

# DECISION AND ORDER

**Decision Issue Date** Monday, November 01, 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): FARROKH ZAHEDI

Applicant(s): BILL ROSS

Property Address/Description: 190 GORDON ROAD

Committee of Adjustment File Number(s): 20 213011 NNY 15 CO, 20 213012 NNY 15 MV, 20 213013 NNY 15 MV

TLAB Case File Number(s): 21 134923 S53 15 TLAB, 21 134931 S45 15 TLAB, 21 134932 S45 15 TLAB

Hearing dates: September 15, 2021, September 21, 2021 and September 23, 2021

Deadline Date for Closing Submissions/Undertakings:

**DECISION DELIVERED BY JUSTIN LEUNG**

## REGISTERED PARTIES AND PARTICIPANTS

Appellant's Legal Rep:	KRISTIE JENNINGS
Appellant:	FARROKH ZAHEDI
Owner:	YASSAMAN ZAHEDI
Applicant:	BILL ROSS
Party:	CITY OF TORONTO
Party's Legal Rep:	AUREN PINDER
Party's Legal Rep:	AN ANDRES
Party:	DAVID GLICK
Party:	KEITH KWOK

Party:	BARRY REITER
Party:	BARRY MICHAELS
Party:	MARINA MIRABELLA
Party:	ROLLAND LEADER
Party:	DAVID JACOBS
Party:	JIEFANG FEI
Party:	SAMEEM SYED
Party:	JAMES FU
Party:	FYMONTT JIANG
Party:	KAI SHI
Party:	ZEYNAB MOUSA
Participant:	ROBERT PATRICK
Participant:	PATRICK SUE
Participant:	MITCHELL SHNIER
Expert Witness:	AILEEN KENG (CITY OF TORONTO)
Expert Witness:	MICHEAL TESTAGUZZA

## **INTRODUCTION**

This is a matter on Appeal from the North York Panel of the City of Toronto Committee of Adjustment (COA) which had refused an application for the severance (consent) of 190 Gordon Road (subject property) to create two lots which would have a dwelling built on each.

This property is situated in the St. Andrew-Windfields neighbourhood in the North York district which is located south of Owen Boulevard and bounded by Fern Avenue to the west and Bayview Avenue to the east. The subject property is located on Gordon Road, south of Owen Boulevard and north of York Mills Road.

This property is designated as '*Neighbourhoods*' in the *City Official Plan (OP)*. The property is zoned as RD (f18.0; a690) as per *Zoning By-law 569-2013* and to R3 under the former *City of North York Zoning By-law 7625*. The reason the property has two Zone designations is that portions of *Zoning By-law 569-2013* are currently subject

to Appeal at the Ontario Land Tribunal (OLT). As such, provisions of the former *City of North York Zoning By-law 7625* continue to apply to these subject lands

The Residential Detached RD zone permits detached dwellings, municipal shelter and a park. The R3 zone also permits residential type uses.

At the beginning of the Hearing, I informed all Parties in attendance that I had performed a site visit of this subject property and the surrounding neighbourhood and had reviewed all pre-filed materials related to this Appeal but that the evidence to be heard is of importance.

## **BACKGROUND**

The Owner originally submitted Applications to the COA in December 2018. A hearing was scheduled for March 21, 2021. The City Planning staff provided a staff report which did not support this proposal. The COA subsequently refused these applications. The Applicant elected to submit an appeal within the 20 day appeal period to the TLAB. The TLAB, in receipt of this Appeal, then proceeded to schedule three days of hearings for September 15, 21 and 23, 2021 in which all relevant parties were notified to attend. It is noted that prior to these scheduled Hearing dates, a case management tele-conference had been held in which the legal counsels for the Appellant, City and the opposing Parties attended. At this tele-conference, it was accepted that the proposal had now been revised by the appellant. The lawyers in attendance further indicated that 3 days of Hearings would be appropriate for this Appeal matter.

### *The proposal*

The proposal before the TLAB is to sever the subject property into two lots and construct a new detached dwelling on each lot. As a result, a total of 13 Variances were requested.

The original Variances being requested by the Appellant can be summarized as follows:

#### **CONVEYED – PART 1**

1. Chapter 10.20.40.70.(1), By-law No. 569-2013

The required minimum front yard setback is 6.0 metres.

The proposed front yard setback is 4.18 metres to the front main wall nearest the front lot line.

2. Chapter 10.20.40.70.(2)A), By-law No. 569-2013

The required minimum rear yard setback is 7.5 metres.

The proposed rear yard setback is 4.42 metres.

3. Chapter 10.20.30.10.(1)A), By-law No. 569-2013

The required minimum lot area is 690.0 square metres.

The proposed lot area is 449.0 square metres.

190 Gordon Road 2

4. Chapter 10.20.30.40.(1)A), By-law No. 569-2013

The permitted maximum lot coverage is 35 percent of the lot area.

The proposed lot coverage is 39.50 percent of the lot area.

5. Chapter 10.5.40.60.(7), By-law No. 569-2013

Roof eaves may project a maximum of 0.9 metres provided that they are no closer than 0.30 metres to a lot line.

The proposed front eaves project 2.42 metres into the front yard setback.

6. Chapter 10.5.40.60.(7), By-law No. 569-2013

Roof eaves may project a maximum of 0.9 metres provided that they are no closer than 0.30 metres to a lot line.

The proposed rear eaves project 3.66 metres into the rear yard setback.

7. Section 12.7, By-law No. 7625

The maximum permitted building height above established grade for a building with a flat roof is 8.0m.

The proposed building height is 10.58m above established grade.

**RETAINED – PART 2**

1. Chapter 10.5.40.70(1)(A), By-law No. 569-2013

The required minimum front yard setback is 8.36 metres.

The proposed front yard setback is 6.94 metres.

2. Chapter 10.20.40.70 (2), By-law No. 569-2013

The required minimum rear yard setback is 9.69 metres.

The proposed rear yard setback is 7.93 metres.

