

DECISION AND ORDER

Decision Issue Date Friday, March 20, 2020

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): ERNEST EDWARD WILLSSHER, CITY OF TORONTO

Applicant: DESIGN PLAN SERVICES

Property Address/Description: 80 TWENTY THIRD ST

Committee of Adjustment Case File: 17 268079 WET 06 MV, 17 268072 WET 06 MV

TLAB Case File Number: 18 211133 S45 06 TLAB, 18 211149 S45 06 TLAB

Hearing dates: Jan 10, May 28, June 13, 2019; Jan 28, 30, 2020

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Mark & Maria Liani	Owners	Russell Cheeseman
TJ Cieciura	Expert Witness	
City of Toronto	Appellant	Aderinsola Abimbola
Sue & Ernest Willsher	Appellants	
Long Branch Neighbourhood Assoc.	Party	Judy Gibson
Deborah Hardy	Participant	
Dorothy-Anna Orser	Participant	
Brian Bailey	Participant	
Christine Mercado	Participant	

INTRODUCTION

Mark and Maria Liani wish to demolish the house and build two new ones at 80 Twenty Third St. Despite the single numbered address, they have already obtained a legal severance¹ and own two 25 foot wide, 290 m² lots. To build the houses they desire they need two variances (Table 1):

Table 1. Variances sought for Part 1 of 80 Twenty Third St. Identical variances are sought for Part 2)			
		Required	Proposed
Variances from Zoning By-law 569-2013 and Etobicoke Zoning Code (1993-108)			
1	Max. Floor space index	0.35 times area of lot	0.60 times area of lot
2	Height of exterior main walls	7.0 m	8.39 m ; reduced to 7.99 after the initial application was made

The Committee of Adjustment approved these variances on August 2, 2018; Ernest Willsher and the City of Toronto appealed and thus this application comes before the TLAB.

Planning staff recommended that the main front wall “be revised and reduced”. Nonetheless the Committee approved a variance of 8.39 m. After the Committee’s decision, the Lianis revised their plans with the notation “lowered 2nd floor ceiling by 0.30 m and soffit by 0.1 m” and now request a variance of 7.99 m for main walls.

Mr. Cheeseman requests a finding that this amendment to the original application is minor pursuant to s. 45 (18.1.1), so that further notice is not needed. This is unopposed and I make this finding.

MATTERS IN ISSUE

The variances must meet policy considerations and all the four tests under s. 45(1) of the *Planning Act*. The tests are whether the variances would individually and cumulatively:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- be desirable for the appropriate development or use of the land; and
- be minor.

¹ City maps show this as 80 and 82 Twenty-Third, with one building spanning the two lots.

To meet the meet the policies in chapters 3 and 4 of the Official Plan:

Physical changes to our established Neighbourhoods must be sensitive, gradual and generally “fit” the existing physical character.

and

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

. . .
c) . . . massing, scale . . . of nearby residential properties; . . .

In this case the key issue is the massing or size of the two proposed dwellings in what I determine is a very low density neighbourhood.

EVIDENCE

I heard from TJ Cieciura, the Lianis’ planner whom I qualified as able to give opinion evidence. I heard also from Sue Willsher testifying for herself and her husband Ernest Willsher; Christine Mercado, testifying for herself and the Long Branch Residents Association, and Deborah Hardy, Dorothy, Anna Orser, and Brian Bailey, who testified on their own behalves and the Association. The City of Toronto called no witnesses and ultimately informed me that for reasons protected by confidentiality, it was taking no position on its appeal.

The qualifications of lay witnesses

I wish to explain why I have accepted witnesses’ evidence without them being qualified as an expert. It is settled law that the evidence of a non-expert may be accepted, subject to weight. I will use my own word “non-qualified” because a person may become an expert at a subject by self-study and experience.

Most of the evidence given by “non-qualified to give opinion” persons was factual. For example, Ms. Mercado’s evidence that Long Branch contains 10,080 people as of the last census. Where the evidence became more technical and judgment laden, I accepted evidence from non-qualified witnesses in the absence of specific counter evidence from Mr. Cieciura or even over Mr. Cieciura’s evidence when it appeared to me to be reasonable to do so. For example, I accepted Mr. Bailey’s FSI mapping in preference to Mr. Cieciura’s blanket rejection. Also, some witnesses gave information which I used to corroborate inferences that I drew from Mr. Cieciura’s own data. Finally, on the very question to be decided, such as whether the respect and reinforce test is met, I am not obliged to accept the unvarnished opinion of the expert; this is ultimately my duty.

ANALYSIS, FINDINGS, REASONS

Background

This case has an unusual history, intertwined with the house next door. In 2012, both numbers 80 and 86 Twenty Third (the house to the north) were 50 foot lots. Number 80 was owned by Sonya Koops, and number 86 by Edward Visan. Mr. Visan applied twice to sever his lot: —in 2012 and in 2014. He sought to create two new 7.62 m (25 ft) wide lots with associated variances. The by-law requires a 12 m (39.4 ft) frontage and a minimum lot area requirement, both of which the proposed Visan lots were unable to meet. Mr. Visan's second refusal was appealed to the OMB, which was denied by Member Schiller on May 25, 2015. Number 86 is still a 50 foot lot.

After the first refusal (March 29, 2012), Mr. Visan demolished his house and replaced it with a tall two storey house, under a proper building permit issued in November 2012. Number 86's design is like many other houses on newly created severances in Toronto. However, instead of being placed centrally, this new house is located entirely on the southern half of the lot. Mr. Cieciura, the planner for Mr. Visan's unsuccessful OMB application, and who is also the current planner for the Lianis, explained Mr. Visan's motivation as follows:

The owner of this property lived elsewhere in Etobicoke at the time. He bought this property for the purpose of severance and developing two dwellings. When the original application was contemplated, there was, **I believe**, there was resistance from the City of Toronto.

I don't understand why Mr. Cieciura was not less ambiguous. Ms. Schiller's reasons for decision clearly state that the City called a planner, so the City's position was clear. After reviewing the physical character of the neighbourhood, it seems that it was Ms. Koops' (who owned number 80 prior to selling to the Lianis) and Mr. Cieciura's testimony that influenced Ms. Schiller's decision², which was adverse to Mr. Visan:

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- [68] The requirement to make a finding of desirability means the Board must look at a finer grain of analysis than is provided by reference to the [Provincial Policy Statement] or the [Growth Plan].
- [69] In doing so, Mr. Cieciura cited the large side yard on the north side of the newly built existing dwelling. He testified that this large side yard is an anomalous gap in the pattern on the street
- [70]
- [71] Mr. Cieciura acknowledged under cross-examination that the generous side yard on the subject site is the result of a deliberate decision by the Proponent to site his newly built existing dwelling hard to the southern end of the subject site to create a generous side yard to the north.
- [72] Rather than characterizing this generous side yard as an unwanted gap, the Board finds that it is the result of a demonstrated and acted upon preference for a generous side yard

In paragraphs 71 and 72 (also excerpted, below), Ms. Schiller makes the specific finding that the decision was voluntary. Mr. Cieciura then explained that Mr. Visan wishes to keep his option to obtain a severance for the future.

