

DECISION AND ORDER

Decision Issue Date Thursday, November 07, 2019

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): XIDA CHEN

Applicant: DOUGLAS LAWRENCE

Property Address/Description: 85 RYKERT CRES

Committee of Adjustment Case File: 19 124455 NNY 15 MV

TLAB Case File Number: 19 161311 S45 15 TLAB

Hearing date: Thursday, September 26, 2019

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Evelyn Wong, Xida Chen	Owners	Ian Andres
Tae Ryuck	Expert Witness	
City of Toronto	Party	Lauren Pinder
Simona Rasanu	Expert Witness	
Geoff Kettel	Party	

INTRODUCTION

Evelyn Wong and Xida Chen wish to demolish their North Leaside house and build a larger one. The family has carefully consulted with the adjoining neighbours who have written to support their application. The opposition to their proposal comes from the Leaside Property Owners Association and the City of Toronto.

The new building needs the following variances:

Table 1. Variances sought for 85 Rykert Cres			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Max. permitted building height	8.50 m.	8.84 m.
2	Max. floor space index	0.60 times the lot area	0.82 times the lot area
3	Min. west side yard setback (the east side yard setback complies)	1.20 m.	0.92 m.
4	Lot coverage	35% of the lot area.	38.7% of the lot area.
Variances from East York Zoning By-law By-law No. 1916			
5	Max. permitted building height	8.50 m.	8.76 ¹ m.

On May 9, 2019, the Committee of Adjustment modified the density from 0.82 to 0.70, approving the other variances. Mr. Chen appealed; and so, this matter comes before the TLAB.

EVIDENCE

I heard from Tae Ryuck, Ms. Wong's and Mr. Chen's planner, and Simona Rasanu, the City's planner, both of whom I qualified as able to give opinion evidence in the area of land use planning. Mr. Geoff Kettel gave evidence on behalf of Leaside Property Owners Association.

MATTERS IN ISSUE

The variances must meet all four tests under s. 45(1) of the *Planning Act*: that is, whether they individually and cumulatively:

- 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

¹ The LPAT is still hearing appeals of City-wide Zoning By-law 569-2013, so the Buildings Department examines plans under both it and the former Borough of Leaside By-law 1916, leading to a duplication of one of the variances. The two heights differ because grade is measured differently under the two zoning by-laws.

ANALYSIS, FINDINGS, REASONS

Overview

The proposed development must respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:

the prevailing size and configuration of lots and

prevailing heights, massing, scale, **density** and dwelling type of nearby residential properties.

The key issue in this case is the prevailing **density**. However, the prevailing **size** of lots is relevant as it is the denominator for the calculation of density. It is accepted that the north side of Rykert has larger lots than the south side and the onus is on the Chen/Wong application is to show that, taking into consideration these larger lots, the application nonetheless respects and reinforces the prevailing density or densities. Instead their evidence largely tries to deny any pattern of limitation to permissible density as a misinterpretation of facts.

This neighbourhood is one of active reinvestment with a considerable number of owners doing the same thing as the applicants; that is, tearing down and rebuilding a much larger home. Under these circumstances, there seems to be good evidence that owners choose generally a Floor Space Index of 0.70 or below. The applicants have instructed their architect, Douglas Lawrence, to create a sensitive design, which is **one** of the goals of the Official Plan, and I find such a design could possibly “fit into” the neighbourhood. However, such design, even if sensitive, must rest on an evidentiary basis of facts, and none exists for a density of 0.82.

The only other density in this range is 0.79 at 112 Rykert, a larger lot on the north side. I find the proposal could support a density like 112 Rykert’s if the façade is redesigned in order to better fit within the existing physical character of the neighbourhood.

The two “purposes and intents” of a density number

The *Planning Act* asks me to determine if the intent of the density standard is maintained. Although the *Act* says “**the**” intent and purpose, it appears that there are at least two:

- a “compatibility” goal — that is, nearby neighbours are shielded from unacceptable adverse impacts; and
- a “fairness” goal, that is, people with equally sized lots receive the same development opportunities and an owner will not build “more house” than the lot can bear.