3. Chapter 10.5.80.40.(3)(B), By-law No. 569-2013

Vehicle access to a parking space on a corner lot must be from a flanking street that is not a major street.

The proposed vehicle access to a parking space is not from a flanking street.

4. Chapter 10.5.40.60.(7), By-law No. 569-2013

Roof eaves may project a maximum of 0.9 metres provided that they are no closer than 0.30 metres to a lot line.

Roof eaves project 2.0 metres into the required front yard setback.

5. Chapter 10.5.40.60.(7), By-law No. 569-2013

Roof eaves may project a maximum of 0.9 metres provided that they are no closer than 0.30 metres to a lot line.

Roof eaves project 2.34 metres into the required rear yard setback.

6. Section 12.7, By-law No. 7625

The maximum permitted building height above established grade for a building with a flat roof is 8.0m.

The proposed building height is 10.42m.

As had been noted previously, the case management tele-conference meeting, which preceded these scheduled Hearings, had involved a discussion where the Parties' lawyers had indicated that the proposal had been revised by the Appellant. These changes have resulted in a relocation of the driveway on the retained lot, so that it has access onto Gordon Road as opposed to Owens Boulevard. It is noted the Appellant did undertake a Zoning Review exercise with the City's Building Dept. This Review found that one of the Variances, as it relates to driveway access, will no longer

be required. Due to these changes, the Variance requests for the retained and conveyed lot have also changed as follows:

#### CONVEYED-PART 1

- 1) The minimum required rear yard setback is 7.5 metres.  
The proposed rear yard setback is 5.10 metres.
- 2) The minimum required lot area is 690.0 square metres.  
The proposed lot area is 500.0 square metres.
- 3) Roof eaves may project a maximum of 0.9 metres, provided that they are no closer than 0.30 metres to a lot line.  
The proposed roof eaves project 2.9 metres into the required rear yard setback.

#### RETAINED-PART 2

- 1) The minimum required front yard setback is 8.36 metres.  
The proposed front yard setback is 6.94 metres.
- 2) The minimum required rear yard setback is 9.69 metres.  
The proposed rear yard setback is 7.52 metres.
- 3) The minimum required lot area is 690 square metres.  
The proposed lot area is 639.7 square metres.
- 4) Roof eaves may project a maximum of 0.9 metres, provided that they are no closer than 0.30 metres to a lot line.  
The proposed roof eaves project 2.0 metres into the required front yard setback and 2.75 metres into the required rear yard setback.
- 5) The maximum permitted building length is 17.0 metres.  
The proposed building length is 17.78 metres.

At this tele-conference meeting, I had found that the revised proposal was acceptable and could be presented at the subsequent Hearing.

### **MATTERS IN ISSUE**

The Appellant has presented to the TLAB a revised proposal which has resulted in a reduction in the number of Variance requests. With this, the proposal continues to be oriented towards the creation of two new residential lots. The Appellant's Expert Witness contends that the changes to this proposal result in a more compatible form of development for this neighbourhood. The City and opposing Parties, while recognizing changes to the proposal have occurred, continue to express concerns with this proposal and the potential of a precedent being established if this proposal were permitted by the Tribunal. They note that other previous Consent (severance) Applications have been refused by the Ontario Municipal Board (OMB, recently organized as the Ontario Land Tribunal).

They further state that those previous OMB decisions should be afforded proper review and consideration by the TLAB. The Appellant indicated that, while they recognize those OMB decisions, the Tribunal should assess this proposal in accordance to planning policies and legislation to reach an independent decision on the subject

proposal. The TLAB will need to assess the arguments and positions which have been provided to it to determine if allowing the creation of these two residential lots constitutes good planning and would be complimentary to the current neighbourhood character.

## **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).

### **Minor Variance – S. 45(1)**

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

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

### **EVIDENCE**

The first day of Hearings commenced with opening statement by Kristie Jennings of Kagan Shastri LLP, legal representative for the Appellant. The subject property is described as being a larger lot, in comparison to others in this neighbourhood. She describes that the irregular lot dimensions are more apparent when one conducts a site visit of this property. Her client proposes a Consent to sever this property to two create two residential lots. She opines that these proposed lots will not be undersized for this local neighbourhood context. In terms of privacy issues, Ms. Jennings contends that the adjacent properties will not have an adverse impact with regards to this.

Ian Andres of Goodmans LLP then provided his statement to the TLAB. Mr. Andres indicated that he was the legal representative for 13 opposing Parties to this Appeal matter. Mr. Andres stated that the position of his clients is consistent with that of the City, whose representatives were in attendance at the Hearing. He contends that the proposed severances do not respect and reinforce the prevailing character of this neighbourhood. These lots, if permitted, would be the smallest within the immediate context. A potential of a precedent could result due to the allowance of these lots by the Tribunal. Mr. Andres references two previous OMB decisions which also related to Consent to sever Applications. In both instances, the OMB refused the severance

requests. Here, Mr. Andres further indicates that since the issuance of those OMB decisions, the policy direction with regards to in-fill type development in established residential neighbourhoods has been enhanced with the passing of *Official Plan Amendment 320 (OPA 320)*.

I asked Mr. Andres if there has been in-fill type development in this neighbourhood. He acknowledged this; however, he does not believe this severance proposal could be defined specifically as in-fill development. He further indicated that their Expert Witness, in the field of land use planning, would be discussing these issues further as part of his testimony.

It is noted Lauren Pinder, City Solicitor, elected not to provide an opening statement to the TLAB.

Ms. Jennings then requested that Lincoln Lo, of MGP City Plan Ltd, be called to the stand to provide testimony relating to land use planning. I asked if any Parties in attendance had any questions or comments regarding this. With nothing being raised, I then stated I had reviewed Mr. Lo's curriculum vitae and was willing to qualify him in the field of land use planning.

Mr. Lo commenced by describing the subject property lot as being of an atypical configuration, in comparison to other lots which form part of this neighbourhood. The subject property has significant landscaping, or trees, on the site. There will be five trees proposed to be removed, to facilitate for this proposal.

