

DECISION AND ORDER

Decision Issue Date **Friday, June 4, 2021**

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): Hamed Ismailzadeh

Applicant(s): Rubinoff Design Group

Property Address/Description: 80 Thirty Ninth St

Committee of Adjustment File

Number(s): 17 228728 WET 06 CO (B0079/17EYK); 17 228734 WET 06 MV (A0789/17EYK); 17 228731 WET 06 MV (A0790/17EYK)

TLAB Case File Number(s): 18 152342 S53 06 TLAB; 18 152353 S45 06 TLAB; 18 152350 S45 06 TLAB

Hearing date: March 22, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY S. Makuch

REGISTERED PARTIES AND PARTICIPANTS

Applicant	Glenn Rubinoff Design Group
Appellant	Hamed Ismailzadeh
Appellant's Legal Rep.	Ron Kanter
Party	City of Toronto
Party	Long Branch Neighborhood Association
Party's Legal Rep.	Matthew Longo
Party's Legal Rep.	Adrienne deBacker

Participant	John Dennis Marshall
Participant	Alexander Donald
Participant	Ester Gomez
Participant	John MacDonald
Participant	Donna Donald
Participant	Dottie Irvine
Participant	Judy Gibson
Participant	Sandre Young MacDonald
Participant	Jacquelyn Wells
Participant	Raymond Wells
Expert Witness	Franco Romano
Expert Witness	Max Dida
Expert Witness	Ian Graham
Expert Witness	Ian Bruce

INTRODUCTION

This is an appeal from decisions of the Committee of Adjustment refusing a consent to sever the subject property into two undersized lots and refusing variances to permit the construction of a detached dwelling with an integral garage on each lot. The application would have resulted in each lot having a frontage of 7.62 m and a lot area of 317.4m² and 317.7 m². The remaining variances were similar for both buildings and related to: lot frontage and area; building height and gross floor area; side yard setbacks of walls and eaves; wall height; size and location of first floors; and location of front porches.

BACKGROUND

The subject property is in the Long Branch Neighbourhood of the City, south of Lakeshore Boulevard West. The appeal is opposed by the Long Branch Neighbourhood Association (LBNA) as well as the City of Toronto and neighbours, including the immediate neighbour to the south. This is one of a number of appeals respecting consents and multiple variances in the area. This appeal took over 12 hearing days and

included a number of motions. One of the motions was to permit the applicant to revise the application. It was granted. The resulting revised variances are found in Appendix 1. The changes resulting from the revised plans were summarized by the applicant as follows:

For both dwellings (80A and 80 B)

1. the first floor component above the garage was removed. This reduces the gross floors area to .58
2. the first floor above the foyer is one level closer to grade level.
3. The sloped roof was redesigned eliminating the eaves variance.
4. A combination of the above changes resulted in a lower main wall and corresponding elimination of main wall height variances.
5. Rear decks were flipped to be close to internal side yards, closer to grade (per above; depending on the elevations between 1.22m and 1.25m above grade) and privacy screens were added.
6. The platform variances appear to be removed through combination of above.

In addition for the South dwelling 80A:

1. The driveway was moved to north side.
2. A slightly larger front yard setback was provided for so this variance was removed.
3. The above combination of alterations helps to protect front private, unregulated trees and continues to protect City tree.
4. A length variance was identified by the designer but may be calculated as depth in which case it is not a length variance, depending on zoning interpretation.

MATTERS IN ISSUE

In spite of the revisions to the plans and the reduction in variances, the variances may be categorized as follows: (1) the size of dwellings and lot frontages; (2) the impact on tree canopy and tree protection, and (3) matters such as wall height and the size and location of the first floor and front porch as they affected the facade and minor elements of building appearance. The first two issues, in turn, are subsumed under the two broader issues of whether the revised proposal maintains the general intent and purpose of the Official Plan: by respecting and reinforcing the physical character of the neighbourhood; and by properly addressing the preservation of the tree canopy and the

urban forest. These issues also bring into consideration the Long Branch Neighbourhood Character Guidelines (LBNCG) and Official Plan requirements for the removal of trees. Although there was detailed evidence regarding the front facades, I did not find the front facades per se to be a significant issue once the plans were revised.

These are the fundamental questions on this appeal, although the applicant must also demonstrate that all variances meet the four tests under s. 45 of the *Planning Act* and comply with provincial requirements. It should be noted that if the variances for lot frontage are not approved then the consent cannot be granted.

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 for 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).

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

The very lengthy hearing provided a full opportunity for all parties to submit their evidence. Indeed, the applicants and the City, under the direction of excellent legal counsel, and the LBNA and residents, under the guidance of exceptional leadership, all

submitted detailed and helpful evidence. The planners for both the City and the applicants provided evidence as did neighbours and residents.

The evidence regarding the front facades was clear as the elevations were revised to address the concerns of the City and the community. The facades largely complied with the LBNCG as a result of those revisions. For example, the front door entry was lowered, a window was added to face the street, the dwellings were two stories, and the facades had different treatment in terms of material. The evidence of the applicant's planner clearly addressed these changes. Therefore, the variances which dealt with the facade and minor elements of building appearance were all addressed and were not a basis for refusing the application.