This was his decision. When he went to construct the house on the lot, he forethought for himself, “if I ever want to sever this in the future, constructing a house in the middle of the lot would be problematic for that type of application or I’d have to demolish it,” and that again would cause more expense for him. I’m giving you his thought process; this is not any planning rationale. So, he decided to construct this house on essentially 25 feet of the existing 50-foot lot and **to avoid public scrutiny**, to avoid the public appeals process that he would be subject to through the Committee of Adjustment process, he instructed the designer to design this in accordance with the as-of right zoning. So that how it was designed; that how it was permitted; and that’s how it was constructed.

We now turn to the subject lot. In a previous motion in this case, I set out some of the background as follows:

On June 13, 2017, the OMB granted a severance of 80 Twenty-Third Street, a 50-foot lot, making two 25- foot lots. The owners were Mark and Maria Liani, . . . The OMB Member Stefan Kreczunowicz authorized variances 1, 2, and 5, relating to lot frontage and lot area and eave projection, but did not authorize variance 3, relating to floor space index, and 4, relating to side yard setback.

My earlier comment about variance 4 is not completely correct; Mr. Kreczunowicz did grant exterior side yard setback variances. Interior side yards of .9 m are permitted once the severance became effective. However, the Lianis are not seeking to use the variances granted by Mr. Kreczunowicz; but are proposing exterior side yards of 1.2 m — more than what is needed, and interior yards of .9 m, both of which are permitted by the zoning by-law.

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- that was created with the siting of the newly built existing dwelling
- [73] Mr. Cieciura acknowledged under cross-examination that the proposed new dwelling will be essentially the same as the newly built existing dwelling.
- [74] **Ms. Koops, the neighbour to the south adjacent to the newly built existing dwelling, testified to the lack of privacy and overlook on to her property that resulted from the design of the dwelling now on the subject site.**
- [75] The Board agrees with the Proponent that a decision on the requested variances that resulted in the construction of a new dwelling on the north side would not change the impact of the existing dwelling.
- [76] The benefit of the newly built existing dwelling being fully in place is that the Board is able to appreciate the impact another similar dwelling would have on a neighbour.
- [77] Under cross-examination, Mr. Cieciura also acknowledged that the proposed new dwelling would exhibit similar characteristics of overlook to those identified by Ms. Koops from the newly built existing dwelling.
- [78] **The Board finds that the proposed variances are not desirable for the appropriate development of the land.** (my bold)

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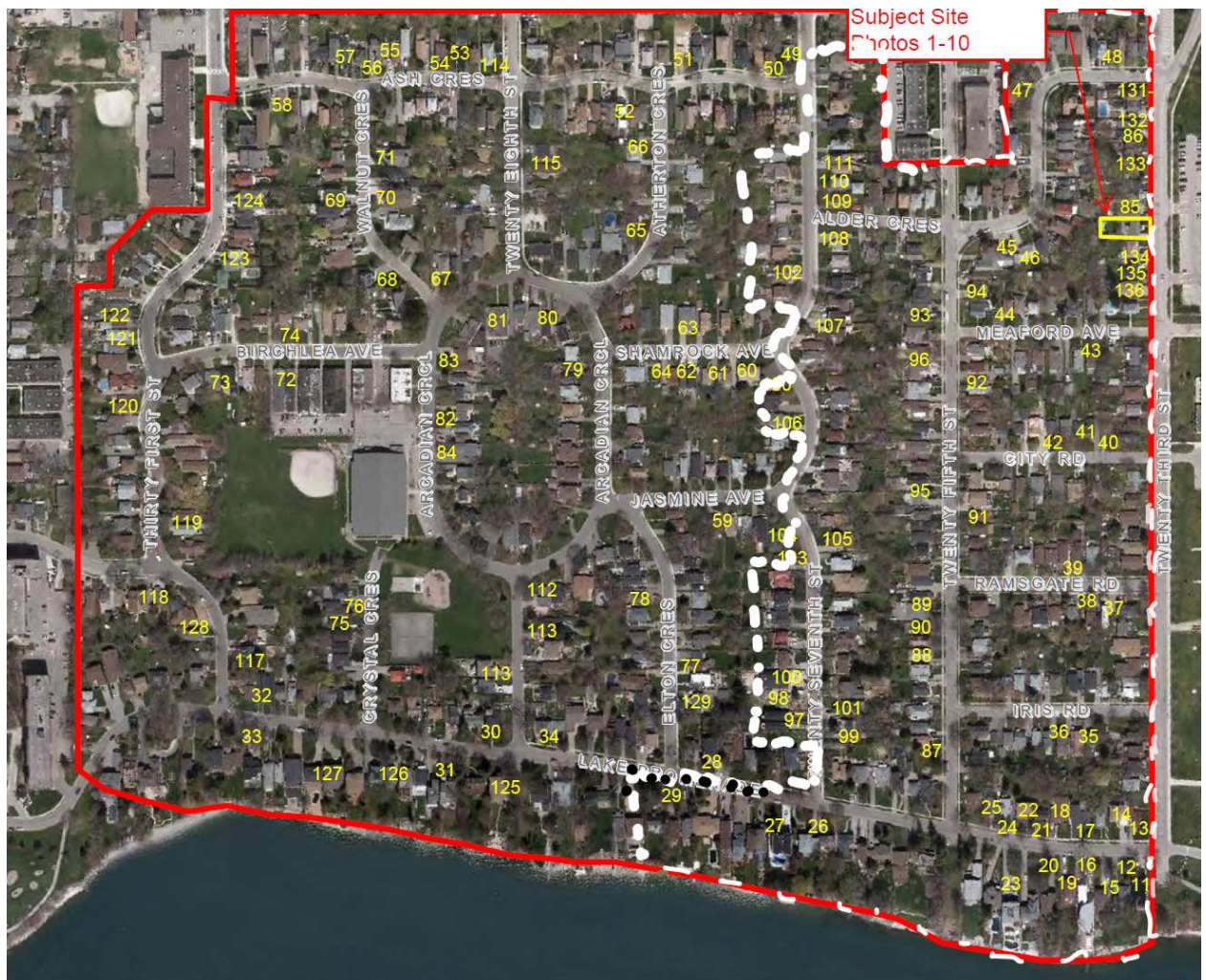
The sought-for FSI has been reduced from the application before Mr. Krzczunowicz (0.69) to 0.60. I now turn to the issues in the hearing.

