

DECISION AND ORDER

Decision Issue Date Friday, September 13, 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): J & J DEVELOPMENT GROUP INC

Applicant: LIRO STUDIO

Property Address/Description: 64 LOCKERBIE AVE

Committee of Adjustment Case File: 18 119986 WET 11 CO, 18 119987 WET 11 MV, 18 119988 WET 11 MV

TLAB Case File Number: 18 220488 S53 11 TLAB, 18 220489 S45 11 TLAB, 18 220492 S45 11 TLAB

Hearing dates: Tuesday, Jan 8, 2019, Tuesday, June 19, 2019, Wednesday, September 4, 2019

DECISION DELIVERED BY T. YAO

APPEARANCES

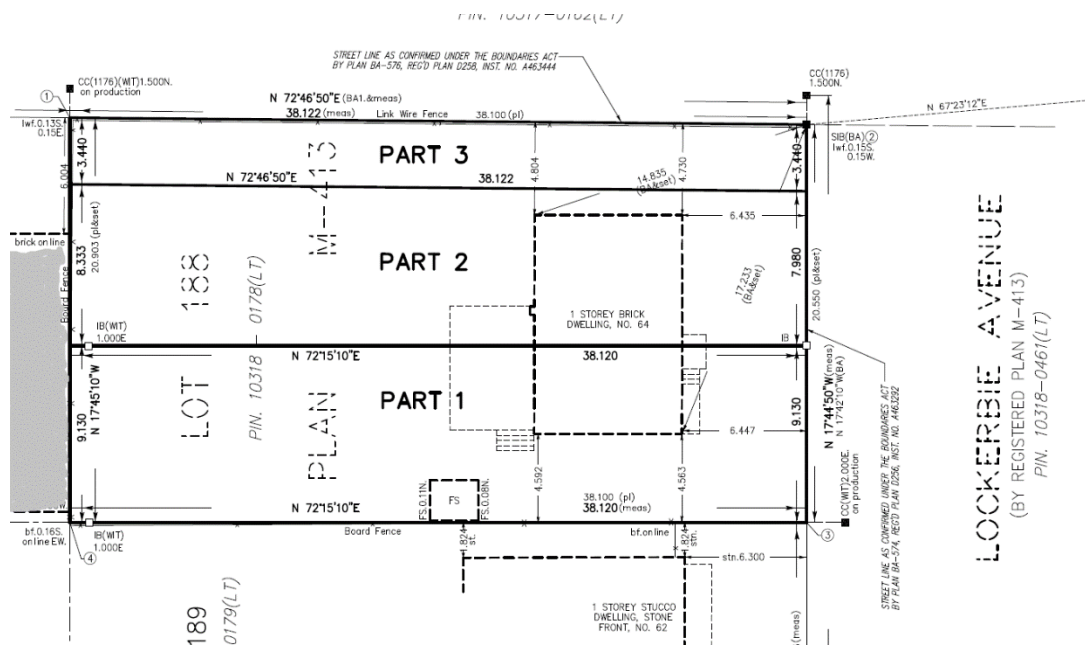
NAME	ROLE	REPRESENTATIVE
J&J Development Group Inc	Appellant	Amber Stewart
Jonathan Benczkowski	Expert witness	
City of Toronto	Party	Ben Baena
Olivia Antonel	Expert witness	
Maria Maiolo	Participant	
Marla Pecchia	Participant	
Antonietta Whyte	Participant	

INTRODUCTION

J & J Development Group Inc wishes to demolish the home at 64 Lockerbie Ave, sever it and build two new dwellings on each half. On August 16, 2018, the Committee of Adjustment refused any permission, J & J appealed and so this matter comes before the TLAB.

BACKGROUND

64 Lockerbie Dr is situated in the area south west of the Jane Street and Highway 400/401 interchange within the Swanek/Pelmo Park neighbourhood. The southbound ramp from the 401 to Black Creek Drive can be seen from the back yard of the subject property. It occupies the northwest corner of Gary and Lockerbie; Lockerbie being one of about seven or eight north-south streets¹ east of Wallace C. Swanek Park. The area was built up in the early 50s, and many homes retain the original “bungalow, side driveway style”-built form.