Sensitive design

The directions to Mr. Lawrence were to lower the height of the existing house and increase the side yard setbacks. In Figure 1 (the photo above) showing the house that is to be torn down, I have inserted a heavy line indicating roughly the existing height, clearly higher still than the neighbours on either side.

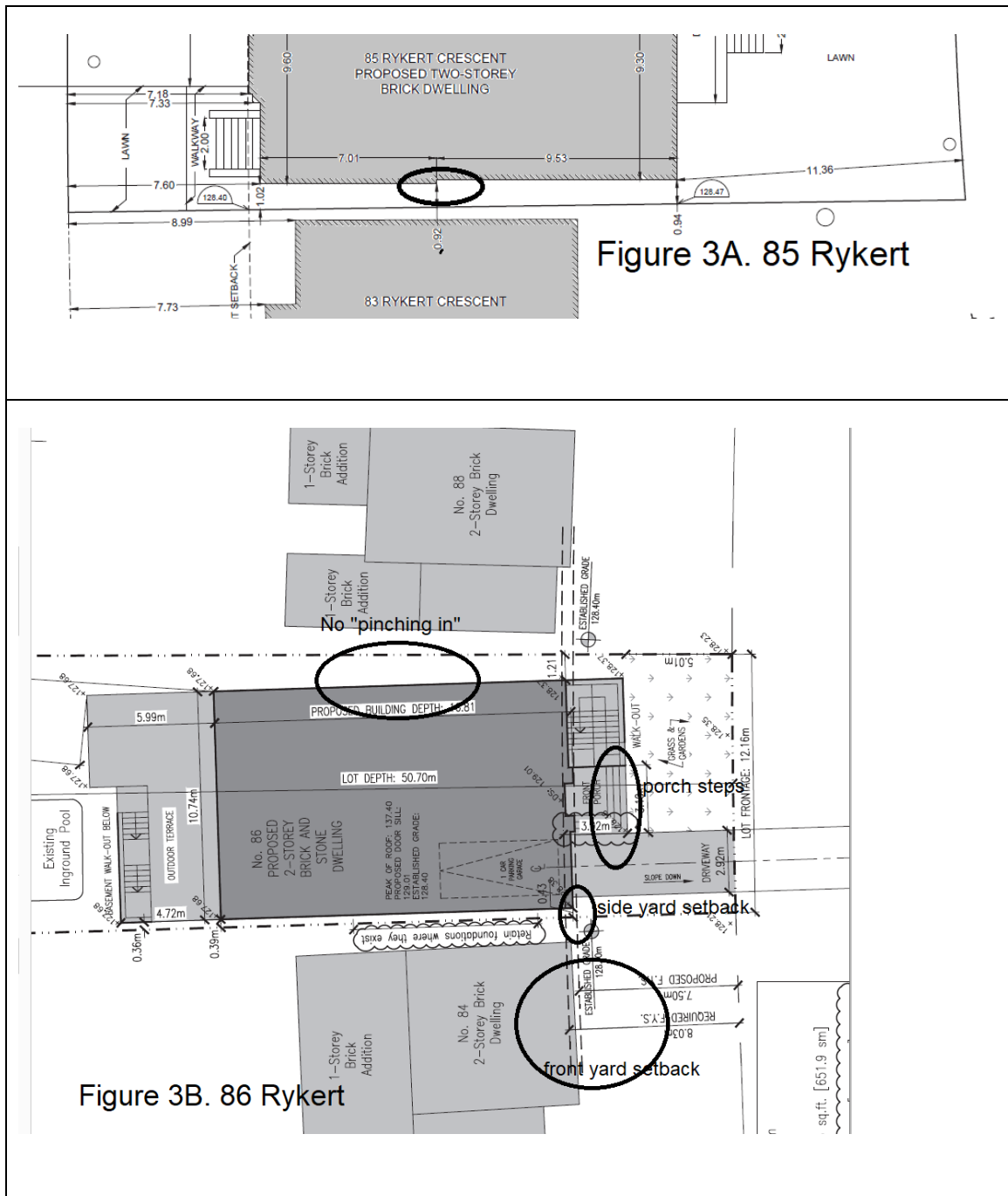


In Figure 2 (left), I have shown Mr. Lawrence's depiction of the new front elevation in relation to the neighbours. The revised roofline is an improvement, (which is unusual for a

new house, which usually comprises everything on the "wish list".)