Mr. Lo referred to the disclosure documents as prepared by the City to show to the TLAB photographs of other in-fill houses in this area. This is used to demonstrate that this neighbourhood is in transition as it relates to its development pattern. He then described changes that had been made to the proposal, which occurred after the COA decision. This has resulted in reduction of Variance requests for both the proposed conveyed and retained lots. The changes were made to alter the driveway orientation on both lots. City Urban Forestry staff have indicated that the tree permitting process would be required, if this severance proposal was approved. City Transportation staff raised no concerns with this proposal. Mr. Lo further notes that the Variance request which relates to the Old *City of North York Zoning By-law 7625* is no longer necessary.

With regards to the proposal, Mr. Lo argues that it is consistent with both the four tests for Variance and with the criteria for subdivision of land, as stipulated by the *Planning Act*.

In terms to the OMB decisions which had been cited by the other Parties to this Appeal matter, Mr. Lo opines that he disagrees with the OMB's assertion that the backyard area is not underutilized and as such, should not be contemplated for potential redevelopment. He cites shopping malls which are now pursuing development on their surface parking area due to underutilization of that land.

Mr. Lo then proceeded to assess *Official Plan (OP)* policies as they relate to this proposal. He believes that this proposal, for two dwellings, will respect and reinforce the prevailing neighbourhood characteristics. The lot frontage, building height and building



setbacks for both conveyed and retained lots will be consistent with the local area context. In addition, he does not believe this proposal will act to destabilize the neighbourhood, if it were permitted by the TLAB. This proposal is also contended by Mr. Lo to not be precedent setting.

With regards to the OPA 320 terms of immediate and broader context, he referenced the disclosure material as submitted by Mr. Testeguzza. Here, Mr. Testeguzza contends that the lot size of properties differs in both the immediate and broader context. Mr. Lo responded that, during his site walk of the neighbourhood, this did not appear to be the case.

Mr. Lo then assesses the rear yard condition of the properties of this neighbourhood. He believes the rear yard setbacks proposed will be similar to the current condition in the neighbourhood and will act to address potential privacy issues for adjacent properties.

Mr. Lo's testimony then transitioned to assess the *Zoning By-law* and its relation to the proposal. He contends that the lot size of the 2 proposed lots are not significantly different than what the *Zoning By-law* permits and, as such, will be able to adapt and absorb into the local area context. The lot frontages are also Zoning compliant. He further argues that if they were to construct a dwelling which is Zoning compliant on the retained lot, that it could actually be placed closer to the adjacent property's dwelling as opposed to what is proposed here. The proposal here is opined as creating two additional lots, which can be supported by City infrastructure and services. It would also be complimentary form of development for this subject neighbourhood.

In assessing the issue of housing, Mr. Lo does state that housing supply and affordability are both issues which are currently being discussed by the broader public.

Ms. Pinder then proceeded to cross-examine Mr. Lo. She inquired if the OP has specific policy direction regarding increasing density in established residential neighbourhoods. Mr. Lo responded that it does not. She then asked if the OP is consistent with the *Provincial Policy Statement (PPS)* and the *Growth Plan for the Greater Golden Horseshoe (Growth Plan)*, as it relates to a recent OMB decision. Mr. Lo acknowledged this.

Ms. Pinder asked if the term undue adverse impact is contained in the OP. Mr. Lo indicated that it is not used in that policy document. Ms. Pinder then inquired if the OP requires certain neighbourhood characteristics to be respected, as they relate to new development being proposed. Mr. Lo responded that is accurate. She then asked if lot area is not an element to consider when determining neighbourhood stability. Mr. Lo responded that his assessment for this neighbourhood was undertaken primarily at the street level to analyze other factors such as building height. This was done to determine if this proposal was a compatible form of development.

Ms. Pinder inquired if the lot fabric has not previously been altered in this neighbourhood. Mr. Lo indicated that there have not been any approved severances in the past 10 years. She then asked if the lot depth acts to impact the rear yard setback. Mr. Lo acknowledged this. She then asked if, on the retained lot, a house could actually

be built to be of a consistent orientation to the adjacent dwelling along Owens Boulevard. Mr. Lo responded that it is potentially achievable. Mr. Lo had stated that property setbacks and lot frontage are important when assessing development proposals like this one. Ms. Pinder then asked if lot area would thus, in his opinion, be a less significant issue. Mr. Lo stated that he focused his analysis on the setback and frontage, but did not dismiss that lot area is an element which is also to be considered for instances such as this.

Mr. Andres then proceeded with his cross-examination of Mr. Lo. He inquired if Mr. Lo, prior to this TLAB hearing, had appeared before this Tribunal in the past. Mr. Lo responded that he hadn't, but has appeared before the OLT as Expert Witness on numerous occasions in the past. Mr. Andres then asked if public input on a Planning Application is relevant for consideration. Mr. Lo commented that they should be considered, however such input or comments must be assessed objectively as they relate to planning policies and legislation. It is one of several elements he analyzes as they relate to Planning Applications. Mr. Andres noted that, after the COA meeting, the lot boundaries of the proposed retained and conveyed lots had changed. Mr. Lo commented that this related to recommendations he made to altering the proposal. Mr. Andres then asked if these changes have resulted in two substandard lots, as they relate to *Zoning By-law* provisions. Mr. Lo responded it could be explained as such. Mr. Andres then inquired if there has been any lot area Variance request in the immediate neighbourhood. Mr. Lo stated there has not been any.

With regards to the proposed rear yard setbacks, Mr. Andre asked if it is not of the prevailing character within the immediate context. Mr. Lo acknowledged this. In terms of the OP's natural environment related policies, Mr. Andre inquired if they need to be considered with proposals such as this. Mr. Lo responded that City Urban Forestry staff do not have concerns with the revised proposal.

