

DECISION AND ORDER

Decision Issue Date Monday, April 29, 2019

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

Appellant(s): JANUSZ MARCINKOWSKI

Applicant: VICTOR GUITBERG

Property Address/Description: 74 MARKHAM ST

Committee of Adjustment Case File Number: 18 126222 STE 19 CO, 18 126248 STE 19 MV, 18 126259 STE 19 MV

TLAB Case File Number: **18 227553 S53 19 TLAB, 18 227570 S45 19 TLAB, 18 227574 S45 19 TLAB**

Hearing date: Friday, February 08, 2019

DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

Name	Role	Representative
Victor Guitberg	Applicant	
Janusz Marcinkowski	Appellant	Amber Stewart
Jonathan Benczkowski	Expert Witness	

INTRODUCTION AND BACKGROUND

Janusz Marcinkowski is the owner of 74, 74A and 74 ½ Markham Street (Subject Property) , located in the Trinity-Spadina Ward of the Municipality of the City of Toronto. He applied to the Committee of Adjustment (COA) for consent to sever the existing lot into two lots, and variances to build a house on each of the lots resulting from the severance. On August 29, 2018, the COA heard the applications and refused them in

their entirety. Mr. Marcinkowski appealed the decision of the COA to the TLAB, which scheduled a hearing on February 8, 2019.

MATTERS IN ISSUE

The requested severance and the listing of variances for the houses to be constructed on each of the lots are recited in Attachment A.

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

At the hearing held on February 8, 2019, the Appellant was the only Party, and was represented by Ms. Amber Stewart, lawyer and Mr. Jonathan Benczkowski, an urban planner. There were no registered Parties or Participants in opposition to the Appeal.

Mr. Benczkowski was sworn in, and qualified as an Expert Witness in the area of land use planning. He provided a brief overview of the nature of his retainer, followed by the history of the case, before proceeding to describe the community in which the Subject

property is located. . The property is located on the west side of Markham Street, in the downtown of the City of Toronto. He also said that the property is situated between Dundas Street West on the north, Queen Street West on the south, and a short walk from Bathurst Street on the west. The property is currently occupied by a one storey metal clad dwelling, which is dilapidated and in disrepair. Mr. Benczkowski added that parking is located in a detached garage to the rear of the dwelling that can be accessed from a municipal lane, behind the house. He also drew my attention to the existence of a mutual right of way, along the south portion of the property in favour of the property located to the south at 70 Markham Street. The right of way extends 13.72 m in depth from the eastern limits of the property towards the rear lane and 0.91m in width.

By way of comments received before the COA heard the application, Mr. Benczkowski highlighted the fact that no City department provided comments on the proposal, with the exception of the Engineering Construction Services, which had requested a 0.37m parcel located on the rear lane for widening purposes. He emphasized the fact that the Planning department did not express any objections to the Consent or the Minor Variance Applications.

He then drew my attention to a proposed change noting a revised FSI for Part 1 of the lot to be created, as well as the addition of a new request for an FSI variance for Parts 2,3 and 4. By way of editorial comment, the updated variances noted above are included in the recitation of variances in Attachment A. He said that the revised FSI was not the result of any design or built form changes, but a consequence of the “reduced lot area for both parcels” . Mr. Benczkowski opined that the notice required under Section 45.18.1 of the Ontario Planning Act could be waived, given the minor change in the proposal. I agreed with his conclusion, allowing for the hearing to proceed forward.

Mr. Benczkowski then discussed his Study Area, which includes all properties except those facing Dundas Street West to the north and zig zags on the south because of the lay out of streets- the southern border essentially excludes properties facing Queen Street West, and includes everything in the interior to the immediate north. The Study Area includes the properties on the west side of Markham Street in the east quadrant, and is bound by the properties fronting on to Gore Vale Avenue and Trinity Bellwoods on the west. However, there is a small group of houses on the west side of Gorevale Avenue, which are also included in the study area. By way of editorial comment, the Study Map is included in Attachment B attached to this Decision. Mr. Benczkowski explained his choice of the study area by stating that this community was what would be experienced by residents of the area in their day-to-day lives, as they walked on the streets. He said that the study area was a “mixed bag of built forms, dwelling types and architectural styles”, and that it contained bungalows, two storey dwellings and three storey dwellings.