Improvement of side yard setbacks

In this section I want to compare the proposed setbacks with those chosen by their across-the-street neighbours. In January 2018, the neighbours obtained 9 variances from the Committee of Adjustment. Being on the north side, they have a larger lot, so they did not need an FSI variance. However, the Lawrence design has made more of an attempt to "fit in," a key provision of the Official Plan.



Both of the side neighbours have substandard side yard setbacks. With respect to #87, whose setbacks range from 0.60, to 0.94, the applicants have chosen to allow the full setback of 1.2 m on that side. Number 83's setbacks are smaller than #87's; and are in the 0.5 m range. (This is the neighbour with the attached garage). The applicants have moved part way to full compliance; from existing west side yards of 0.6 m to 1.02 m front and 0.92 m rear². (See variance 3). This is about .34 m or a foot extra

² Figure 3A shows the rear setback to be 0.94 m instead of 0.92. I do not know the reason for this discrepancy.

and the Wong/Chen family could theoretically have argued that they were just extending an existing substandard condition.

In addition, the architect Mr. Lawrence has "pinched in" the side walls to take into consideration the slight tapering of the lot at the rear (oval in Figure 3A, previous page).

Figure 3B shows four circles on #86's plans with my comments (from top down):

- Although the #86 tapers in similar fashion to #85, with the wider part of #86 (rear and left), the architect has chosen to design a house with straight side walls, which are easier to build, but less sensitive to the lot's shape;
- The porch steps' width of 3.19 m (2 m permitted) requires a variance;
- #86 has an existing condition of a substandard side yard setback of 0.44 front to .16 m rear like the applicants. (Lower right corner in Figure 3B, which shows the proposed design.) #86's architect has chosen to create a new side yard of 0.39 m at the rear (a 23 cm **improvement**), but a one-centimeter **worsening** at the front;
- The bottom circle shows that the entire front of the house except for the doorway intrudes .5 m into the front yard setback. Mr. Chen and Ms. Wong, with a lot one third smaller, have not sought any front yard setback.

My point in comparing the two designs is not to criticize the Committee's decision, but to point out that, notwithstanding #86's having more leeway (their FSI is only 0.52), the applicants have made a number of design choices that are superior, in my view, in terms of streetscape, to those made by their neighbour across the street.

Ms. Rasanu's consistent approach

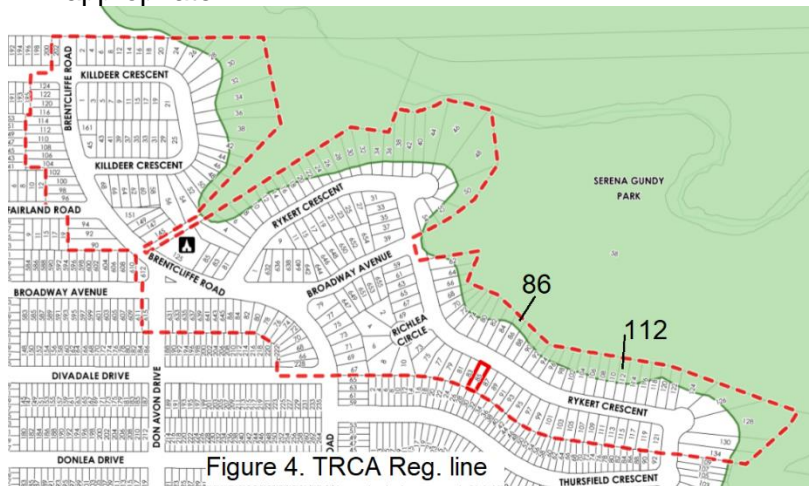
I start with the observation that Leaside was designed by Frederick Todd, Canada's first landscape architect, who also planned Assiniboine Park in Winnipeg, Wascana Park in Regina and Shaunessy Heights in Vancouver. This design puts higher density near Eglinton and created curvilinear streets; especially pronounced for the two streets abutting Serena Gundy Park: Kildeer Crescent and Rykert Crescent. Mr. Todd intended lots on Kildeer and Rykert to be the most desirable lots in North Leaside. This has proven to be the case; a century later; they are on quiet streets, devoid of through traffic, yet within walking distance of Eglinton, which is now receiving a new subway line.