I asked Mr. Lo if he has handled other severance proposals in the Greater Toronto Area (GTA). Mr. Lo indicated that he has. I then referenced the two OMB decisions which had been cited during this Hearing and his professional opinion regarding this. Mr. Lo stated that he recognizes those decisions, which did not permit severances. However, he does not believe that it acts to restrict severances from occurring in this neighbourhood and if there was a proposal brought forward which was appropriate, it should be afforded proper review and consideration.

Ms. Jennings stated that she was not aware tree-related questions would be proffered by Mr. Andres. She did not believe them to be relevant to this Appeal matter and further inquired if an arborist should attend to provide testimony. I responded that the tree-related questions posed to Mr. Lo are typical in TLAB Hearings, and they had been in relation to the OP. In terms of an arborist, it had not been discussed at the teleconference meeting. As such, I found it may be an issue to make such a recommendation at this stage. In addition, as City Urban Forestry staff had not raised objections to this revised proposal, I did not believe an arborist attending to provide testimony would provide any further pertinent information to the Tribunal.

With this, the first day of Hearings concluded.

At the beginning of the second day of Hearings, it was indicated that four of the Parties would provide statements to the TLAB. I responded that they are permitted to provide statements to the Tribunal, and further indicated that they may be recognized as local area experts, as has been done in other previous TLAB Appeal matters.

Party Dr. Rolland Leader proceeded with providing his statement to the TLAB. Dr. Leader indicated that he is not a regular participant in planning matters. However, this planning proposal was of concern to him and had resulted in him gathering other neighbourhood residents to oppose it at both the COA and the TLAB. He had engaged in fundraising amongst the residents to hire a lawyer and planner to represent them at this Hearing.

Ms. Jennings asked Dr. Leader about the adjacent properties of 191 and 193 Gordon Road and if one could determine the sitting of the houses on each property at the street level. Dr. Leader responded that, from the street level, it appears there are larger houses on each of the properties.

Party Mauro Cappuccio then presented to the TLAB. He noted that written material that had been submitted to the Tribunal had been done by his wife named Marina Mirabella. He raised concerns about diminished privacy to his adjacent property.

Ms. Jennings inquired if the proposed house to be built on the lot closest to his property would be higher than Mr. Cappuccio's house. He responded that it would result in a new condition which replaces the trees currently there. Ms. Jennings then referred to Mr. Cappuccio's Witness Statement and inquired about his comments on the Variance requests. Mr. Andres inquired about these questions and of the ability of Mr. Cappuccio to provide planning related testimony. I stated that the TLAB does recognize local area experts, which is residents who have intimate knowledge of a neighbourhood due to residing there for a longer period of time. It was indicated that Mr. Cappuccio's testimony may be provided as such.

Ms. Jennings asked if the side windows of Mr. Cappuccio's house have sightline into the subject property. Mr. Cappuccio responded that the side window is connected to a home office. She then asked if the new proposed house would have privacy issues to his house. Mr. Cappuccio stated that there are no windows directed towards his dwelling so acknowledged limited privacy issues.

Ms. Jennings referred to potential sunlight issues as raised by Mr. Cappuccio's Witness Statement. Mr. Cappuccio responded that, while he is not an expert in such issues, believes the two proposed houses will act to detrimentally affect the sunlight which enters his dwelling. She then asked about his comments on lot sizes of the retained and conveyed lots. Mr. Cappuccio stated that this statement is made to generally describe the lot sizes of the area and how this proposal would not be consistent with the neighbourhood attributes

Dr. Keith Kwok then provided his testimony to the Tribunal. He stated that he believes the neighbourhood character will be negatively impacted if this proposal was

permitted. He also cited traffic issues which would be exacerbated if this proposal proceeded.

Ms. Jennings asked Dr. Kwok if he is aware City Transportation staff had raised no transportation related concerns with this proposal. Dr. Kwok acknowledged this, however, he indicated that at the street level, he observes these traffic issues. He believes the proposal will only negatively contribute to such issues.

Mitchell Shnier, of the St. Andrews Ratepayer Association, then provided testimony to the TLAB. He stated that he believes a precedent would be set if this proposal was allowed by the Tribunal. Furthermore, it could act to destabilize the neighbourhood as there could be other potential severances which would then occur as a result. Mr. Shnier presented a graphic which assesses lot fabric of the neighbourhood. Ms. Jennings indicated that this was not provided previously by Mr. Shnier to the TLAB. I stated that, as per *TLAB Rules*, material must be provided within prescribed timelines. As such, this graphic should not be presented at the Hearing.

With regard to the lot fabric, Ms. Jennings inquired if that is typically experienced at the street level and not at an aerial or helicopter type perspective. Mr. Shnier acknowledged this but also noted that local residents can experience lot size effects. This can be seen in the rear yard setbacks between dwellings and how close residents are located in proximity to each other. Ms. Jennings then asked if severance proposals should be permitted due to potential negative impacts for access to sunlight for adjacent properties. Mr. Shnier indicated it is one element to consider when assessing severance proposals.

Ms. Pinder then requested Ms. Aileen Keng be called to provide land use planning testimony. I asked if there were any questions or comments related to this. With none provided, I indicated that I had reviewed Ms. Keng's curriculum vitae and was willing to qualify her in the field of land use planning.

Ms. Keng commenced by stating that she has had carriage of this file since its initial submission to the COA. She then outlined the PPS and *Growth Plan* and how they relate to this proposal. The PPS prescribes minimum standards which direct how development occurs in local municipalities. In terms of the *Growth Plan*, it delineates growth targets that municipalities must meet. Ms. Keng's testimony then transitioned to assessing the City's OP. She specifically described OPA 320 and how in-fill type development is to be assessed. Such development must be done in a manner which respects and reinforces the character of the local area context.

Ms. Keng then described the Zoning provisions for this subject property. As per *Zoning By-law 569-2013*, she stated this property has a RD, f18, a690 Zone designation which permits single detached dwellings. The proposed lots will both not meet lot area *Zoning By-law* requirements. In terms of the local area context, Ms. Keng presented a photographic study of the neighbourhood. The local area comprises principally detached dwellings, with some bungalows.