He added that dwellings ranged from detached to semi-detached to row townhomes, and concluded that there was “no consistent built form or architectural style to the area, leading to an inconsistent and fractured built form.”

Mr. Benzkowski then discussed the relationship between the proposal and Provincial Policy Statement (PPS- 2014). He said that the proposal satisfied a key objective of the PPS, which is that municipalities should accommodate growth through intensification. He next discussed the relationship between the proposal and the Growth Plan for the Golden Horseshoe, 2017(Growth Plan). He opined that the proposal was consistent with the applicable policies of the PPS, which promoted intensification and the achievement of complete communities, with a mix of housing options to accommodate households of different sizes. He added that the Growth Plan promoted intensification within built up areas, and the achievement of complete communities with a mix of housing options, including detached housing, before highlighting several examples which satisfied this Policy.

After reciting the details of the properties to be created as a result of the consent, Mr. Benczkowski stated that in his opinion, the proposed consent satisfied the criteria listed in Section 51(24) of the *Planning Act*. He discussed the relevant criteria, and how they applied to this proposal, and suggested that some of the criteria listed in 51(24) were not directly relevant.

He then discussed how the proposed consent conformed to the City of Toronto Official Plan (the “**Official Plan**”). In his professional opinion, the Property was suitable for two residential dwellings, and had adequate utilities and municipal services. He added that the shape and size of the proposed lots were more than adequate for the provision of a detached dwelling, and were similar to other lots in the vicinity of the Property.

The size and configuration of the proposed residential lot is found within the study area, as well as an actual map, showing the distribution of lots. By way of editorial comment, this map is the same as the map in Attachment B

He provided frontage statistics for the chosen study area, which are reproduced below

Lot frontage range (in metres)	Number of lots	Percentage of lot frontages in study area
2.0- 4.6	264	24.04%
4.7-5.9	483	43.99%
6- 39.7	351	31.97%
TOTAL	1098	100%

Non-Compliant Lot Frontages in Study Area

Total Lots in Study Area	Lot Frontages < 6 m	Percentage of lot frontages in non-compliance
1098	747	68.03%

Lot Frontages Subject Property

Total Lots in Study Area	Lot Frontages >9.22 m	Percentage of lot frontages in non-compliance
1098	44	4.01

Mr. Benczkowski also pointed out that there was only 1 successful consent application in the study area, namely at 91 Claremont Avenue, over the 10 year period for which decisions could be obtained. He named another property at 139 Euclid Ave, where a consent to sever was granted, but not completed.

On the basis of this information, I drew Mr. Benczkowski's attention to the lack of significant severance activity in the Study area. I also pointed out that while there had been one plot which had been severed, there were 44 other lots in the neighbourhood, with frontages exceeding 9.2 m, which meant that they could be future candidates for similar consents to sever, if the consent at 74 Markham Street were approved. Mr. Benczkowski responded by saying that these 44 lots would not be divided because they were "beautiful ,well developed properties" on them. When asked if the rate of approvals of consents were consistent with the OP's recommendation that growth be slow and steady, he agreed that the growth through consent applications was not steady.

Mr. Benczkowski discussed the compatibility between the proposal and the Official Plan (OP). He pointed out that the Property was designated *Neighbourhoods* in the OP, and that this designation permitted low-rise residential uses up to four storeys in height. He emphasized that the intent of the OP was to ensure that new development did not result in changes that were out of keeping with other developments within the area.