The result is a high degree of reinvestment, with many Rykert lots experiencing either an addition or a teardown, and the Committee of Adjustment might be expected to be hard pressed to maintain a consistent approach. And yet it seems it has. Ms. Rasanu has found that from 2010 to 2019, nine Rykert lots have received FSI variances averaging 0.69; six Kildeer properties received an average of 0.69 (including an OMB approval at 0.61), one Brentcliffe lot with an FSI of 0.7 and one Broadway lot receiving 0.78.

Number 26 Rykert received an FSI of .957 under the new by-law and 0.677 under the former by-law. I consider this to be a case where table land above stable top of bank was involved, which is not the situation here. Both Mr. Ryuck and Ms. Rasanu referred to the density of 112 Rykert as “0.79” although the plans show 80%. I am using this 0.79 as the evidence given at the hearing and **this will be the maximum possible density in the Order.**

Mr. Kettel observed that the north side that abuts the Park has received larger FSIs:

The average of the recent decisions on the south side of Rykert] is 0.674 whereas the average of the north side is 0.794³ i.e. 0.12 FSI difference or 20%. As such the Committee of Adjustment . . . FSI (0.70) is more in line with the FSI approvals on the south side, and the requested FSI (0.82) is more in line with the FSI approvals on the north side. This suggests that the Committee of Adjustment decision was more appropriate.



The larger north side properties are counterbalanced by the presence of the TRCA regulated fill line (Figure 4 left) which cuts north side (even numbered) lots at about the 33-66% ratio. The stable top of bank does not always coincide with the TRCA Regulation fill line; for example, #86

may use its whole lot area, while #112, just down the street, cannot. This will be discussed in greater detail in the next section.

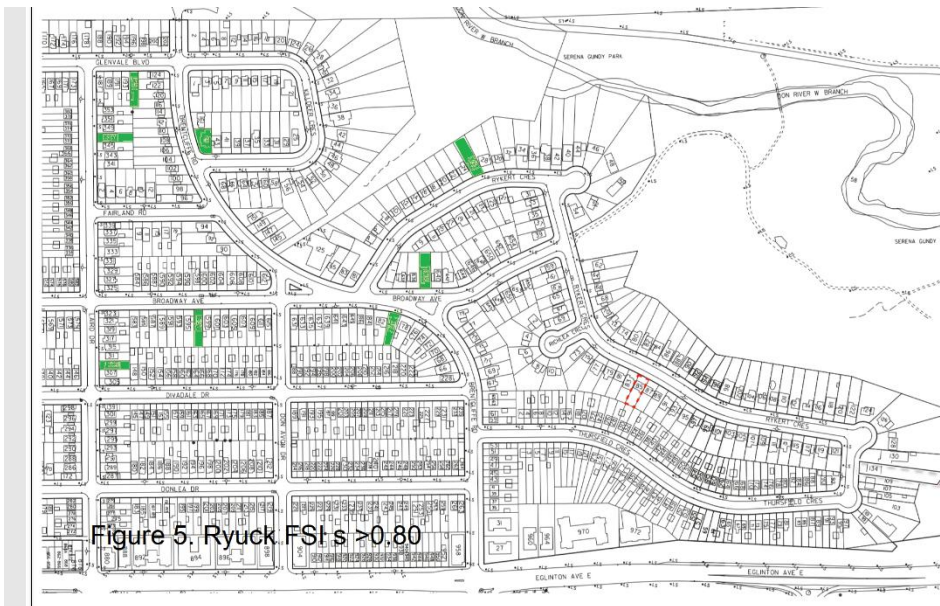
Mr. Ryuck said:

That's all it is; It's [the FSI] just a number, it's not reflective of how size of home would be over-developed on the lot.