A key feature of this application is that J & J's 22.55 m frontage (almost 74 feet) will be reduced to 19.1 m (62.7 ft) as a result of a required conveyance to the City at no

¹ The Pelmo Park neighbourhood includes these north south streets: Dalbeattie, Farnsworth, Lockerbie, Deerhurst, Langside, Ranwood, Portage and Walwyn

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cost for a road widening. This would be secured as a condition to a severance². If the severance is not granted, then J & J would retain the present lot intact. Ms. Stewart (J & J's lawyer) began with this opening statement:

When my clients first filed this application, they did not know that the City would be requesting a road widening along Gary Drive, so they originally intended for the lots to be a little bit wider than they are proposed to be. But when they received the comment from Engineering about the fact that Gary Drive is identified in the OP as having a wider right of way, they amended the reference plan to accommodate for that.

J & J 's first R-Plan, now obsolete, showed two parcels: 9.4 m and 11.1 m (31 and 36.4 feet). On learning of the required conveyance, J & J filed a second R-Plan, which is the one that is the subject of this decision (please see the diagram on the previous page). The frontages from north to south are:

- Part 3, the strip to be conveyed; 3.44 m wide ((11.3 feet wide)
- Part 2: 7.98 m (26.2 feet); and
- Part 1: 9.13 m (30 feet).

The diagram also shows a shaded portion, which is the brick wall of the adjoining strip plaza at 173-161 Gary.

J & J will need the following variances:

Table 1. Variances sought for Part 1 of 64 Lockerbie Dr (Similar variances for Part 2)			
		Required	Proposed Part 1 (Part 2)
Variances from Zoning By-law 569-2013			
1	Minimum lot frontage	15 m or 50 feet	9.13 m or 30 feet (7.98 m or 26.2 ft)
2	Minimum lot area	550 m ²	348 m ² (310.9 m ²)
3	Max. lot coverage	30% of the area of lot	35.75% times area of lot (40%)

² 5.1.6 ACQUISITION OF LANDS TO IMPLEMENT THE OFFICIAL PLAN Under the Planning Act if an Official Plan includes a provision relating to the acquisition of land, Council may acquire or hold land for the purpose of developing any feature of the Official Plan and dispose of the land when no longer required. Policies 1. Lands may be held and acquired by the City for the purpose of developing any feature of the Official Plan and any land so acquired or held may be sold, leased or otherwise disposed of when no longer required.

4	Min. side yard setback	1.8 m	Part 1 0.6 m from interior (north); 1.2 m from exterior (south);
			Part 2 0.7 from interior (south) lot line
5	Min. side yard setback for corner lot	3 m	Not applicable for Part 1; 0.45 m for Part 2

MATTERS IN ISSUE

The severance is the most important issue. The by-law minimum for frontage is 15 m or slightly over 49 feet, and the minimum lot area is 550 m² or 5929 sq. ft. A partial list of the applicable severance *Planning Act* tests would include:

- 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*, that is, whether the variances cumulatively and individually:

- 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

Jonathan Benczkowski testified on behalf of J & J. Olivia Antonel testified on behalf of the City. I qualified both as able to give opinion evidence in the area of land use planning. Maria Maiolo and Antonietta Whyte testified on their own behalves.