Mr. Benczkowski relied on Sections 2.3.1 (1), 3.1.2.(1) and 4.1.5 to evaluate the proposal's being consistent with the existing physical character of buildings, respect and reinforce the existing physical character, as well as specific criteria expected of developments in the "Neighbourhoods". He stated that the OP recognizes that the Neighbourhoods experience physical change, and are not "frozen in time". He then asserted that the proposed houses would add to the existing eclectic nature of the existing neighbourhood, which is characterized by a wide variety of architectural forms, and replacement dwellings. He emphasized that the lot frontage request was consistent with other properties in the area. On the basis of this discussion, he concluded that the proposed dwellings upheld the purpose and intent of the Official Plan.

Mr. Benczkowski then discussed the compatibility between the proposal and the purpose of the Zoning By-Law. He stated that the Property is zoned Residential (R) under City of Toronto Zoning By-law 569-2013 ,and R4 Z 1.0 under the former City of Toronto Zoning By-law 438-86., and added that there was no site-specific By-law or

Secondary Plan for this property. He commented that the general intent and purpose of these Zoning By-laws is to ensure that the proposed development is compatible with the built forms within the area, and that there are no adverse, unacceptable impacts of a planning nature.

He addressed the performance standards of the various types of variances, and demonstrated that the performance standards were satisfied. On the basis of this discussion, Mr. Benczkowski concluded that the proposal satisfied the spirit and intent of the Zoning By-law.

On the test of being desirable, Mr. Benczkowski said that he saw the proposed dwellings as being modest additions, which would not result in unacceptable impacts on adjacent neighbours. He repeatedly emphasized that two modern, habitable dwellings would replace the existing, dilapidated shack, and consequently improve the visual experience of pedestrians, if the Appeal were to be allowed. Through this reasoning, he concluded that the proposal met the test of being desirable for the appropriate development of the Property.

He lastly addressed the test of the proposal's being minor in nature. He said that the variances did not have, individually and cumulatively, any unacceptable adverse impacts on either neighbouring property, or the overall neighbourhood. He drew attention to the fact that this property was in a densely packed urban area, and that the streetscape would not be "compromised" as a result of the proposed setbacks, which he suggested, were minimal. He concluded that the proposal met the test of being "minor" on the basis of this evidence.

Based on the discussion above, Mr. Benczkowski concluded that the Appeal should be allowed, and that the consent and variance applications should be approved.. He recommended the imposition of standard conditions on the variance, as well as requiring the Applicants to build the dwellings in substantial conformity with the submitted plans and elevations.

ANALYSIS, FINDINGS, REASONS

I start off by noting that this application involves consent to sever the property into two halves, as well as variances to help build a dwelling on each of the severed lots. In other words, the variances become meaningful and implementable only if the consent to sever is approved. I also note that the requested variances include specific variances for sub-standard frontages; these frontage variances, while examinable under Section 45.1, echo the examination of lot frontages under Section 51(24). Given the importance and interlinkage between the OP on both the consent to sever, as well as the lot frontages, I deem it prudent to see if the proposal is consistent with the OP, before examining other tests.

I examine this relationship under 2 different scenarios- the first accepts, *Prima Facie*, that the Study Area put forward as being adequate to assess the impact, and the fit of the proposal. The consequence of accepting the Study Area is that the statistical information put forward by the Appellant's expert witness, can be utilized for coming to conclusions. Based on the COA table, and the photo tour, I accept Mr. Benczkowski's contention that there is no consistent built form in the area, and that the architectural styles and sizes of homes embody the concept of eclecticism. When the information about the age of the houses, also provided by Mr. Benczkowski, is superimposed on the information about size lots, it is easy to conclude that the community's evolution is the epitome of slow but steady growth over time.

It is important to note that Mr. Benczkowski's commentary concentrated on the built form, architectural styles and dwelling sizes and styles. He was candid in conceding that there has not been much severance activity in the neighbourhood. The example cited of 91 Claremont St., is at the opposite end of the study area, separated by at least 600 metres from the subject property. I conclude from this information that while the buildings have evolved steadily, the lot sizes and lot patterns have not changed significantly over the decades- in other words, the lot distribution patterns, and sizes are practically "frozen in time".