Her testimony then proceeded to assessing criteria for subdivision of land, as per the *Planning Act*. Here, Ms. Keng contends that the proposal is not consistent with the

OP nor does it provide consideration of the current neighbourhood lotting fabric. In terms of the *Zoning By-law*, she explains that this document acts to implement the OP policies.

In terms of the rear yard setback. Ms. Keng had assessed other previously approved rear yard setback Variance requests. She found that those requests were still not of the same magnitude of the Variance requests for the subject proposal. As such, she opines that the two proposed lots are undersized.

Ms. Jennings then asked Ms. Keng about issues relating to housing supply and affordability in the City. She inquired of Ms. Keng if there is an under-supply of detached dwellings. Ms. Keng responded that she does not believe there is an under-supply of such housing stock. She then asked Ms. Keng if this proposal is a form of intensification. Ms. Keng indicated that it would, and this would be similar to the testimony as proffered by Mr. Lo.

In terms of OP housing policies, Ms. Jennings asked if this proposal is consistent with the OP. Ms. Keng commented that, in general terms, this proposal would be consistent with said policies. She then asked Ms. Keng and if this proposal is consistent with the PPS. Ms. Keng also acknowledged this.

Ms. Jennings then directed Ms. Keng to the *Zoning By-law* and how it relates to this proposal. Ms. Keng stated that she believes there are two elements, lot size and open space, which are not sufficiently addressed with this proposal.

Ms. Pinder then inquired of Ms. Keng if the subject property is currently under-utilized. Ms. Keng responded she does not believe so. She then asked Ms. Keng if there are any lots within the immediate context which are 550 square metres or under 690 square metres. Ms. Keng stated there aren't such lots in existences.

I then asked Ms. Keng if issues such privacy and sunlight are valid planning considerations when looking at a development proposal. In terms of privacy, she would have to look at this on a case-by-case basis. With regards to sunlight, this is not typically assessed for Consent or Variance Applications.

The second day of Hearing then concluded.

On the third day of Hearings, Mr. Andres asked that Mr. Michael Testaguzza be called to provide evidence to the TLAB. I asked if there were any questions or comments regarding this. With none provided, I indicated that I had reviewed Mr. Testaguzza curriculum vitae and was willing to qualify her in the field of land use planning. Mr. Testaguzza commenced by stating that his analysis of this proposal is rooted in the *Zoning By-law*, size of lot and street pattern. Here, with this severance proposal, he believe lot configuration and rear yard setback condition of properties in this neighbourhood are relevant to look at.

In terms of lot depth, he states that it is difficult to determine from the street level. Mr. Testaguzza then cited the two OMB decisions for severances which are in this neighbourhood. He describes these decisions as stating that the physical character is a

normative assessment methodology for severance proposals. In describing the subject proposal, he opines they are wide, shallow lots which he argues is not currently existing condition in this neighbourhood.

Mr. Testaguzza further indicates that if this proposal was allowed, that it could establish a precedence for potential future severances to occur in this local area. Furthermore, with regards to potential streetscape issue that was raised previously during the hearing, he does not believe that to be an accurate characterization. He does not believe a severance proposal is necessary here to address potential streetscape deficiencies.

Mr. Andres asked Mr. Testaguzza about Mr. Lo's testimony that there is redevelopment that has begun to occur in this neighbourhood. Mr. Testaguzza responded that there have been previous Variance requests for redevelopment of housing stock in this area, which is typical in established residential neighbourhoods. However, there has been no previously approved Consent (severance) in this local area context and he does not believe it to be an appropriate form of development.

Mr. Testaguzza reiterated the testimony of Ms. Keng in describing OP policies and lot configuration are not satisfactorily, as per the criteria for subdivision of land, as per the *Planning Act*, and that the related Variance requests do not conform with the four tests for Variance, as per the *Planning Act* as well.

Ms. Jennings asked Mr. Testaguzza if a purely numerical analysis is not how planning proposals should be assessed. He acknowledged this.

She then inquired if his Expert Witness Statement does not discuss the PPS and Growth Plan in comprehensive detail. Mr. Testaguzza responded he assessed it in a more concise manner. She then asked about in-fill development and how it is defined. Mr. Testaguzza indicated that there are different methods to define it. Here, with a severance proposal to create a new lot, the term has been scrutinized at length during these proceedings without consensus on whether it constitutes in-fill. However, he does contend this proposal is a form of intensification.

Ms. Jennings asked if his analysis, as contained in the Expert Witness Statement, acts to artificially inflate the lot size. Mr. Testaguzza indicated he does not believe that was his intention. He believes there is a difference between the immediate and broader context, which has resulted in the conclusions he has drawn for this proposal.

Ms. Jennings then provided closing statement to the TLAB. She referenced an OMB decision for 30 Thorndale Avenue, in the Old City of Etobicoke, which outlines that intensification is not to be focused solely on certain growth centres and could occur in neighbourhoods as well. Relating to this, she further contends that the OP does contemplate for change and development to occur in neighbourhoods. With regards to Mr. Testaguzza's testimony, she states that it appears it was incomplete as he did not assess all OPA 320 requirements as they pertain to in-fill type development proposals.

Ms. Pinder then proceeding with her closing statement to the Tribunal. She contends that Ms. Keng and Mr. Testaguzza's testimony is complete, and did not neglect relevant planning policies and legislation as argued by Ms. Jennings. As this is a local type development proposal, she does not believe documents such as PPS and Growth Plan are as pertinent for the TLAB to consider here. She opines that the OMB has, in previous decisions, described that the lot fabric for this area is comprised of large, deep lots. Ms. Pinder further contends that whether or not this proposal constitutes in-fill type development should not impact the decision the TLAB reaches on this Appeal matter.

Mr. Andres then commenced his closing statement. He opines that the Appellant's legal representative and Expert Witness contention that this lot is under-utilized is flawed. Furthermore, the discussion on in-fill type development has become a 'red herring' discussion and should not impact how the proposal is assessed by the TLAB. He argues that the building depth *Zoning By-law* permissions are being improperly deviated from with this proposal. If this proposal is approved, it would be the first instance this type of severance would be permitted in this neighbourhood.