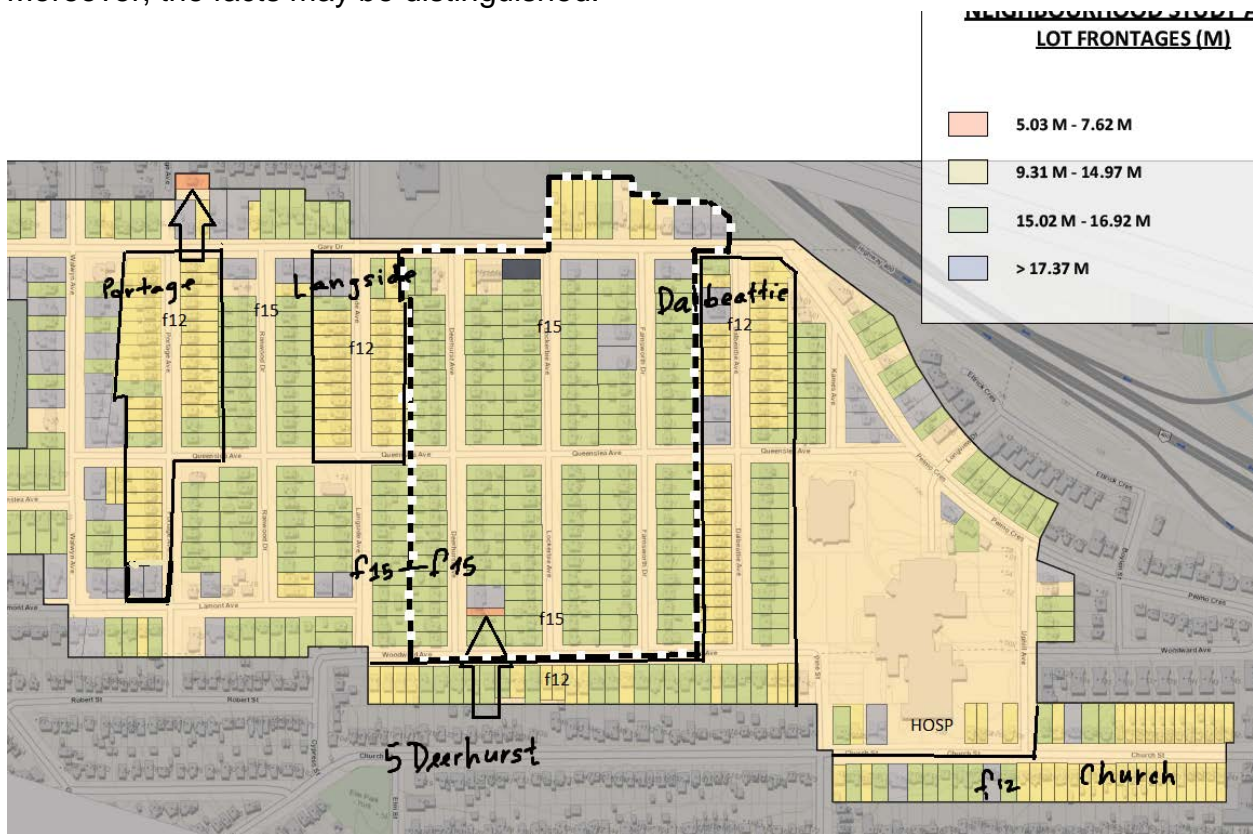
ANALYSIS, FINDINGS, REASONS

Overview

I review these issues:

- This neighbourhood contains both 12 m lots and 15 m lots, with the latter predominating;
- Mr. Benczkowski’s argument was a form of “deductive reasoning” in two steps;
- 12 m lots are similar to 15 m lots
- 9 m lots are similar to 12 m lots
- Therefore, in his estimation, 9 m lots are similar to 15 m lots and would maintain the intent of the latter’s zoning.

An argument made in the course of submissions, urged me to follow *241 Pellatt Ave*. The OMB decided that a property near or abutting a non-residential use is more entitled to a severance. If this is what the case says, I do not feel such a principle is justified. Moreover, the facts may be distinguished.



The inclusion of RD f12 zoned lands in Mr. Benczkowski’s study area

Above is Mr. Benczkowski’s study area. Ms. Antonel’s (the City’s planner) study area is the area within the dotted line. The only similar sized properties (7.62 m) are

indicated by the two upwards arrows³. Both planners include Farnsworth, Lockerbie and Deerhurst — solidly 15 m frontages; to the tune of 95.5%, according to Ms. Antonel. Her study area is uniformly RD f15 (minimum frontage 15 m and minimum lot area 550 m²).

However, Mr. Benczkowski also included four RD f12 areas (minimum frontage 12 m and minimum lot area 370 m²).

Portage Ave (far left “island”)
 Langside Ave (centre left “island”)
 Dalbeattie Ave (long finger, centre right)
 Church Ave (lower right, east of the HOSP (Hospital) zoning).