Theory of the Lianis' case

The Lianis make two planning arguments:

1. That other instances of FSIs of 0.60 exist in east Long Branch and that therefore the respect and reinforce policies of the Official Plan are maintained; and
2. That the variance request is a sufficient reduction in FSI to differentiate itself from the planning underpinnings of Mr. Krzczunowicz's reasoning.

I reject both.



The study areas

Mr. Cieciura's area runs from:

Twenty Third on the east;
Lakeshore on the north; and
the RM/RD boundary on the west (acronyms are Residential Multiple/Residential Detached).

The RM demarcation runs between Thirty First and Thirty Third along the backs of the lots fronting those streets. (There are no even numbered streets south of Lakeshore.)

From this area, he compiled 141 FSI-related Committee of Adjustment and OMB decisions over the last ten years; indeed, a large task. But this is not enough; without knowing how many properties there are in his study area, I am left with a numerator but no denominator.

Mr. Bailey's area comprises the eastern part of Mr. Cieciura's; it has 326 properties. Since Mr. Cieciura never told me the exact number in his study area; I have to guesstimate to make sense of his 141 decisions. Mr. Krzczunowicz found that Mr. Cieciura used two study areas, one with 639 properties and a smaller 413 property study area. The smaller one ends at Twenty Eighth; so, this cannot be the one he used for this hearing. If he did use the larger one, or one roughly similar, I am left to assume a denominator in the 640± property range.

The 141 decisions

Mr. Cieciura stated that the average FSI granted in his study area was 0.58. Again, I need to ask, what is the denominator? Mr. Cieciura explained the 141 figure to the universe of study area properties as follows:

So reviewing the subject proposal and that it is for an FSI of 0.6, and as shown on the architect's calculation, it's actually 0.589 and 0.584 [for the two Liani lots] , that is, **consistent with** the average of other approvals in this neighbourhood So, seeing the other developments in the surrounding context, in my opinion the proposal is for variances that **exist in the neighbourhood, for a built form that exists in the neighbourhood**, something that will respect and reinforce the existing physical character of the neighbourhood and for all those reasons, it is my opinion that the variances maintain the purpose and intent of the Official; Plan.

The "consistent with" or "similar to" other variances argument is also made in paragraph 30 of his written statement:

30. Seeing the other developments in the surrounding neighbourhood, the proposal is for a built form **similar to what already exists in the neighbourhood**, and for all the other reasons provided above, it is my opinion that the minor variances maintain the purpose and intent of the official plan. (my bold)

After a closer examination of the 141 decisions, I find that 0.60 densities **do not form part of the physical character** of the neighbourhood nor does this variance reinforce the predominantly low density character that exists. Hence the intent of the Official Plan is not maintained.

I now discuss the 141 decisions in greater detail. I found three typos that reduce the 141 to 138 decisions³ and so I get an average of 0.57 instead of 0.58. Nothing turns on this small discrepancy in the light of the examination that follows.

I discarded Number 93 Lake Promenade, approved at 1.48, which Mr. Cieciura included, but conceded was anomalous. After discarding this property, the average becomes 0.56 based on 86 approvals.

I now explain how the 141 become 86 decisions or properties. The 141 decisions include refusals, which obviously should not be included. Moreover, each severance application has an "A" file number (the consent), and two "B" file numbers for variances; (or three file numbers per parent lot). When refusals and A file numbers are winnowed out, we obtain 86 separate decisions; 13%, if we use 639 properties. Of these, 31 (4.8%) granted increases of 0.60 or greater. There is also a cluster of nineteen 55 to .60 approvals which might be supportive of the Lianis' case for a higher FSI, and if added to the 31, bring the percentage up to 7.8%. This is still too small for:

Either a physical characteristic to be respected and reinforced (pre OPA 320);
or

a **prevailing** physical characteristic that must be respected and reinforced (post OPA 320).

I state both tests, because I am aware that Mr. Cheeseman's position is that because the application was made before the coming into force of OPA 320, it is not subject to OPA 320. This latter document changed the wording of the development policies for Neighbourhoods lands in the Official Plan slightly. In view of a joint finding, the applicability of this argument (the "Clergy" principle) is not necessary.

The decisions broken down according to type of development

Ms. Mercado observed that many high density houses on non-severed lots do **not** have the same incompatible built forms (high windowless side walls, high rear decks, loss of tree canopy, hardscaping of front yards, privacy and loss of sky views, etc.) because they are built on wider lots or are simple additions, in which the shell of the

³ 68 Twenty Fifth is listed twice, 80 Twenty Seventh appears to be a duplicate of 82 Twenty Seventh, and 73 Twenty Fifth is listed but does not appear to have a corresponding back-up decision.

original house is retained.. She observed that her Association does not generally oppose additions, particularly second storey bump-ups. Accordingly, in order to test her assertion, I broke down Mr. Cieciura's 86 decisions into:

additions;
"non-consent" teardowns;
and the remainder (teardowns that are associated with a consent).

The statistics for these three categories are contained in Table 2 as follows:

Table 2: My tabulation of Mr. Cieciura's Committee of Adjustment/OMB Approvals				
	All approvals	Additions	Teardowns	Consents
Number of COA / OMB decisions	86	30	18	38
Average FSI	0.56	0.48	0.53	0.64

This Table implies that owners who are simply adding on to an existing home or those who tear down in a non-consent-type situations typically seek FSIs that are lower than what the Lianis seek. It also reinforces my view that Mr. Krzeczunowicz granted the creation of two narrow lots only because he was of the view that these narrow lots should have commensurately smaller homes. Finally, I observe that although this is not an application for severance; it appears over the whole study area, of some 640 lots, relatively few severances have been granted and since severances seem to bring higher FSIs due to their narrow frontages, there is no existing pattern of high FSI-narrow frontage lots that this application might respect and reinforce.

Mr. Cieciura's data shows additions are **overrepresented** among small increases in FSI and under-represented in larger FSI increases, corroborating one of Ms. Mercado's observations. Of the 30 approved additions

Three are ≥ 0.60 ;
Five are between 0.55 and 0.60
22 are less than 0.55, mostly in the low forties.