In response, Ms. Jennings stated that Ms. Keng's testimony did not define significant difference between immediate and broader context. In terms of potential precedence occurring here, she describes this as a unique type lot so it would not result in other future severance proposals being brought forward as a result.

With closing statements having been provided, I indicated that the case law they had presented should be submitted to the TLAB after the Hearing. Ms. Pinder indicated that after this Hearing, she would be departing the City. As such, she would be submitting material to the Tribunal indicating this and for the carriage of the file to be transferred to another City Solicitor. I acknowledged this information and with that, the third day of Hearings concluded.

## **ANALYSIS, FINDINGS, REASONS**

As had been discussed comprehensively at the three days of Hearings, the Parties had indicated that there has not previously been any approved Consent to sever Applications (severances) for this subject neighbourhood. There had been considerable discussion on two previous OMB decisions for 230 Upper Highland Crescent and 159 & 161 Owen Boulevard. 230 Upper Highland Crescent related to the proposed construction of a dwelling on a lot. The lot in question, while existing as a rear yard, had not merged on title and as such was treated as a separate lot of record. Here, the OMB adjudicator found that the proposal was not appropriate nor compatible for this neighbourhood and refused it. With 159 & 161 Owen Boulevard, this pertained to a Consent and Variance Application to create a new lot which would have a dwelling constructed on it. The OMB here decided to refuse these Applications.

The two OMB decisions, as referenced previously, were presented by the opposing Parties to this Appeal matter to demonstrate that the subject proposal here should also not be permitted by the TLAB. The Appellant's representatives stated that

the OMB decisions can be reviewed and considered by this Tribunal. However, the Tribunal should also not be bound by those previous decisions and should assess the subject proposal independently to determine if it constitutes good planning or not.

During the course of the three days of Hearings, there were two issues which were also explored at length by the Parties in attendance. These related to housing affordability and to in-fill development. In terms of housing supply, the Appellant's Expert Witness Mr. Lo stated as follows:

“101. I have previously noted that the existing dwelling on the Property is an underutilization of the large lot based on its density relative to other lots in the Study Area. The proposal to create two lots (and two dwellings) represents a more efficient use of the Property and improves the City's housing stock which conforms with the City's housing policies.

102. The creation of an additional dwelling that is compatible with the Study Area will introduce new housing supply to the existing neighbourhood through infill and represents a form of gentle densification that will marginally boost the City's housing supply without causing undue adverse impacts.”<sup>1</sup>

What is being articulated by Mr. Lo, and was further expounded upon in the Hearings, was that this severance proposal would address housing shortage issues within the City. The opposing Parties countenance to this was that this is not an under-utilized lot. In addition, they argued that the creation of a new lot here would not act be a sufficient means to address housing issues within the City.

The issue of in-fill development, and how it is defined, was also broached at the Hearings. What was noted is that in the relevant planning policies and legislation, the term is not used and as such, it has remained open to interpretation by various parties involved in the planning process. However, it is noted that in the previously referenced OMB decision for 230 Upper Highland Crescent that the adjudicator did elaborate on this issue:

“21 The next sentences to the one quoted above are, "However, these neighbourhoods will not stay frozen in time. Some physical change will occur over time as enhancements, additions and infill housing occurs on individual sites." Mr. Franco and Ms Spears disagreed as to whether the proposed Fenn St. house could be labelled "infill housing". It is the Board's opinion that it cannot. This is not a vacant lot. And, the City does not have a "backyard infill" policy as do some other municipalities. Nor is the lot "underutilized", which is among the criteria found in the PPS. It serves its original function as a backyard for two existing homes.”<sup>2</sup>

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<sup>1</sup> Lo, L. *Expert Witness Statement of Lincoln Lo*. August 2021, pp. 18

<sup>2</sup> Pinder, L.. *Party Disclosure submitted by Lauren Pinder*. September 2021, pp. 18



What is relevant to note is that, while planning policies and legislation may not address certain issues, the courts or tribunals act to provide that form of additional interpretation. As a result, this provides the additional direction to relevant parties on matters such as land use planning. This OMB decision indicates that in-fill type development is generally applicable to vacant lots, as opposed to newly created lots. The subject proposal is a severance to create a new lot. Expert Witness Mr. Testaguzza, under cross-examination, noted the differing opinions on in-fill at this Hearing. While so, he stated that this proposal would constitute a form of intensification. Here, it would appear that the proposal is to create a new lot in an established residential neighbourhood. As such, it would be a new form of development which is being introduced.

In terms of issue of housing supply, the Hearings elicited a broad discussion which ranged from housing shortage to housing affordability. It was accepted by the Appellant and opposing Parties that housing issues are impacted by a variety of factors. Here, although a consensus was not achieved on this issue, it is noted that it may not be as relevant a discussion for this Appeal matter. The TLAB is principally tasked to assess the Consent and Variance Applications to determine if they meet the requirements, as stipulated in the *Planning Act*. Issues such as housing are typically addressed in a separate forum by other government entities. This was evident in the testimony of City Planner Ms. Keng who referenced the City's 'Expanding Housing Options in Neighbourhoods' initiative. As such, while this issue was raised at the Hearings, whether a consensus is reached on it would not act to influence the outcome or assessment of this proposal.