The post-OPA 320 Official Plan requires that the proposed development **respect and reinforce the “prevailing size of lots” and “prevailing density of nearby residential properties.”**⁴ So my first task is to identify the study area, whether it should include RD f12 lots when the subject is RD f15. In addition, to apply the minor variance test I must ask what the intent of an RD f15 zone is and whether its intent differs from RD f12’s.

As a matter of simple counting, both study areas contain a majority of 15 m or >15 m lots.

Comparison of frontage distributions for the two neighbourhoods		
	Benczkowski (J & J Developments)	Antonel (City)
Total lots	554	154
0 to 9.13 m	8 (1.4%)	1 (0.6%)
7.63 to 15.16 m	165 (29.7%)	6 (3.9 %)
15.24 m and wider	381 (68.7%), of which 72% are exactly 15.24 m	147 (95.5%), of which 92% are exactly 15.24 m

Ms. Antonel speculated that the RD f12 areas were remnant artefacts from the lands being in the hands of different owners, some of whom chose to make 12 m (40 feet) the standard lot size, while others chose to make 15 m (50 feet) the standard.

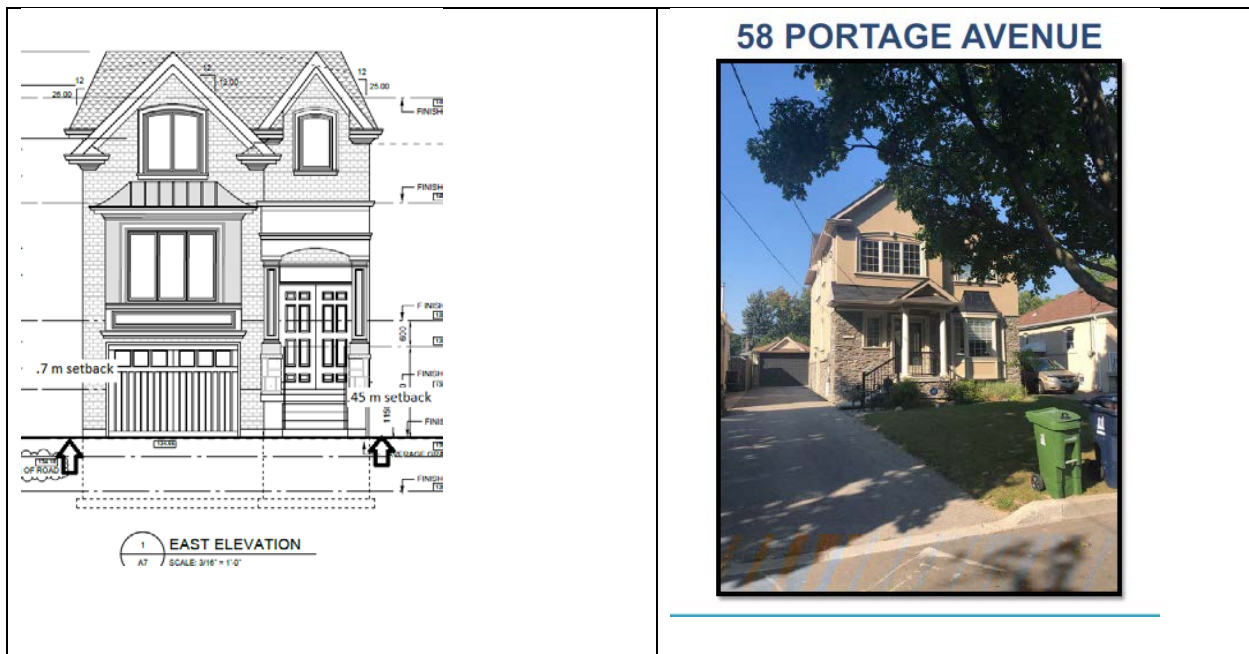
³ The arrow near the word “Portage” points to a lot that is at the rear of a Gary property. It is confusingly placed.