While the existing lot sizes in the community span an entire spectrum, there are not the result of severance applications. Should any change be made to the lot sizes through the approval of this application, it would have a snowballing impact on the possibility of the 44 other lots in the community with frontages of more than 9.2 m, and result in the creation of at least 88 properties with smaller frontages. The net impact could be one of unleashing an avalanche of severance applications in an area that has seen little change with respect to creation of lots. While Mr Benczkowski's assumption that well maintained properties may not make attractive for severance candidates may be reasonable, there is no direct evidence before me to prove the veracity of this assumption.

Looked at through the prism of public interest, such sudden change would be catastrophic, and not in keeping with the mantra of slow and steady change, as stated in the OP. As a result, the proposed consent fails the test of public interest in Section 51(24); it also does not conform to the Official Plan..

I consider another scenario, where the hypothesis behind the study area is scrutinized closely, in contrast to the earlier scenario where it was accepted *prima facie*. The area has 6 parallel, north south streets between Dundas and Queen, each of which is packed tightly with buildings and residences. However, each has a different characteristic and feel, when experienced from the street, with some being more densely packed than the others. Van Gore, for example, opens up onto Trinity Bellwood park, and consequently has a feel that is different than other streets with houses on both sides. Manning Avenue has a school on the east side and residential properties mainly on the west; the road jogs before the section closer to Queen Street has a symmetric distribution of houses on the east and west sides, resulting in an asymmetric

distribution. But this road jogs onto a different section closer to Queen St., which has a symmetric distribution of houses on the east and west sides. The consequent feel is different from streets such as Palmerston and Markham, where the distribution of houses on both sides of the road is symmetric.

While the residents may experience the diversity of housing styles and typology, as stated, they will also experience the asymmetry of the distribution of houses on the streets. This would be evident to the average resident in this community, who would know the history of the community, and would recognize the distribution of lot size as they walk through their community. In other words, the residents' experience of each street within the study area as suggested by Mr. Benczkowski would be different, notwithstanding other similarities alluded to in this discussion. This means that the study area, and the accompanying analysis would have to be set aside.

, it is probably helpful, under these circumstances, to make decisions based on the immediate context of the area. When I look at the distribution on the street immediately surrounding the Subject Property, between 84 Markham Street to the intersection of Markham St. and Robinson Terrace, as well as corresponding properties on the opposite side (75 to 45 Markham Street), it is easy to see that there is a preponderance of larger properties, with a minimum frontage of 6 m. When we look at the houses fronting onto Palmerston Ave (between 73 and 61 Palmerston Ave), behind the Subject Property, there are three houses with frontages of more than 6 m, and two properties that are less than the requested 4.6 m. While Mr. Benczkowski may be accurate in stating that there is a concentration of smaller lots on Markham Street, many of these houses lie on the northern end of the street, closer to Dundas, whereas the Subject property is closer to the southern end of Markham.

From this discussion, I infer that the immediate neighbourhood is stable, and home to more properties that confirm to the frontage required under the Zoning By-Laws. The sub-standard frontages proposed are not the norm in the immediate vicinity of the property. Based on this discussion, I conclude that the planned consent is not consistent with the Official Policy, and therefore deserves to be refused.

The examination of the consent to sever under two different, indeed opposite perspectives, produces identical results, namely that the consent to sever is not consistent with lot sizes, as elucidated in the OP, or the public interest, or both. I accept Mr. Benczkowski's contention that the consent satisfies other clauses under Section 51(24), or is not impacted by them.

Since the consent to sever fails two of the tests listed in Section 51(24), the severance is effectively refused. Since the consent to sever has failed the tests listed in Section 51(24), the variances don't have to be analyzed since they are the consequence of the severance.

The severance fails under both scenarios listed. Based on this, I conclude that the Appeal is to be refused, and that the COA decision may be upheld.

I take this opportunity to commend Mr. Benczkowski for the thorough and pertinent statistical information submitted with his Witness Statement, as well as his candour throughout the hearing.