At the Hearings, Mr. Lo communicated changes have been made to the severance proposal since the COA meeting. He indicated that, once he was retained, Mr. Lo had spoken with the Appellant/client to devise, in his professional opinion, a more appropriate proposal or form of development for this local area context. These changes were highlighted by presenting a new Consent (severance) sketch which had been prepared by Mr. Lo and shown here:

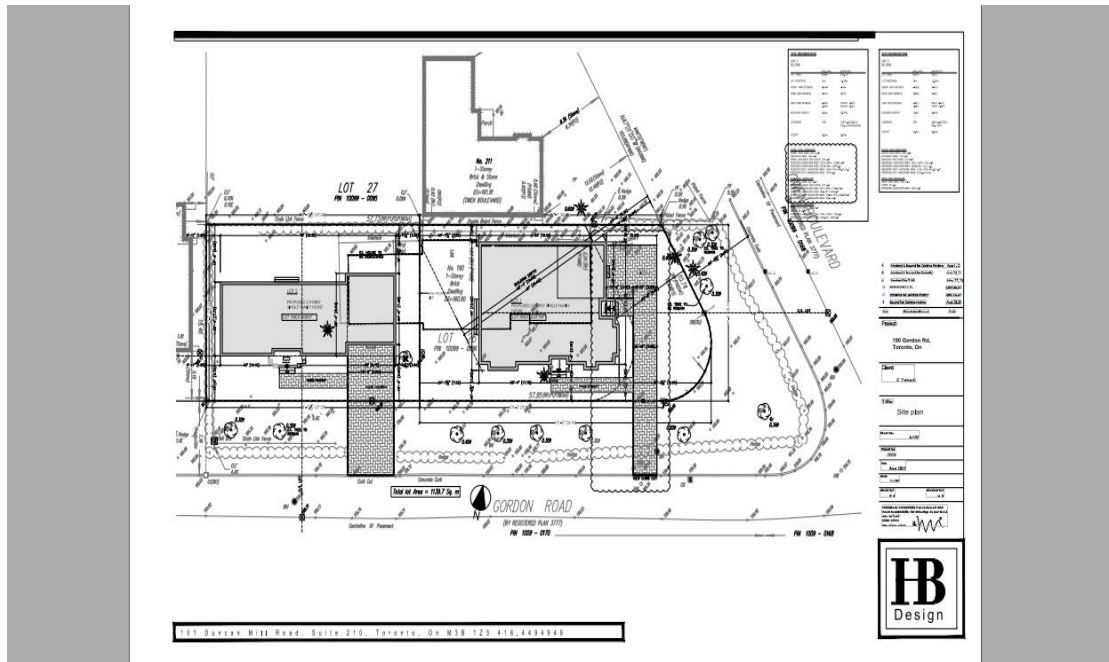


Figure 1: Revised site plan (extracted from Expert Witness Statement of Lincoln Lo)

Mr. Lo stated that the proposal has now been altered so that both the conveyed and retained lots, as proposed, will now both have driveway access onto Gordon Road. In addition, changes to the related Variance requests were also undertaken, which was described previously in this document. It is noted that the overall quantum of Variance requests has now been reduced. These changes were accepted by all Parties to this Appeal matter at the tele-conference meeting and I also deemed it acceptable, as per *Planning Act* stipulations.

Mr. Lo contended that the revised proposal would be a more compatible form of development and would act to meet both criteria for subdivision of land, and the four tests for Variance, both contained in the *Planning Act*. While so, the opposing Parties legal counsel and land use planning Expert Witnesses continued to lodge concerns with the proposal and did not believe that, even with these revisions, that it would be a compatible and appropriate development this neighbourhood context.

Two Expert Witnesses, Mr. Testaguzza, as retained by 13 Parties who oppose this proposal, and Ms Keng, with the City Planning Dept, were called to provide testimony that was contrary to testimony proffered by Mr. Lo to the TLAB. Both Mr. Testaguzza and Ms. Keng's testimonies drew parallels with one another, most notably in assessing the current lot configuration for this local area context. Both argue that if this severance proposal were to be allowed, the two lots created would essentially be under-sized, in relation to the current lot fabric of this neighbourhood. Their opinion evidence was based on disclosure documents which they had submitted to the Tribunal. The documents were comprised of research assessing the current lot fabric of the neighbourhood. It would representative a quantitative analysis method for this planning proposal.

Ms. Jennings stated that planning proposals should not be assessed from a strictly quantitative approach but should also incorporate qualitative methodology. She cited my previous TLAB decision for 63 Methuen Avenue which I provide such commentary. I noted that the statement as proffered by Ms. Jennings is accurate, and that Planning Applications are, as demonstrated in other TLAB Appeal matters, is to be assessed by both quantitative and qualitative methods. However, it should be noted that 63 Methuen Avenue was an Appeal relating to a Variance Application. The proposal here involved both a Consent and Variance Applications. As such, the assessment criteria employed with this proposal is different.

In relation to the testimony of the Expert Witnesses, they all critiqued OPA 320 and how it interfaces with this severance proposal. In recognizing the comments as provided by Ms. Jennings, it should be noted that the City has promulgated OPA 320 to provide additional assessment criteria for development proposals within established residential neighbourhoods. When a property-owner applies for a Planning Application a residential area through a mechanism such as a Variance Application, OPA 320 is then 'triggered' and must then be applied to that proposal. As such, this policy direction acts to apply an additional layer of quantitative analysis for such proposals, which is unique to the City.

The Expert Witnesses for the City and opposing Parties, as it pertained to OPA 320, provided their analysis which were both based upon assessing the lotting fabric of the neighbourhood, and also of the Variance requests for the two proposed lots. The material they proffered also included a photographic study of the neighbourhood, as provided by Ms. Keng, which provide a visual reference to the existing neighbourhood conditions. With both of these testimonies, they have found that the tenets of OPA 320 have not been properly accounted for with this proposal.

In terms of qualitative analysis, the Party Witness Statements and testimony of local residents, who were recognized as local area experts, provided an additional layer for the TLAB to assess this proposal. Their testimony highlighted how current neighbourhood conditions could be exacerbated if this proposal was allowed to proceed. Furthermore, it cannot be sufficiently determined that future severance proposals will not be submitted due to the approval of this subject proposal.

Under cross-examination, Mr. Lo explained that this was his first appearance before the TLAB and one of the first instances where he has assessed OPA 320 in relation to a development proposal. I had found that Mr. Lo does have substantial planning experience within the Greater Toronto Area (GTA). While so, it is the Tribunal's duty and responsibility to assess the testimony of Expert Witnesses to determine their veracity for the Appeal matter at hand.