⁴ 5. Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular: b) prevailing size and configuration of lots; c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;

Each of the included RD f12 zoned areas are themselves homogenous, for example, the portion centered on Portage has 39 lots, 31 are exactly 40 feet, 2 just under 50 feet, and 5 that are exactly 50 feet and 32 Lamont being 63 feet. I conclude that the f12 areas are deliberately drawn to keep like with like. The intent of the two zones must be different, which is only common sense. The conclusion is that no matter what the starting point, the farther a severed frontage deviates from 15 m, the less likely it will respect and reinforce a neighbourhood of 15 m lots and the less likely it will maintain the intent of the f15 zoning.

Mr. Benczowski's study area includes Church Street at the lower right-hand corner. The basis for this inclusion is that a walker or driver would primarily enter the neighbourhood from Jane and pass by these lots, about a 15-minute walk from the subject site. I am skeptical that a planner needs to go as far afield as this; I find this is a separate neighbourhood both from a visual comparison of the map on page 5 and because this area contains a solid block of 10.06 m lots (33 feet), not found in the upper portion of the map.

So, I reject first link in the "deductive reasoning" argument, that RD f15 zones are functionally comparable to RD f12 zones for purposes of Official Plan and s. 45(1) compliance. I find that Mr. Benczkowski's area should not include RD f12 subareas, especially those lots on either side of Church Street near Jane.



The second link

I now turn to the second link in the argument, that existing 12 m lots are "similar to" the proposed lots. Mr. Benczkowski said:

[speaking of 58 Portage} If we take the 12.19 m (40 ft), as I spoke to you with these rear drive aisles, that actually lead to the rear and they're probably anywhere between 2.8 to 3.2 meter wide drive aisles, we are (sic) built form that is **similar to** what is proposed today.⁵

Number 58 Portage is on the west side of Portage in RD f12 zone, right photo on the previous page. To the left is the eastern elevation of the northern proposed lot. There are some architectural similarities, but the pattern of open spaces is different, especially when one takes into consideration that the photo shows space for a car on either side of 58 Portage, which would be impossible for future 64A-64B Lockerbie homes with setbacks of 1.2 m, 0.6 m, and 0.7 m. One may argue that the open, postwar pattern of physical development in this part of Toronto is obsolete, but that is a matter for Council to address.

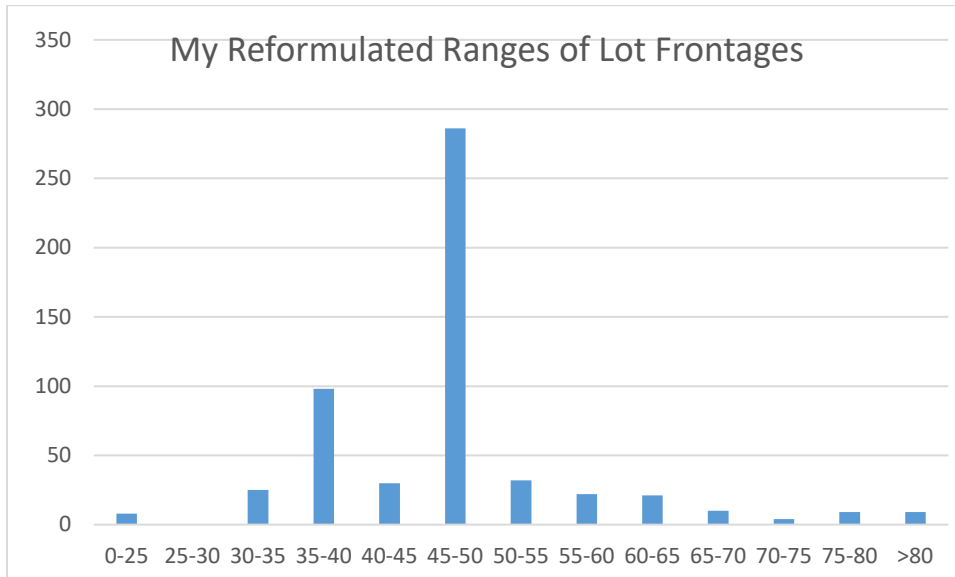
No other similar frontage lots except 5 Deerhurst

Mr. Benczkowski used four ranges of lot frontages:

Table 2. Distribution of Lots using Mr. Benczkowski's ranges on page 5		
Ranges in meters		Number of Lots
5.03 – 7.62 m	16.5 – 25 ft	8
9.31 – 14.97 m	30.5 – 49.1 ft	162
15.02 – 16.92 m	50 – 55.5 ft	310
>17.37 m	>57 ft	74
Total		554

I found it useful to break these down into 5-foot ranges and display them in a chart (next page). The proposed lots are 7.98 m (26.2 ft) and 9.13 (30 ft) and Mr. Benczkowski's range skips the interval between 7.63 and 9.30 m, which would contain these lots. The above chart also shows this phenomenon, that is, I found no exemplars between 25 to 30 feet. The chart shows strong peaking at 40 and 50 feet, with many "leftover" lots in the tail to the right. I believe in so choosing his intervals, Mr. Benczkowski did not wish to mislead me by including, for instance, the proposed 30-foot lot with the large number of 33-foot lots on Church.

⁵ This reasoning is also used by the *241 Pellatt* panel: at paragraph [13] . . . [the owner's planner] stated that the proposed new lot will provide infill development in an established area with full services, access to public transit and a full range of public amenities. He stated that a variety of infill development with a variety of lot sizes had already taken place in the area. He noted that there **are similar size** (sic.) lots in close proximity, conceding that they largely contain semi-detached dwellings.



However, with no other exemplars, it is a tough argument to make that the existing physical character is respected and reinforced.

This site is at the confluence of four different “neighbourhoods:” and the plaza to the east, the school and park to the north, the “Gary east” lots to the east, and Lockerbie lots to the south.

The plaza lots

As a good advocate, Ms. Stewart addressed all three possible neighbourhoods in the nearby context. We have dealt with the Lockerbie block. Next, we discuss the plaza lots. The smallest lots overall are: 177 Gary frontage 0 m (obviously a mistake), 208–165 Gary (6 properties at about 5.2 m), 5 Deerhurst 7.62 m and then 64 and 65 Portage at 9.31 m each. So, if the plaza lots were included in the study area, this would assist J & J’s 8 and 9 m lot argument greatly. However, I feel that this is an apples-to-oranges comparison and one for which no evidentiary foundation was laid.

First, we are dealing with 6 properties; about 1% of Mr. Benczkowski’s 554 lots. The zoning text for these lots was not filed; (probably M1 under the old North York By-law 7625). Although they are in his spreadsheet, Mr. Benczkowski did not colour most of these lots (except for Brioni’s Supermarket), signifying an intention to exclude them; and he consistently used the word “homes,” by which I infer he meant owner-occupied homes, not the rented apartment over commercial in the plaza. I believe that these would be likely to be owned by absentee landlords, with a different planned function and are not part of a reasonable delineation of a neighbourhood.

The “east Gary” lots

This is a two-block long strip of houses east of the subject property and technically part of opposite side of the same block (diagram below). They back onto Pelmo Park, and contain frontages from 11.6 to 18.3 m, much wider than proposed.



In my view, they form a unique subset, being relatively isolated with their own locational characteristics (longer lots, heterogenous frontages and proximity to the 401 interchange). Perhaps the immediate four lots are similar to 64 Lockerbie's intended frontages; but the test requires more; it must be explained how this pattern is **reinforced** by the intended 8 and 9 m frontages.