“It's just a number”

³ All parties are working from the same data base, but Mr. Kettel broke down north side Rykert and south side Rykert. At this point he was dealing with a sample size of 8 properties; 4 under 0.60 and four over.

His map of >0.80 FSI properties is shown to the right. There are no coloured lots on Rykert; the closest candidate might be #112 at 0.79 which is almost 0.80. The scarcity of shaded properties suggests to me that he cannot assert that >0.80 properties are either the prevailing density of either the broader neighbourhood (i.e. the one as far as the corner of Divadale and Laird) or the immediate neighbourhood. I also note that Mr. Ryuck did not supply the back up decisions for the shaded properties, as Ms. Rasanu did.



Mr. Ryuck's conclusion in support of the higher density was to deny the applicability of the numerical aspect (other decision makers have called this dismissively "a numbers game"). He asserted a consistent neighbourhood preference for about 335 m² gross floor area.

So 86 is located directly across the street, . . . and this is located on a much larger lot, or property and the detached dwelling that was approved on this particular property is actually similar in size . . . as the one proposed for the subject site, and was approved by Committee in January 2019, . . . without requiring any density variances, because it is a deep ravine lot. . . where the stable top of bank does not affect the [FSI measurement] on this particular lot.

And also, at 112 Rykert Crescent . . . That was approved at an FSI of 0.79. notwithstanding the fact that approximately one third of the lot was excluded from the lot area, because it is below top of bank line, and in both cases as one walks the street, looking at the north side of Rykert Crescent, or on the south side of Rykert Crescent, one can't tell the difference if the north side has deeper lots or larger lot areas compared to the south side. It's all in the manner in which the proposed dwelling has been deployed or mass[ed] onto the property.

And the proposal as I indicated, with the exception that small sliver, on the west side yard [where the applicants need a side yard variance] is pretty much an as-of-right building envelope. And it does not exceed in terms of height that would be irregular from the adjacent dwellings.

Table 2 Comparison of 85, 86, and 112 Rykert			
	85 Rykert	86 Rykert	112 Rykert
Gross Floor Area	336.9 (3624 sq ft)	335.3 (3609 sq ft)	332.6 m ² (3580 sq ft)
Lot Area	410 m ²	651.9 m ²	632 m ²
Table Land	N/A	N/A	Table land = 416.7 m ²
Floor Space Index	0.82	0.51	0.79

Mr. Ryuck's thesis is that it is only an accident of lot size that causes their FSIs to differ.

Mr. Andres wrote in submissions:

...Ms. Rasanu could not provide any legitimate planning reason to deny the owners their desired interior floor space and layout. Rather, it can be inferred from their evidence that she believes it is appropriate to **penalize** the owners for purchasing a lot that is shallower than the ravine lots on the north side of the street. (my bold)

I don't agree that this is her position; I find she is prioritizing fairness and consistency rather than punishment.

I disagree with Mr. Ryuck and I note that the By-law must have applicability to the entire City not just Rykert Cr. In Table 3 I have taken data for two other properties that I have heard evidence on within the last month; Tilson is in the Eglinton/Mount Pleasant area and Macdonell is in the Roncesvalles Village area. All are four bedrooms; all have at least four-bathrooms, and all are subject to a limit of 0.60 FSI. There is no suggestion that this is a scientific. It is more of an anecdotal observation.

Table 3 Comparison of 85 Rykert with 2 other non-Leaside properties (from reported TLAB decisions)			
	85 Rykert	65 Tilson	199 MacDonell
Frontage	12.15 m (40 ft)	7.15 m (23.45 ft)	5.31 m (17.4 ft)
Lot area (m ²)	410	207.4	211
GFA (house size) in sq ft	3624	2232	2400
FSI	0.82	0.77	1.02

Result	Modification to 0.79	Rejection (but the decision is still within appeal period)	Approval
Table 4 Three other larger Leaside lot areas (from Ms. Rasanu's backup material)			
	61 Rykert	121 Rykert	15 Kildeer
Frontage	Not known	Not known	Not known
Lot area (m ²)	449	485	466
GFA (house size) in sq ft	3186	3576	3432
FSI	0.659	0.685	0.684

In Table 4, I compare desired house size sought by owners of properties half the size of 85 Rykert's. These are in other parts of the City. The house they sought is about 1200 sq ft less, and the reason being their lot size is only common sense. The owner of 65 Tilson had a mutual driveway that further limited her options and she placed one bedroom in the basement. In Table 4 I compare the flip side; larger Leaside properties, where the owners also sought less house.