Mr. Testaguzza, as part of his testimony, opined that the proposed lots would be of a small size configuration to those within the immediate context. However, Mr. Lo did not find it would not be smaller when assessing the broader context. In relation to this, OPA 320 emphasizes immediate context over broader context.

Mr. Testaguzza critiqued this further by stating:

“14. I have reviewed certain aspects of my analysis based on Mr. Lo’s analysis of the immediate context and the results are provided below:

-The average lot size based on Mr. Lo’s analysis of the immediate context would be 1,042m; which does not substantially differ from my previous findings (average lot area 1,060m). Proposed Lots 1 and 2 remain well below the average lot size in either interpretation of the immediate context.

- Lot 2 (500.0m) would remain the smallest lot in the immediate context by a substantial margin. Lot 1 (639.7m) would be the second smallest lot, followed by 184 Gordon Rd. at ~697.2m and subsequently by 216 Owen Blvd. at ~797.5m.

- All lots smaller than Lot 1 remain outside of the immediate context, including: 89 Munro Blvd, 91 Munro Blvd., 230 Upper Highlands Cres., and 194 Fenn Ave.”<sup>3</sup>

This testimony was also provided in a similar context by Ms. Keng when she testified. Here, I would find that the principals of OPA 320 have not been sufficiently met. It is also noted, as evident in the Party Witness Statements and testimony of the opposing Parties, that the qualitative elements which constitute the character of this neighbourhood, such as the sightlines between properties and tree canopy, would be adversely impacted if this proposal were allowed to proceed.

In addition, the criteria for subdivision of land, as contained in the *Planning Act*, was also assessed at the Hearings. It is noted that the various elements which comprise the criteria is applied on a case-by-case basis, as it relates to the proposal at hand. The City and opposing Parties Expert Witnesses focused on the criteria relating to a proposal’s conformity with the OP, adjacent plans of subdivision and dimension of the proposed lots. With these two criteria, they found that this proposal would not be consistent with such criteria’s requirements. It is noted that the Appellant’s Expert Witness contends that such findings are inaccurate and opines that this proposal will not create a new condition which cannot be ‘absorbed’ within this neighbourhood. Moreover, they further contend that the criteria have been interpreted to prohibit land severances which Mr. Lo finds to be an inappropriate assessment for this proposal.

Here, I have found that OPA 320 is not consistent with this proposal. In addition, the proposed lots will result in an interruption in the lot pattern. As such, it is concluded that the criteria for subdivision of land, as per the *Planning Act*, has not been sufficiently met which translates to this severance proposal not being able to be permitted here.

In arriving at this determination, it is noted that the Consent and Variance Applications are inter-related. As such, the inability of the Consent Application to meet the requisite planning policies and legislation would mean that the Variance Applications

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<sup>3</sup> Testaguzza, M. *Reply Witness Statement of Michael Testaguzza*. August 2021, pp. 8

could not proceed. The Variance requests are proffered to facilitate for the creation of the proposed retained and conveyed lots. With the Consent Application unable to meet the necessary requirements as stipulated by provincial and municipal planning frameworks, the Variance Applications would thus no longer be necessary to be pursued.

In making such a determination, it is noted that the Expert Witnesses did discuss, at length, the Variance requests and whether they meet the four tests for Variance, as per the *Planning Act*. The City's Expert Witness assessed specifically the property setback Variance requests and how, in Ms. Keng's summation, would result in dwellings which would not exhibit a condition which would complement the neighbourhood attributes. Mr. Testaguzza's testimony further assessed that these setback Variance requests would be a significant departure from current *Zoning By-law* permissions. Mr. Lo's testimony contended that the setback Variance requests will not create a condition which is incompatible in relation to the adjacent properties.

The Hearings also focused on the lot area Variance requests. Here, Ms. Keng and Mr. Testaguzza highlighted how this Variance request results in under-sized lots being created. Mr. Lo opined that lot frontage and front yard setbacks are *Zoning By-law* compliant, and as such the overall scale and impact has been minimized.

I would find that, even without lot frontage and front yard setback Variance requests, the revised proposal continues to require property setback, lot area and building length Variance requests to facilitate for the Consent to sever Application. This represents a proposal which is introducing a new condition to the local area context which would be detracting of the neighbourhood attributes. As such, the four tests for Variance, as per *Planning Act*, would not be able to be met as a result.

In reviewing the disclosure material and Hearing oral testimony, I would be remiss in not recognizing that there has been two previous OMB decisions, which relate to severance type proposals, with which both were refused by the OMB. The general convention is that previous court and/or tribunal decisions are to be afforded consideration. Here, I recognize that there have been previous attempts for land severances in this neighbourhood which were not successful. The OMB has issued clear direction that regeneration and redevelopment in this neighbourhood can occur. However, land severances are approached and assessed in a different manner. To permit additional lots to be created in this local area context has been found to be concerning as they could act to change the neighbourhood characteristics. If I were to allow this subject proposal, it could be referenced by prospective Applicants to justify additional land severances for this neighbourhood.

Setting aside matters such as housing supply or what constitutes in-fill type development, the Tribunal must determine what the current neighbourhood character is. With this, I would need to further analyze if a proposal will be complimentary to this character. This relates to the appropriate and orderly form of development which neighbourhoods, and their residents, should expect. This proposal would detract from such expectations. As such, I would find that the decision of the COA to refuse the Consent and Variance Applications to have been made in a rationale and cogent manner. I further determine that their decision should be upheld and that this proposal

not be permitted, which would ensure relevant planning policies and legislation are upheld while also providing neighbourhood residents clear direction on what forms of development they can expect to occur in their adjacency.

## **DECISION AND ORDER**

The Appeal is refused, and the Committee of Adjustment decision, March 11, 2021 is upheld. The Consent and Variances are not authorized.

**X** 

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Justin Leung  
Panel Chair, Toronto Local Appeal Body