DECISION AND ORDER

- 1) The Appeal respecting the consent to sever 74, 74A and 74 ½ Markham Street, as well as the variances for the houses to be built on the resulting lots, is refused in its entirety.
- 2) The Decision of the Committee of Adjustment , dated August 29, 2018, respecting 74, 74A and 74 ½ Markham Street, is confirmed.

X 

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body

ATTACHMENT A

RECITATION OF THE SEVERANCE AND VARIANCES REQUESTED ON EACH OF THE SEVERED LOTS AT 74, 74A AND 74 ½ MARKHAM STREET

To obtain a consent to sever the property into two undersized residential lots and maintain existing easements/rights-of-way.

Retained – Part 2, Draft R-Plan

Rights-of-way – Parts 3 and 4

Address to be assigned

The lot frontage is 4.6 m and the lot area is 190.3 m². A new three-storey semi-detached dwelling and a new rear semi-detached garage will be constructed and will require variances to the Zoning By-law.

Parts 3 and 4 are subject to existing easements/rights-of-way as described in instrument number CA583570.

Conveyed- Part 1, Draft R-Plan

Address to be assigned

The lot frontage is 4.61 m and the lot area is 188.7 m². A new three-storey semi-detached dwelling and a new rear semi-detached garage will be constructed and will require variances to the Zoning By-law.

Revised List of Variances – 74 MARKHAM STREET Part 1)

REQUESTED VARIANCES TO THE ZONING BY-LAW:

1. Chapter 10.10.30.20.(1)(B), By-law 569-2013

The minimum required lot frontage is 6 m.

The frontage of the conveyed lot will be 4.61 m.

2. Chapter 10.10.40.30.(1)(A), By-law 569-2013

The maximum permitted depth of a semi-detached dwelling is 17 m.

The new semi-detached dwelling will have a depth of 18.52 m.

3. Chapter 10.10.40.10.(2)(B)(ii), By-law 569-2013

The maximum permitted height of all side exterior main walls facing a side lot line is 7.5 m.

The height of the side exterior main walls facing a side lot line will be 9.45 m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index of a semi-detached dwelling is 1.0 times the area of the lot (187.01 m²).

The new semi-detached dwelling will have a floor space index equal to 1.015 times the area of the lot (189.9 m²).

5. Section 6(VII)(1)(ii), By-law 438-86

The minimum required lot frontage is 6 m.

The frontage of the conveyed lot will be 4.61 m.

6. Section 6(3) Part II 5(II), By-law 438-86

The maximum permitted depth of a semi-detached dwelling is 17 m.

The new semi-detached dwelling will have a depth of 18.52 m.

7. Section 6(3) Part I 1, By-law 438-86

The maximum permitted gross floor area of a semi-detached dwelling is 1.0 times the area of the lot (188.7 m²).

The new semi-detached dwelling will have a gross floor area equal to 1.01 times the area of the lot (189.9 m²).

Revised List of Variances – 74 MARKHAM STREET Part 2+3+4)

REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

1. Chapter 10.10.30.20.(1)(B), By-law 569-2013

The minimum required lot frontage is 6 m.

The frontage of the retained lot will be 4.6 m.

2. Chapter 10.10.40.30.(1)(A), By-law 569-2013

The maximum permitted depth of a semi-detached dwelling is 17 m.

The new semi-detached dwelling will have a depth of 18.57 m.

3. Chapter 10.10.40.10.(2)(B)(ii), By-law 569-2013

The maximum permitted height of all side exterior main walls facing a side lot line is 7.5 m.

The height of the side exterior main walls facing a side lot line will be 9.45 m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index of a semi-detached dwelling is 1.0 times the area of the lot (188.6 m²).

The new semi-detached dwelling will have a floor space index equal to 1.006 times the area of the lot (189.9 m²).