Two of the three higher density additions were specifically mentioned in paragraph 29 of Mr. Cieciura's written witness statement⁴: number 32 Twenty Eight and

⁴ 29. The Neighbourhood Minor Variance Research [i.e. the summary list of 141 decisions] summarizing the research in the neighbourhood details other variances that were found and approved which were similar to or even higher than the subject proposal. 76 Ash Crescent (approved at the OMB); 58 Ash Crescent (approved at the OMB); 56 Ash Crescent (approved at the Committee of Adjustment); 5 Ramsgate Road (approved at the Committee of Adjustment); 9 Meaford Avenue (approved at the Committee of Adjustment); 99 Twenty Seventh Street (approved at the Committee of Adjustment); 97 Twenty Seventh Street (approved at the OMB); 2 Twenty Seventh Street (approved at the Committee of Adjustment)

number 89 Twenty Seventh. The third is not mentioned in his list, but it is shown in his photo album. The photos show none of these three developments is comparable to what is proposed, and I reject his conclusion that the proposed built form is “similar to” any of them.



32 Twenty Seventh St (above left):

To construct a partial second storey addition above the existing dwelling and a two-storey front addition. (authorized FSI = 0.60)

89 Twenty Seventh St (above right):

To construct a partial second storey addition above the existing dwelling and a two-storey front addition. (authorized FSI = 0.64)

According to Mr. Bailey’s spreadsheet (to be discussed more fully later) ,32 Twenty Seventh is on a 45-foot lot and the 89 Twenty Seventh on a 50-foot lot, and the photos confirm this. Each involves a single instance of higher density on a wide lot; not a pair of narrow lots as in the Liani application.

59 Thirty First (photo next page).

To construct a two-storey front addition and a second storey rear addition

We don’t have a frontage measurement, but this appears to be a wider lot. There are two houses in the picture below; the increased FSI house is on the left; the other is number 61 Thirty First. The Committee granted front yard and side yard variances as well as an increase in FSI to 0.67. Despite this, number 59 retains the cottage feel

and OMB); **89 Twenty Seventh Street**⁴ (approved at the Committee of Adjustment); **32 Twenty Eighth Street** (approved at the Committee of Adjustment); 2, 4, and 6 Shamrock Avenue (approved at the OMB). (Cieciura Witness Statement, my bold indicating non consent entries)

characteristic of Long Branch; there is no integral garage and the roof line is lower than its neighbour to the right. I find none of the properties has or will have a built form comparable to the Liani proposal.



The remaining additions (27 decisions) are all lower than 0.60. I am satisfied that decisions involving additions are not supportive of Mr. Cieciura's claim that the Liani higher FSI variance complies with the respect and reinforce test.

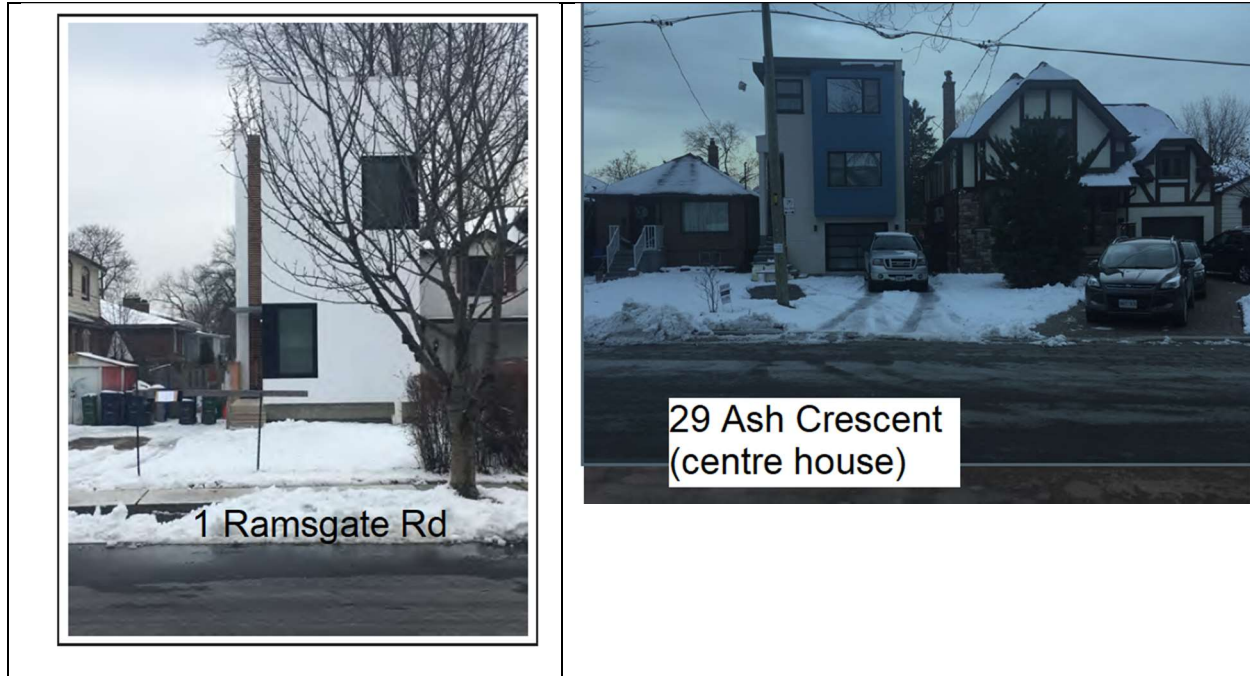
Non-consent teardowns

Of the 18 non-consent teardowns, five are over 0.60 and 13 are under 0.60. Teardowns are overrepresented in the smaller FSI decisions. I list the five highest density properties in Table 3 below:

Table 3 Teardowns with FSIs greater than 0.60		
	Frontage in feet	FSI
34 Twenty Seventh	75	0.77
1 Ramsgate	20	0.68
29 Ash	Appears to me to be 25	0.64
89 Twenty Seventh	50	0.64
16 Twenty Fifth	35	0.61

I only show two photos (below, this page). According to Ms. Mercado, number 1 Ramsgate, was "a repurposed garage", purportedly the smallest lot in Long Branch. Mr. Bailey lists it as 5.89 m (19.3 feet). Ms. Mercado said, "A couple bought it, and this is what they decided to build." Although it was developed prior to her Association coming

into being, it would not have been opposed, since the couple “worked with the neighbours”, so there was no opposition at the Committee of Adjustment. I find that this was an anomalous situation, owing to the property being on a lot of record and in any case their decision to forgo an integral garage renders the massing unlike the proposal.