I don't accept Mr. Ryuck's proposition, even though Table 3 shows that there does seem to be a societal expectation of a four-bedroom house, if one is to make a major investment.

I agree with the City's position that fairness for the entire City means the s. 4.1.5 analysis indicates the numerical standard must be given some weight in the application of the four tests. There is also support in *Vincent v Degasperis*,⁴ where the Court approved a partly mathematical approach: minor was considered to be "small in size," which is a numerical comparison.

Synthesis of two findings

So, we have good evidence that the design is sensitive, which is certainly one goal of the Official Plan, and fairness arguments suggesting a lower FSI which is also a goal of the Official Plan. I am resolving this conflict by allowing an FSI of 0.79, close to what the applicants seek, but imposing a redesign. If the applicants are not willing to redesign, they can avail themselves of the density award given by the Committee of Adjustment, which I also give, and which is still more than what is permitted.

⁴ A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. Par 12. *Vincent v. Degasperis*, 2005 CanLII 24263 (ON SCDC), 256 DLR (4th) 566 — 200 OAC 392 — [2005] OJ No 2890 (QL) — 12 MPLR (4th) 1 — 140 ACWS (3d) 752.

Ms. Rasanu took far more photographs than did Mr. Ryuck and these photographs depict houses from all parts of the study area. These are plotted in Figure 6 below, with the location of Ms. Rasanu's photos in lighter shading and Mr. Ryuck's in darker shading. To make this map I took Ms. Rasanu's study area map and coloured the addresses of photos shown in each planner's witness statement. I further looked at the photos and added numbers 1, to 5 to indicate certain architectural and planning details as follows:

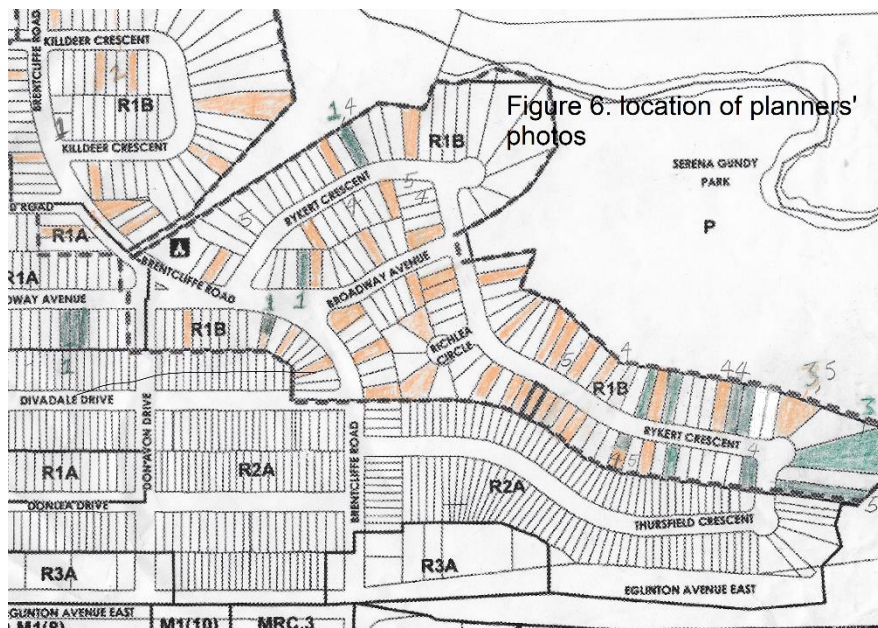
"1" for a density of 0.80 or over; these are copied from Figure 5;

"2" for a two storey above integral garage design; this is inferred from the photos;

"3" to show a two-car garage design. From photos and Mr. Ryuck's oral testimony.