5. Section 6(VII)(1)(ii), By-law 438-86

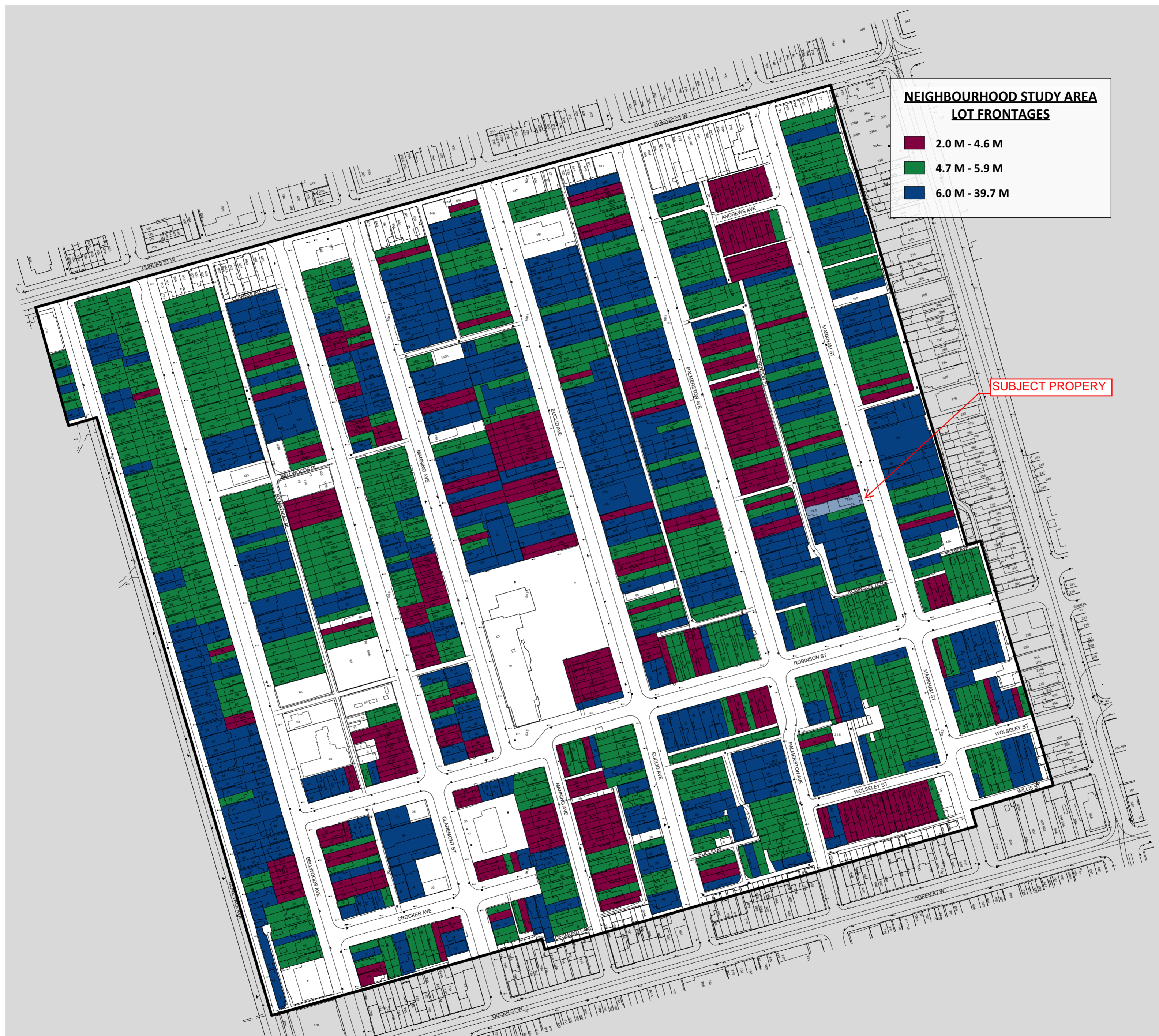
The minimum required lot frontage is 6 m.

The frontage of the retained lot will be 4.6 m.

6. Section 6(3) Part II 5(II), By-law 438-86

The maximum permitted depth of a semi-detached dwelling is 17 m.

The new semi-detached dwelling will have a depth of 18.57 m



NEIGHBOURHOOD STUDY AREA - LOT FRONTAGES