241 Pellatt Ave⁶

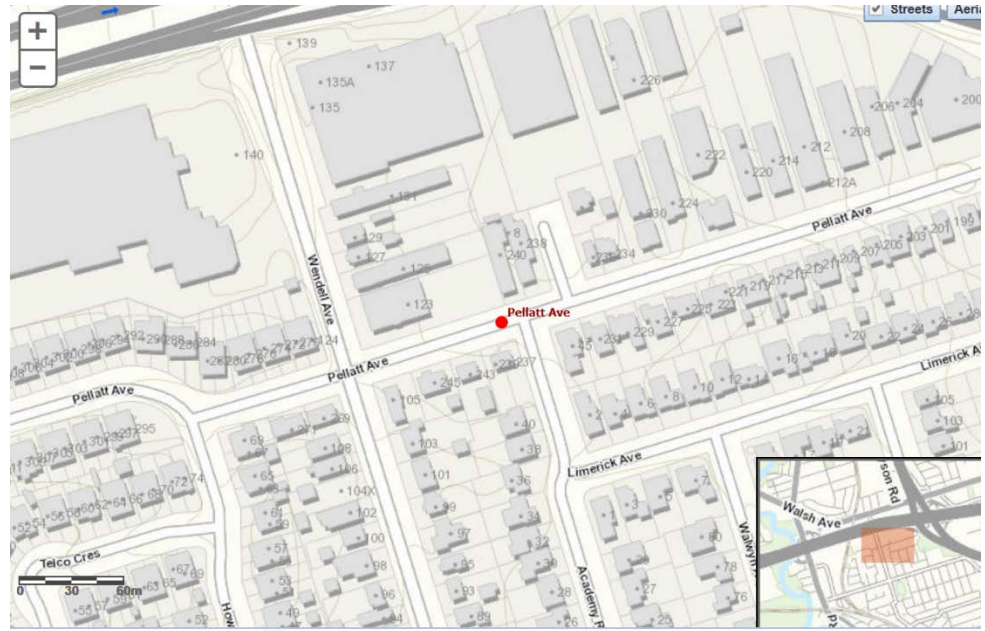
Ms. Whyte filed three LPAT cases for nearby properties. One was the granting of a severance at 241 Pellatt. Since the geographic context is basic, I reproduce the City's zoning map. This wasn't an exhibit, but both counsel made submissions about this case, drawing heavily on what they inferred from the reasons, which did not contain a map. Ms. Stewart consented to Mr. Baena's filing of a photograph of the land use (a trucking business) across the street from 241 Pellatt during his submissions.

⁶ *Peter Pitino v Toronto*, PL140247 (Sept 19, 2014)

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Pellatt Avenue lies just south of the 401, east of Wendell Avenue, All the properties on the north side of Pellatt are designated Employment and it is clear from

the lot sizes and configuration they have a very different planned function from the residential neighbourhood to the south. West of Wendell are lots that are uniformly semi-detached homes, apparently to buffer the south side from the industrial building that may be seen in the upper left-hand corner. The decision's authors, at



para 27, state that the trucking business, which is enclosed by a see-through chain link fence, “constitute part and parcel” of the area in which it is located. The authors went on to say that:

“It constitutes part of the character of that area **more so** than does the interior of neighbourhood on whose periphery it sits”. (my bold)

Treating Employment uses as nothing more than nuisances is “old school”; Toronto’s Official Plan makes it clear that Employment lands are a resource for the long-term prosperity of the City, to be protected against incursions from residential uses. It is possible to envision that future residents of 241 Pellatt will approach City elected representatives to complain about the frequency of truck movements and open nature of the fence and compel it to defend activities that the City wishes to sustain. I believe the cited statement is wrong and not supported by a complete reading of the Official Plan and zoning.

241 Pellatt can be distinguished

Even if *241 Pellatt* is accepted as being a correct application of the Official Plan and other *Planning Act* tests, it is distinguishable in its facts, because the trucking business is a light industrial use, whereas we are dealing with a local strip plaza. An Employment designation allows manufacturing and warehousing uses that are not

permitted in a Neighbourhoods designation. Conversely, residential uses are not permitted in Employment designations.

Section 4.1 of the Official Plan states the designation “may contain a full range of residential uses as well as “parks, schools, local institutions and **small-scale stores and shops** serving the needs of area residents” (my bold). This plaza serves the needs of area residents. Ms. Whyte shops there and once lived over the Portuguese take out chicken shop. Lots abutting it are not “transitional”, the term used by the panel; as a permitted use, it is expected there will be many instances where homes will abut small scale stores and shops. Indeed, there will also be instances where homes will abut parks, schools and local institutions, for example, a day care or church; and no one would expect that an abutting residential lot was thereby entitled to a severance.

In conclusion, the Official Plan test that the development must respect and reinforce the existing physical character is not met.

DECISION AND ORDER

The appeal is not allowed; the severance is not granted, and the variances are not authorized.



T. Yao
Panel Chair, Toronto Local Appeal Body