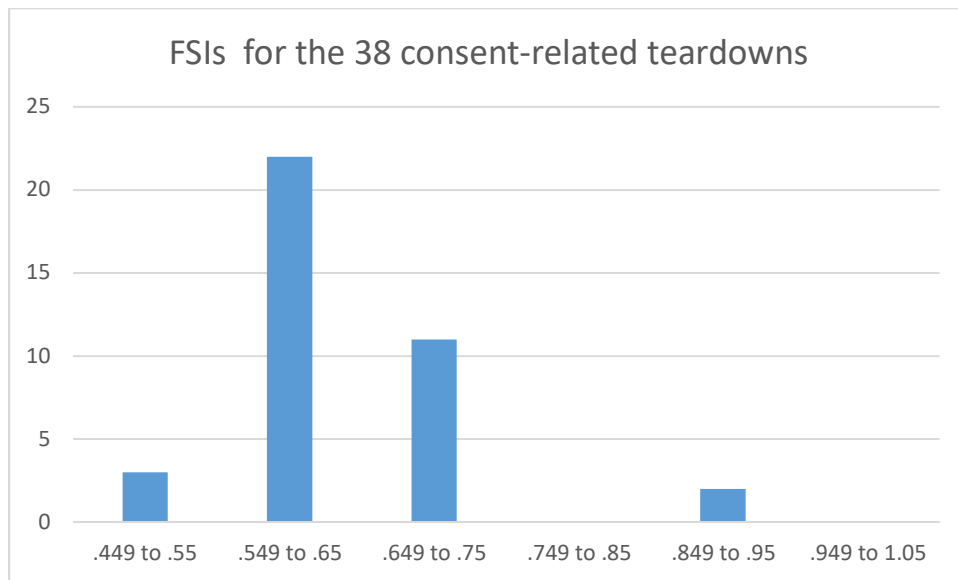


At 29 Ash (which had two applications, for 0.54 and 0.64), a house like the Lianis' proposal was built, requiring 0.38 m side yard setbacks on both sides (.9 m required). However, unlike the proposal, it did not create three houses in a row with narrow side yard setbacks. Number 29 Ash is slightly larger than the Liani lots (303 m² versus 290 m².) Nonetheless I would conclude there are enough similarities that it may be considered comparable.

The other three are wider lots, not like the two Liani lots. Thus, except for 29 Ash, few of the 19 teardowns may be considered supportive; either because the higher FSIs occurred on wider lots or because the approved FSI is lower than 0.60. Number 1 Ramsgate was a unique situation, mitigated by a consultative community process.

Comparison to other consent lots

We now examine the remaining decisions, which consist of 19 parent properties that have become 38 new severed lots. These do create built forms like the proposal. The average is 0.64, about midway between what the Lianis currently seek and the 0.69 they originally sought on the 2017 application, denied by Mr. Krzeczunowicz. Below is a chart showing how FSI variances granted to the 38 lots.



I have already explained why the higher density additions and teardowns are not comparable. The 38 consent-related approvals, or 39 if 29 Ash is included, form 6.1% of 639 lots, too few to form a neighbourhood characteristic. It is clear from this evidence that FSIs in this range are almost uniquely associated with lot severances into 25 foot lots and the chart show that 0.60 is squarely in the most typical range. In all these cases, the decision maker granted a package of one consent and two sets of variances. Mr. Krzeczunowicz is the exception in which only the former was granted.

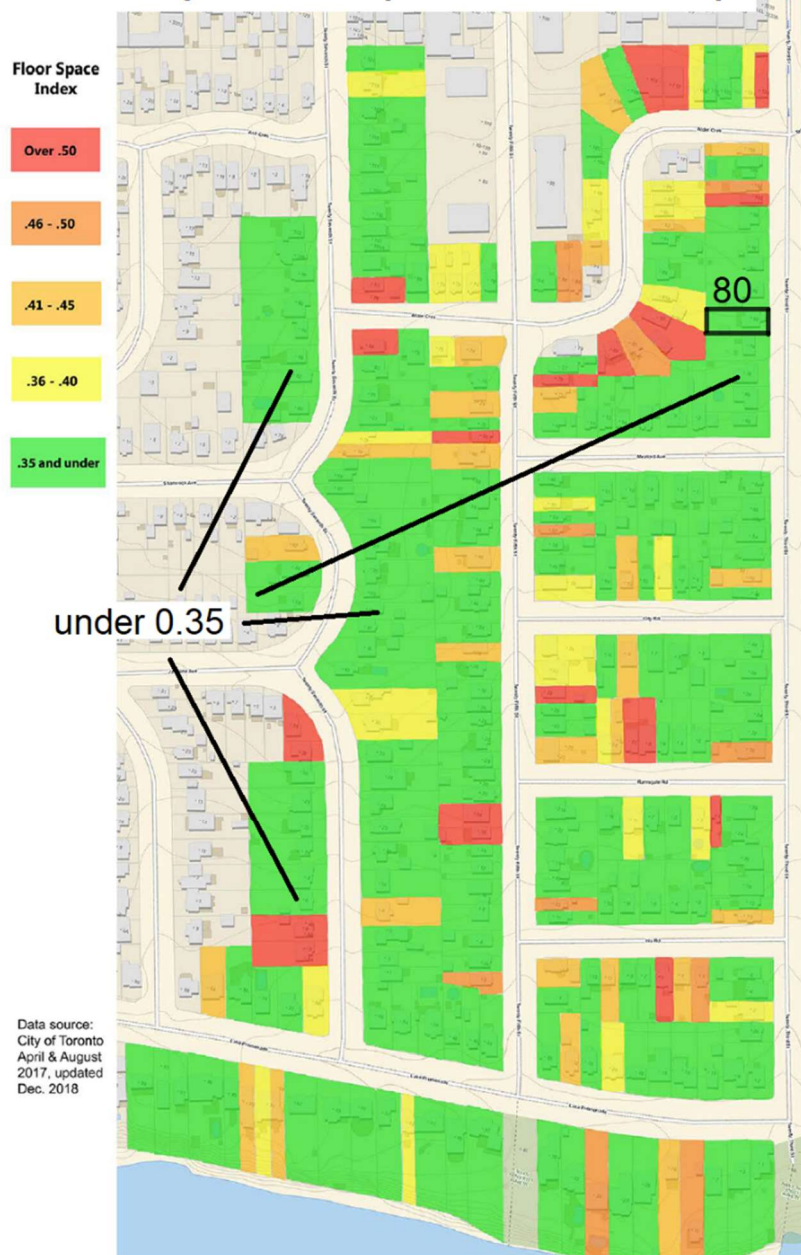
Thus, the road map for Mr. Cieciora was clearly laid out. He did the best he could for his clients; assembling photos of each of the 19 pairs in his photo album. This includes 5 Ramsgate, 99 Twenty Seventh, 20 Elton Crescent, 56 Ash, 9 Meaford Ave and 4 Shamrock, which remain in their historic built form, despite planning approvals in the 2016-7 period. I find, even assuming they are developed some day, these 19 pairs fall short of the threshold number to form an existing physical characteristic of the neighbourhood.