The evidence which was important, however, related to two matters: (1) Lot frontage and whether the lot size and building size and width respected and reinforced the character of the neighbourhood, and (2) The care that was taken and would be taken to preserve the urban forest.

With respect to the first issue there was the evidence of two qualified urban planners, Mr. Romano for the applicants and Mr. Graham for the City. In addition, there was the evidence of the residents. Also, I have visited the neighbourhood and observed its physical characteristics.

Mr. Romano's evidence was clear. His study of the surrounding area as set out in his witness statement and presented orally, was that the area was eclectic; made up of many of different widths and sizes and buildings of different widths and sizes. He found that a substantial number of lots had the same frontage as proposed and many were narrower. He was less concerned about lot size as it is not discernable from the street. His conclusion was that the neighbourhood had characteristic of a mix of lot and house sizes and that there is a mix of frontages and gross floor areas or floor space indices. In his opinion the proposal met the general intent and purpose of the Official Plan which is to protect and reinforce the character of the area as found in Policy 4.1.5. and in the policies of OPA 320.

Mr Graham's evidence was based on a smaller study area than that undertaken by Mr. Romano. His study focused on lot footage and size compared to building size and width. His conclusion was based on comparing the lot frontages and or sizes with the gross floor areas of a building on its lot. He opinion was that gross floor area was an useful indication of whether a building "fit" on a lot or was oversized for a lot. In his view the proposal resulted in dwellings which were too large for their lots. This conclusion was reinforced by the reduction in side yard setbacks and by a finding that the character of the area was one of smaller dwellings on larger lots which reinforced the green and treed character of the area.

Mr. Romano gave evidence that the determination of whether a dwelling fit on a lot and in turn fit in the neighbourhood was a subjective determination although he had ample examples of lots of similar frontage and area with dwellings of similar size as those proposed in the neighbourhood. Mr. Graham had statistics to demonstrate that

there were numerous large lots with small dwellings and that this was a characteristic of the neighbourhood. He agreed that the judgement on this issue was subjective.

The neighbours all gave evidence that in their opinion the dwellings were too large for the lots and did not fit the character of the neighbourhood. They also gave evidence that the LBNCG stated that the Guidelines should be applied to evaluate the proposal and that the proposal did not meet them. The Guidelines themselves, approved by City Council state on page 1 that they “will serve as an implementation tool for the City of Toronto Official Plan and zoning bylaw in the evaluation of development applications”. The Guidelines further state that “The objective of the Guidelines is to identify the neighbourhood’s key character defining qualities and to ensure that future developments are designed in a manner which is contextually sensitive and responsive to the neighbourhood character in keeping with policy 4.1.5 of the City’s official Plan.” At page 24 the Guidelines further state that (in Section 2.2.1, Neighbourhood Configuration, Frontage and Severances) “Recent lot severances, which are disbursed throughout the neighbourhood, produce... narrow frontages (6.0 m - 8.0 m) that do not meet the intent of the Zoning Bylaw.” In Mr. Romano’s opinion the Guidelines do not apply but, in any event, the proposal met them.

With respect to the issue of preservation of the urban forest it was clear that this was an issue that was not seriously addressed in the planning or designing of the development of the site. The impact of the proposal on the tree canopy and how to minimize destruction of trees did not appear to me to be seriously considered by the proponents until the issue was raised at the hearing. As a result, significant changes were made to the site plan and the proponent is to be commended for obtaining additional professional advice respecting this issue and for revising the plans. The evidence of three arborist was presented, two for the proponent and one for the LBNA . The evidence of the proponent’s second arborist ultimately outlined how the proposal was revised after being presented to TLAB to meet possible City requirements and concerns of the LBNA. The evidence was clear, however, that trees are a part of the character of the neighbourhood and that the tree canopy was important part of that character. Evidence respecting trees was also given that Official Plan policy 3.1 states that “building activities and changes to the built environment will be environmentally friendly based on:...(d) preserving and enhancing the urban forest by: i providing suitable growing environment for trees; ii increasing tree canopy and diversity; iii regulating the injury and destruction of trees.” It was, however, clear that trees would be destroyed and replaced with smaller trees and that the proposal would have an immediate impact on the tree canopy. Moreover, there was the additional issue of whether a boundary tree (a tree in the rear yard beside a garage) proposed to be removed can be removed given the opposition of the neighbouring property owner. It was also in question whether other trees were boundary tree along the southern property line of the subject property.

I visited the site and the neighbouring area. Based on that visit I found the neighbourhood to be one which is treed with a significant tree canopy. consistent with the testimonies of the neighbours and witnesses for the LBNA. It is also an area with a

cottage like atmosphere which is characterized by space between many of the homes and by small house on large lots. There is generally not overcrowding of houses close to each other but rather green space between houses that help create the cottage atmosphere. .

ANALYSIS, FINDINGS, REASONS

This is indeed a difficult decision. The proponents have made significant improvements to their proposal during the course of the hearing. They attempted to address the concerns of the neighbours. The dwellings plans were altered in a number of positive ways. The height and stories were reduced. The materials altered. The roof pitch was changed. The facade was made to comply with the facade standards of the LBNCG.

