ft	50	(touching 148) 50 ft

I find two 25-foot properties **somewhat near** the subject property do not provide enough examples of very small properties to affect the physical character of an area with generally 33, 40 and 50-foot lots. Therefore, I conclude that an additional severance that creates two adjacent 25-foot lots will **not** respect and reinforce the existing physical character of this neighbourhood.

**The spatial distribution of 50-foot lots**

Turning to 50-foot lots, Mr. Wong’s study area has about the same percentage of 50 foot lots as Mr. Chan’s (16% vs 18%). Their geographic distribution is also important. If, for example, the area is “sprinkled” with 50 footers, a severance here or

---

<sup>4</sup> Mr. Chan did not obtain dates of construction.

**Decision of Toronto Local Appeal Body Panel Member: T. Yao**  
**TLAB Case File Number: 17 269655 S53 31 TLAB,**  
**17 269656 S45 31 TLAB,**  
**17 269657 S45 31 TLAB**

there might be less destabilizing. However, this is not the case; they occur in contiguous blocks. Below I have set out the lotting pattern on Tiago for its entire length, with a second diagram focusing on the block where the subject is located. The first diagram shows about a hundred properties with their range of addresses, followed by the same information on the frontages. The second diagram, in which I have also added the year of construction, shows every house from Glenburn to Vitoria Park.

Westview	#16-62 All 33 ft		Barron	#64 74.8 ft	#76-112 37.5 to 40.7 ft	Glenburn	See next diagram	Victoria Park	
	Tiago								
	#19-43 33's	Topham	#45 - 61 33's	#63-61 40's	Squires		#63-75 40's		See next diagram

The heavy vertical lines in the diagram above indicate the division between the two plans of subdivision. It seems a fair conclusion that lots get smaller from east to west. (The expression “33’s” means mostly 33’s, not that 100% of the lots are 33-feet.) For the block face containing 148 Tiago, the subdivider has chosen to create a uniform strip of 50-foot lots, a pattern that is not replicated anywhere else on Tiago. I find a severance in this strip would be destabilizing.

Glenburn	114	116	126	130	134	138	142	<b>148</b>	150	152	Victoria Park
	1951	1952	1919	1955	1950	1951	1949	<b>1948</b>	1951	1950	
	50	50	50	50	50	50	50	<b>50</b>	50	50	
Tiago											
	121	123	125	129	131	135	139	School <sup>5</sup>			
	1948	1952	1955	1955	1955	1947	1951				
	32	34	34	33	33	42	50				

<sup>5</sup> No attempt has been made to draw the lots to scale. The western boundary of Victoria Park Public School is about 3 lots to the west of the subject property.

Contiguous blocks of 50 foot lots are also evident on 101-11 Galbraith, 122-148 Yardley, and 131 to 145 Yardley, all at the eastern end of those streets. This pattern is not seen in Mr. Chan's area, on Furnival, Adair, Peard or Holmstead. Although Mr. Chan concluded in paragraph 37 that the variances are not destabilizing, nor will act as a precedent, I note that he cited as a precedent my decision for 78-80 Peard (April



2018) in which I authorized a pair of severances. In my experience every planner cites every previous recent severance and every minor variance as a precedent, although at the same time acknowledging that one TLAB member is not obliged to follow another's decision. I disagree with Mr. Chan; a severance will act as a precedent.

Homes in the Wong study area are characterized by generous side yards, generally separated by driveways, even for the 33-foot lots on Tiago west of Topham (see Photo 1, above). This will not be the case for the proposed new houses. The subject property will start to create a new character of very narrow distances between buildings. I conclude that because of this, a severance will not respect and reinforce the existing physical character of the neighbourhood and thus the appeal should be dismissed

### Transit supportive policies

Paragraph 76 of Mr. Chan's witness Statement<sup>6</sup> states that the subject property will support the "complete community" provisions of the Growth Plan. The reason he used "complete communities" as a justification, rather than the transit-supportive policies is because the Growth Plan does not indicate that the development of a house

---

<sup>6</sup> It is my opinion that the proposal conforms to the policies of the Growth Plan. The proposal is for a development within the delineated built boundary, on a site and street that has existing municipal water and wastewater systems, and supports the *complete community in which it is to exist* (my italics) The subject site is approximately 150m away from the existing TTC Bus stop for Route 24 a/b at the intersection of Yardley Avenue and Victoria Park Avenue, which route is also designated on Map 5 of the Toronto Official Plan as a Transit Priority Segment; the subject site is also approximately 1.4 km from the planned Line 5 Eglinton LRT stop at O'Connor Drive and Victoria Park Avenue. Line 5 is a Higher Order Transit Corridor demarcated on Toronto Official Plan Map 4. (Chan Witness Statement, par. 76).

like 148 Tiago requires any special encouragement. The policies do support projects within 500 m of subways stations and the planned Eglinton LRT stop. This is not the case here. The Victoria Park service is characterized as a “mixed traffic” transit service in the Growth Plan and no special consideration seems to be given to developments that are close to such services. Indeed, the Pardalises (neighbours to the west) household uses the subway but gets there by driving rather than by bus.

The Growth Plan’s definition of “complete communities” is:

Places such as mixed-use neighbourhoods or other areas within cities, towns, and *settlement areas* that offer and support opportunities for people of all ages and abilities to conveniently access most of the necessities for daily living, including an appropriate mix of jobs, local stores, and services, a full range of housing, transportation options and *public service facilities*. *Complete communities* are age-friendly and may take different shapes and forms

It favours the young, the old, the disabled, those wishing to purchase or rent affordable accommodation and locations that are convenient to the necessities of life. All locations in both study areas are in my view within walking distance or a short drive to Victoria Park, O’Connor Drive or the Golden Mile, where there are a variety of local shopping and services. But the proposed homes, would offer nothing except an additional unit, which in my view does not respond to the nuances in complete community policies. In short, I do not find that this severance is justified by the Provincial Policy Statement or the Growth Plan.

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 severance would be destabilizing and would be poor planning. Since it does not conform to the Official Plan, it should not be given.

## **DECISION AND ORDER**

I do not give the requested severance and do not authorize the variances set out in Table 1. The Xhaferis’ appeal is dismissed, and the decision of the Committee of Adjustment of November 22, 2017 is confirmed.

X

*Ted Yao*

---

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