Neighbourhood characteristics

East Long Branch is a primarily very low density neighbourhood. Part of my reasons for so finding, are:

- similar findings by Mr. Krzeczunowicz and Ms. Schiller;
- photos from both parties;
- oral evidence of Ms. Willsher, Ms. Orser, Ms. Hardy, and Ms. Mercado (the first three also being witnesses at the Krzeczunowicz hearing); and
- Mr. Bailey's map. (Mr. Bailey is a resident of Meaford Cr and an active member of the Association).

Bailey Floor Space Index Map



Mr. Bailey ordered the City data, which is the same data usually used by City planners and private consultants. It includes lot areas and GFA (gross floor areas) from the Municipal Property Assessment Corporation, from which one can calculate FSIs. I said previously that this information is often out of date and incomplete. Where lots are odd shaped, Mr. Bailey sometimes would leave the FSI numbers blank. (See for example, the corner lots on Twenty Seventh).

Mr. Cieciura rejected this City data. I find that he was wrong to do so; it is the information we have, and pieces of it were freely accepted by Mr. Cheeseman as shown in his cross examination below. The cross examination also shows that Mr.

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Cheeseman did not ask Mr. Cieciura to investigate the building records for what is the nearest, highest density, 25 foot lot – 100 Twenty Third.

Mr. Cheeseman: And that building, it was built in 1929, according to the records, correct?

Mr. Bailey: Um, 100 was built in 1923.

Mr. Cheeseman: 1923, sorry, 1923. That look like a 1923 construction to you, sir?

Mr. Bailey: Ah, (exhales), yeah.

Mr. Cheeseman: Could be? Y'think anything's been added?

Mr. Bailey: Ah I wouldn't be surprised, that that um that looks like that was put in later.

Mr. Cheeseman: Like a dormer, right?

Mr. Bailey: Sorry?

Mr. Cheeseman: That's a dormer?

Mr. Bailey: Yeah, that doesn't look like an original dormer, they've they've probably um changed that upper floor.

Mr. Cheeseman: Right.

Mr. Bailey: Looks like it was always a storey and a half, or two stories.

Mr. Cheeseman: Or two stories, right yeah? And that dormer that was added -- that would have increased the GFA of the building, right?

Mr. Bailey: Mmm, I don't think it necessarily would.

Mr. Cheeseman: Oh, it wouldn't? You think? You think, if I had a dormer, I could get away with adding a dormer without increasing the GFA?

Mr. Bailey: It depends on if that was a full storey. Lots of houses in, in the neighbourhood have slopes, ah, walls, ah from, you know, not being a full second storey. I, I don't know what that house looked like before that dormer was changed.

Mr. Cheeseman: No, you don't. Right? And if the dormer was changed subsequent to 1923, and that gross floor area was increased, and the number may not be correct, correct? That's what the Planning Department is warning you against?

Mr. Bailey: That's a lot of ifs.

Mr. Cheeseman: Great. Thank you, sir. Those are all the questions I have of this witness.

The cross-examination did not reduce the probative value of the map since all the questioning was hypothetical. In any case, the Lianis have the statutory obligation to demonstrate that tests are met, and Mr. Bailey's map corroborates Mr. Cieciura's own evidence that there exist only 38-39 higher density ($FSI \geq 0.60$) recent approvals out of a data base of 639 properties.

The predominant physical character is low density. The map (page 14) depicts properties with density of 0.35 or lower in green; other colours indicate higher densities. I have drawn arrows to make the green value clear in black and white. I

find FSI-compliant properties comprise the sizable majority and **form the existing physical characteristic of the neighbourhood**. For example, all but two streets have averages under the by-law maximum; (bolded in Table 3). Even those streets display an average very close to .0.35.

Table 3. Summary of Mr. Bailey's data					
	No of prop.	Avg		No of prop.	Avg
Twenty Third	36	.29	City	11	.28
Twenty Fifth	59	.32	Ramsgate	13	.36
Alder	36	.38	Iris	12	.32
Twenty Seventh	64	.29	Lake Prom.	50	.27
Meaford	11	.22			

Massing and scale are but one component of physical characteristic. Mr. Bailey map gives us some numbers allow us to “drill deeper” into the issue of physical characteristic of the neighbourhood.

The five highest density properties are shown in Table 4.

Table 4 Five highest density properties on Twenty Third		
	Frontage in feet	FSI
100 Twenty Third	25	0.53
30 Twenty Third	38	0.48
102 Twenty Third	25	0.46
10 Twenty Third	25	0.43
2 Twenty Third	37	0.37

Nos. 100 (left) and 102 right are historical 25 foot properties. If the houses were built today, they would require variances. Nonetheless they have a less dominating appearance, mainly because the owners have a parking pad instead of an integral garage. They do not have long windowless side walls or high rear decks (the Lianis propose a rear deck six feet above established grade.). They have mature trees. (The Liani owned Freeman maple, in good condition, 25 cm breast height diameter, was removed between March 2018 and January 2020 by unknown persons.) The FSIs, even though over 0.35, are less than sought by the Lianis.



Finality of Mr. Krzczunowicz's decision

Mr. Cieciora described the thinking behind this application:

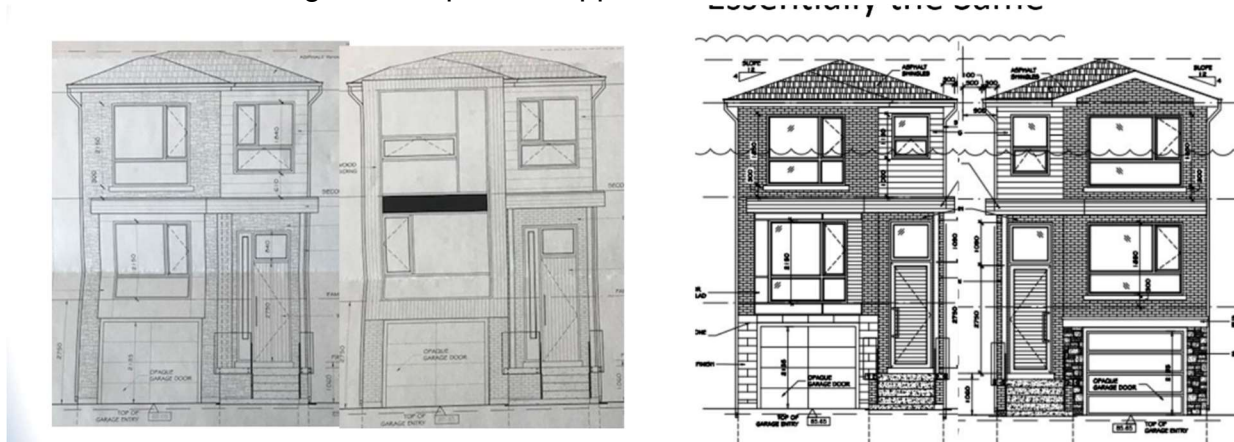
Because this had proceeded to an OMB hearing for which I gave evidence, initially, which would have been in June of 2017, we started talking after that [OMB] hearing about what options exist on this property for development in accordance with that [OMB] decision or in accordance with that [OMB] decision **and** any potential other variances that either didn't comply with the zoning by-law or didn't fit with the approvals given by the Ontario Municipal Board. **So, the owners decided to comply with the Ontario Municipal Board ruling, with regards to the side yard setbacks, with regards to the variances that were granted, those are being complied with in this proposal.** The owners decided to create a proposal that included an additional two variances — one was the FSI variance which was denied by the [OMB] at a number of .69 times the FSI. They came in with a lower FSI on the new proposal [and the main front wall height] and so those are the two variances that went back to the Committee of Adjustment and those are the two variances that are in front of the TLAB today. So, to prepare. . . I updated the evidence [given at the OMB] to reflect the two variances that are before the tribunal today.