However, this was insufficient. The fundamental problem raised by Mr. Graham and the residents was not addressed by these changes and remains. The proposal results in two dwellings which are too large for their narrow lots. Moreover, they would be placed beside a similar house on a similar sized lot and thus would create three dwellings in a row with a similar “overdevelopment” characteristic. The proposed lot frontages and areas are too small for the size of the buildings and reduced setbacks. A variance for lot frontage of 7.62 m from 12m is simply too substantial as pointed out in the LBNCG which state that a frontage of that size does not meet the intent of the bylaw. I find the Guidelines are useful, not only because they clearly indicate the general intent of the zoning bylaw but also because the proponents accepted their applicability by amending the proposal to meet them. The revisions, however, did not change the frontage which does not meet the intent of the zoning bylaw. A provision in the bylaw permitting existing frontages does not alter that intent as it is merely to legalize existing frontages..

In conclusion, based on my observations on the suggestion in the LBNCG and the magnitude of the frontage variance (12 m to 7.72 m), I find that the frontage variances do not maintain the general intent and purpose of the zoning bylaw. Moreover, such frontages do not maintain the intent of policy 4.5.1 of the Official Plan. The general intent and purpose of the Official is to ensure that new development respects and reinforces the physical character of the area. The character of the area is not one of dwellings with reduced frontages, and reduced side yard with dwellings that appear oversized. Indeed it is that type of development I find the Official Plan and zoning bylaw are enacted to prevent. In this case the building size being is reflected in a significant increase in density from .35 to .58 which will give the appearance of an overdevelopment of the lots. This maybe a subjective assessment, as Mr. Romano stated, but it is clearly not a character for the area which should be respected and reinforced and is not a character which is appropriate for the development of the site.


With respect to the preservation of the trees on the site it is clear that no attempt was made to design the development in a manner to preserve and enhance the urban forest in a neighbourhood where the forest and canopy are part of its character. Indeed, the proponent was not aware of a least one boundary tree which may not be able to be destroyed without permission of the neighbour. As a result, in spite of revisions to the plan to address concerns regarding the urban forest, I find it premature to approve a development when it is possible that a third party's permission is necessary to destroy a boundary tree for the development to proceed. Granting such permission may result in undue pressure for the destruction of the tree. It is important that proponents and their architects seriously consider preservation of the urban forest and tree canopy when beginning the preparation of their plans and not treat this issue as an afterthought. I find that this consideration may be fundamental in deciding whether variances are "desirable for the appropriate development or use of the land, building or structure". In this case there was no evidence of forethought being given to Official Plan policies respecting trees.

As stated, this was a difficult case. The proponents made a serious attempt to address the concerns of the City and of other opponents, all of whom presented an excellent case. Although the proponents ultimately presented a strong case, the revisions did not address the fundamental inadequacies of the proposal which were narrow frontages and oversized buildings and further a failure to address the issue of tree preservation adequately.

Since the footage and FSI variances, which are fundamental to the proposal, are not approved, all the other variances also fail as the dwellings cannot be constructed. Similarly without the frontage variance, the consent cannot be granted.

DECISION AND ORDER

The appeals are dismissed, and the variances, revised variances, and consent are denied.

X 

S. Makuch
Panel Chair, Toronto Local Appeal

Appendix 1

80 THIRTY NINTH STREET - PART 1

1. Section 10.20.30.10.(1)(A), By-law 569-2013

The minimum required lot area is 370 m².

The new lot area will be 317.4 m².

2. Section 10.20.30.20.(1)(A), By-law 569-2013

The minimum required lot frontage is 12 m.

The new lot frontage will be 7.62 m.

3. Section 10.20.40.40.(1)(A), By-law 569-2013

The maximum permitted gross floor area is 0.35 times the area of the lot (111.09 m²).

The new dwelling will have a gross floor area of 0.58 times the area of the lot (183.4 m²).

4. Section 10.20.40.70.(3)(C), By-law 569-2013

The minimum required side yard setback is 1.2 m.

The new dwelling will be located 0.6 m from the north side lot line and 0.9 m from the south side lot line.

5. Section 10.20.40.20.(1), By-law 569-2013

The maximum permitted building length is 17.0m.

The new dwelling will be 17.37m in length.

80 THIRTY NINTH STREET - PART 2

1. Section 10.20.30.10.(1)(A), By-law 569-2013

The minimum required lot area is 370 m².

The new lot area will be 317.7 m².

2. Section 10.20.30.20.(1)(A), By-law 569-2013

The minimum required lot frontage is 12 m.

The new lot frontage will be 7.62 m.

3. Section 10.20.40.40.(1)(A), By-law 569-2013

The maximum permitted gross floor area is 0.35 times the area of the lot (111.2 m²).

The new dwelling will have a gross floor area of 0.58 times the area of the lot (183.4 m²).

4. Section 10.20.40.70.(3)(C), By-law 569-2013

The minimum required side yard setback is 1.2 m.

The new dwelling will be located 0.9 m from the north side lot line and 0.6 m from the south side lot line.