"4" to show the comparables used by Ms. Rasanu for her averages; and

"5" to show Mr. Kettel's lots which did not seek an increase in FSI.



Number 1 (density). There is one >0.80 lot on Rykert and one on Broadway, but none in the immediate block. As I stated previously, I feel this is too few to form a convincing case that this is a prevailing characteristic.

Number 2 relates to the two storeys above garage design. Since the

applicants have purchased a house that had this design from original construction and has improved the situation, I feel they are entitled to keep a similar design even though I can find only one other example, in the top part of Kildeer.

I will jump to number 5, which is data from Mr. Kettel. There are five 5s; three on the north side of Rykert and two on the south. The presence of two south side lots suggests that these two owners were in the same position as the applicants but chose to build **within the 0.60 limit**. The other three 5s were owners of larger lots and for 124 Rykert at the end of the street, a very much larger lot. It is pretty easy to see why they would not need extra FSI. On this slim evidence, there is further support for the

conclusion for owners of lots similar situated to the applicants, they could not or chose not to argue for an increase in FSI.

The front façade condition

I observe that in Table 4, we are relying on decisions that go back some eight or nine years. Similarly, this decision will be considered in future FSI applications in North Leaside for ten years. I believe that the City and the Association are concerned that what was a reasonable and routinely granted FSI of 0.70 is now to be moved to 0.80, with no real justification other than the desire of the owners for more space on what happens to be a relatively smaller lot. I too, share that concern.

The distribution of number 3s show the occurrence of a two-car garage; there are only two; both at the east (right) end of the block. I think it is unfortunate the owners of the smallest frontage on the street have chosen this design and it is obvious from Figures 1, 2 and 3B of this decision that the prevailing typology is of a single driveway, less than 3 m in width leading to a single car garage. **The owner, on whom the onus rests throughout, must demonstrate that each of the variances both cumulatively and individually maintain the intent of the Official Plan and zoning by-law; this is fundamental. It is only on this condition of a façade modification that I authorize anything above 0.70.** This is based, in part, on the evidence of Mr. Ryuck in which both comparables have single car garages and the many photos taken by Ms. Rasanu.

In opposition to this suggestion Mr. Andres wrote:

Given that the zoning by-law permits a double garage as-of-right, and that there are other examples of double garages on the street and in the broader neighbourhood, there is no valid basis for the City or LPOA to object to the garage. In fact, if the lot were slightly wider at the front yard setback (thereby exceeding the 12 m frontage threshold⁵), the second parking space would be excluded from the GFA and FSI calculations pursuant to section 10.5.40.40(3)(D) of Zoning By-law 569-2013. Furthermore, no weight should be afforded to Mr. Kettel's unsubstantiated assertion that the garage negatively impacts the streetscape or his reliance on the 2003 Leaside Residential Character Preservation Guidelines. The TLAB has previously found that the Leaside Guidelines are outdated, have never received Council approval, and have no formal status.

While the zoning permits double car garages as of right, this is not an as-of-right building, even at 0.70. Beyond the Leaside Residential Character guidelines, which I acknowledge are only guidelines, there are many references in the Official Plan that I believe are supportive of a single car garage physical characteristic:

- “beautiful architecture and **excellent urban design** that astonish and inspire” (Making Choices);
- the viability of Toronto’s transit system is **crucial** (2.2 Structuring Growth);

⁵ I am not certain Mr. Andres’ premise is correct. Par 29 of Mr., Ryuck’s witness statement says the frontage is 12.15 m or 40 feet.

- development will respect and reinforce the existing physical character, **streetscapes**. . . (2.3.1 Healthy Neighbourhoods;
- 3.1.1 The Public Realm — entire section;
- “Toronto’s streets, parks and open spaces are defined by the **façades** of many buildings”. (3.1.2 Built Form).

DECISION AND ORDER

I authorize variances 1, 3, 4, and 5 in Table 1. I authorize an increase of FSI to 0.70.

If the applicants are prepared to redesign the front facade to contain a single car garage opening only, then I authorize a variance in density to 0.79.

In either case new plans must be drawn up, and it is a condition of either density that the applicants shall build in substantial compliance with the site plan and exterior elevations of plans to be submitted.