I find the owners never had any real intention to comply with Mr. Krzczunowicz's decision as no designs compliant with his decision have ever been produced. And despite the slight drop in FSI, the overall number is not much different, as shown in Table 5:

Table 5. Then and now FSI numbers		
	Krzeczunowicz (June 13, 2017)	TLAB (Jan 10, 2019)
FSI	0.69	0.60
Sought-for GFA for each lot	199.4 m ² (2149 sq ft)	Roughly 172.5 – 173.7 m ² (1856 to 1869 sq ft)

The difference is in the range of 25.7 to 26.9 m² per lot which is about 280 sq feet or 140 sq ft per floor. I find this is similar to the Krzeczunowicz application.

Ms. Mercado did not see any difference between the massing and scale of the new application compared to the previous one. (Please see her side by side depiction of the two front elevations; left is from the file for the previous application and right is for the present one.) I agree with her that the massing and scale are very similar, albeit the revised main wall height of the present application is lower.



The Lianis agree with Mr. Krzeczunowicz's severance but disagree with his refusal to grant a higher FSI. But that decision is that it is a comprehensive whole. Mr. Cheeseman said, "I don't see how he could come to the conclusion that smaller lots should contain smaller houses" (in paragraph 48.) but he (Mr. Cheeseman) had no problem with the intensification justification on which the consent was granted. It is the same justification based on Provincial policy that support the refusal to grant a higher FSI.

If they wish to depart from Mr. Krzeczunowicz's decision, the Lianis must do more than simply reduce the asked-for FSI by a small amount. They must show that the neighbourhood had changed or that Mr. Krzeczunowicz made an error; neither of which was done.

Even if I am incorrect about the similarity in the two applications, a fresh application whose main purpose is to defeat a recent comprehensive planning (decision) is **piecemeal planning**, which provincial planning legislation strives to avoid. Some examples showing a preference for comprehensive planning are:

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- Not permitting the Committee of Adjustment to grant a variance in respect of a recently passed site specific zoning by-law (s. 45 (1.3));
- Not permitting the Committee to vary a condition to a zoning by-law (s. 45 (1.1));
- Obligating appellants to seek relief at the LPAT instead of the TLAB, when there are related matters beyond consents and variances.

In each of these, it is assumed that a comprehensive planning process has been undertaken for which the variance process at the TLAB is inappropriate. I find that what the Lianis are attempting here, is in effect a two-step process, which is similarly inappropriate.

Doesn't the application deserve credit for meeting most performance standards?

One of Mr. Cheeseman's submissions was to underscore the merits by noting compliance with height, sideyard and rear yard setbacks. He then relied on s. 4.8 of the Official Plan to argue for compatibility:

Zoning by-laws will contain numerical site standards for matters such as building type and height, density, lot sizes, . . . and any other performance standards to ensure that new development will be compatible with the physical character of established residential Neighbourhoods.

I interpret this section as saying it is mandatory that zoning by-laws contain standards. The Plan then adds by way of education of the public that part of the function of such numerical standards is to ensure compatibility. It does not say that if a performance standard is met that compatibility is ensured.

The Association photos show the properties on Twenty Third contain spacious side yards often accompanied by an attached or detached garage; for example, #90 has a side driveway, and there is one between 92-98. Similar driveways or "spacious" side yards are also associated with 78, 68, 66 (corner), 58, 54, 52, 50 and 44 (corner) Twenty Third. I find these are a feature of the neighbourhood and are a component of its relatively low density character.

Apart from photos of number 86, Mr. Cieciura showed no evidence that high rear decks and long high featureless side walls are a characteristic feature of the neighbourhood. The Association showed me 69 Twenty Seventh, with both a high rear deck and high side wall, along with the notation “decks removed after three years of litigation.”



Mr. Cieciura’s aerial photo shows that the present building at 80 Twenty Third slightly forward of 86 Twenty Third (the Visan building). The new building will be positioned a little behind the front yard setback and will overhang the Visan building by about .9 m. It may be readily seen from this photo that the Visan building is behind the typical rear walls of buildings to either side and the photo supports Mr. Krzczunowicz’s conclusion of “relatively shallow building lengths”, which is part of the character that must be respected and reinforced.

I will now quote Mr. Krzczunowicz’s decision in some detail:

[42] The proposed dwellings are narrow and tall, with integral, front-facing garages. The Applicants are seeking variances that would permit an FSI of 0.69 on each of the proposed lots, almost double the permitted maximum of 0.35 under both by-laws. The 0.35 standard is one of the most restrictive for Neighbourhoods in Toronto.

[43] The Board finds that the FSI variances do not meet OP Policy 4.1.5 c) The visual evidence shows that homes near the subject property have a mass and scale that is moderated by **wide setbacks, relatively shallow building lengths, and spacious front, side, and rear yards. The clear separation between homes and the generous open space is possible in part because the homes occupy large lots.** Where there are smaller lots—similar in size to those proposed by the Applicants—they accommodate proportionately smaller homes.

[44] As such, the Board finds that the separation of the new dwellings, from each other as well as from neighbouring properties, would be **conspicuously out of place.** Moreover, on a street where the proportion of buildings to lots is perceptibly low, the dwellings would look too large for their lots from both front and rear yard perspectives. **The massing and scale would be noticeably disruptive and the princip[al] cause is the proposed FSI.**

[45] Mr. Cieciura argued that the purpose of the FSI standard is to preserve open space for amenity use and stormwater runoff. The Board agrees, but notes that the amount of open space afforded by the FSI variances is substantially less than what is present on adjoining properties . . .

[46] The Board also agrees with Mr. Cieciura’s claim that the 0.35 standard serves to add a layer of additional control on development applications. This begs the question

though: why might this be necessary? The Board's answer is **that additional control is needed to preserve the historical, and somewhat unique, pattern of relatively smaller homes on relatively larger lots** in Long Branch. Far from being anachronistic, the standard has an important purpose in reinforcing the character of the neighbourhood. Approving the FSI variances would therefore not maintain the general intent of the by-laws.

[47] The Board heard little evidence to show that densities of 0.69 are a common feature of the neighbourhood. In fact, the only empirical evidence presented to the Board on the density of development in the area showed that the requested FSI would be the *highest* among recent approvals: of the 49 applications for FSI variances made in recent years . . .

[48] The Board concludes that an FSI of 0.69 is very high in the neighbourhood context and is certainly not typical. Importantly, with respect to "nearby residential properties", the evidence indicates that FSIs of 0.69 would contribute to building mass and scale that is distinctly uncharacteristic of the properties along this part of Twenty-Third Street. The Board has found that narrow frontages at this location can fit within the neighbourhood. However, they will **only fit with smaller homes than those being proposed**.

[49] In applying the third variance test under the Act, the Board has considered Mr. Ciecura's statement that adhering strictly to an FSI of 0.35 would only permit houses of 1,100 square feet on the proposed lots. In his view, these would be too small for modern homes with integral garages. However, **the desire of homeowners for a large house is not a criterion for approving a variance** under s. 45(1). Desirability is only to be assessed in the context of the "appropriate use of the land, building, or structure." In this respect, the Board notes the proposed homes and lots have no unusual characteristics that might justify relief from FSI standard. Nor would enforcing the standard deprive the new occupants of a reasonable enjoyment of their properties.

[50] Moreover, the Board notes that **small homes are not alien to this neighbourhood**. Directly north of the subject property on Twenty-Third Street are two small homes (numbers 100 and 102) on 7.62 m lots, albeit without integral garages . . .

[51] In assessing whether the FSI variances are minor, the Board has considered the testimony of Ms. Willsher and Ms. Hardy, [who -gave evidence at this hearing] . . . Their major concern was the massing of the proposed dwellings. In their view, the "soldier house" design, incorporating tight setbacks and comparatively small rear yards, would "crowd" nearby properties and would negatively impact their ability to enjoy their rear yards. {similar evidence was also given in this hearing}

[52] Ultimately, the Board proffers the same conclusions about whether the FSI variances are minor as it did for the 30 Thirty-Sixth Street appeal:

With respect to the test of whether the variances are minor, the Board is mindful that massing and scale may be controlled by standards other than FSI. The Applicant is entitled to ask why the Board finds an FSI of 0.67 [NB. in this case, 0.69] to be excessive when variances for building length, height and lot coverage are not required. The answer is twofold. First, for the Board to ignore the magnitude of the variances—**almost double the maximum permissible**—would be to conclude that there is effectively no valid rationale for the 0.35 standard. In fact, the rationale is clear. The 0.35 standard is

intended to reinforce, where appropriate, the historical pattern **of relatively small homes on relatively large lots**. It is unusually low in this neighbourhood because only a low FSI would effectively implement OP policies that seek to preserve the neighbourhood character.

Second, the FSI standards, because they address the relationship of a building to its lot, are particularly important when evaluating a combined severance/variance proposal as they are a crucial limit on overdevelopment. It is because of the proposed FSI that the Board finds that the new dwellings look, in totality and when compared to nearby residential properties, like they are **too big for the new lots**.

Finally, in the broader context, the Board finds **that the FSI standard of 0.35 indirectly supports the Provincial interest. PPS and Growth Plan policies that promote intensification do not intend that the same size houses be built on smaller lots**. The Provincial goal to use land more efficiently also means a more efficient use of building space.

As I have repeated stated throughout this decision Mr. Krzeczunowicz's rationale for the severance is joined with the FSI limitation and without the FSI limitation, development on the two 25 foot lots cannot "fit in".

Destabilizing

In chapter 2.3.1, Healthy Neighbourhoods the Official Plan states

A cornerstone policy is to ensure that new development in our neighbourhoods respects the existing physical character of the area, reinforcing the stability of the neighbourhood.

The word "stability" is not defined. It is rare that we have the evidence of a person's motives and even rarer when one has acted on them in such a public way. I find that any sensible observer would predict that if the Lianis obtain their FSI variance, Mr. Visan would soon apply for the same severance that Ms. Schiller rejected in 2012.

This stretch of the block south of number 80 Twenty Third is shown in the montage below, with Ms. Orser's house, just out of the photo and next to the leftmost house (number 68).



Ms. Orser stated in chief that number 90 Twenty Third, (immediately north of number 86) sold in two days and that the for sale sign had "Ripe for Change" on it. She continued:

The couple at 78 are retired, are totally stressed out by all of this; as soon as they sell, . . . nobody is going to want to live beside it unless it is the same.

And the couple south of them, when I approached them .they've just moved in and it's their house for life and they've just renovated, and they're in their back yard, If they end up with a wall beside them, I've seen it, people just move. . . . I was offered 1.5 million to put up four houses, so I know the whole street is up for grabs.

Why is this destabilizing, Mr. Cheeseman asked, when everyone always has the right to apply for anything. The answer is that change should be gradual, and the rapidity and concentration of physical change takes it out of the simple episodic and occasional application posited by Mr. Cheeseman.

In submissions, Mr. Cheeseman claimed Ms. Orser was unable to explain how adding 800 square feet was destabilizing and thus his cross examination defeated her assertion. (The premise of the cross examination being that the Lianis would build to the as-of-right density and then add 800 more sq feet through a variance.)

I reviewed Ms. Orser's cross examination and there was no such question put to her. Instead there was a discussion at cross purposes; Ms. Orser emphasizing the value of community in her decision to invest; "It my home; I raised my children here; I know my neighbours". Mr. Cheeseman insisting that she would act only on economic motives. I don't see this cross examination as destroying her claim to the variance being destabilizing.

In conclusion, the proposal does not maintain the intent of the Official Plan because this is a low density neighbourhood with very few FSIs as high as 0.60. This increase is not minor nor desirable for the same reason. Finally, it does not maintain the intent of the zoning by-law because the 0.35 density is not just one performance standard, but one that when obeyed counters many other negative impacts, high windowless walls, high rear decks, hardscaping of front yards, and destruction of tree canopy. If the Lianis build within the by-law, these same negative impacts can occur and are "beyond the public appeals process", but that is not a justification when, as here, they need a variance.

DECISION AND ORDER

The appeals are allowed, and variances not granted or authorized. The decision of the Committee of Adjustment is set aside.

X 

Ted Yao
Panel Chair, Toronto Local Appeal Body