

DECISION AND ORDER

Decision Issue Date Monday, December 06, 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): 1069946 ONTARIO LIMITED
Applicant(s): 1069946 ONTARIO LIMITED

Property Address/Description: 1032 Kipling Ave

Committee of Adjustment File

Numbers: 20 219136 WET 02 CO, 20 219137 WET 02 MV, 20 219138 WET 02 MV

TLAB Case File Numbers: 21 155937 S53 02 TLAB, 21 155938 S45 02 TLAB, 21 155939 S45 02 TLAB

Hearing date: Oct. 28, 2021

DECISION DELIVERED BY T. YAO

REGISTERED PARTIES AND PARTICIPANTS

Applicant	1069946 Ontario Limited (Mark De Santis)
Appellant	1069946 Ontario Limited
Appellant's Legal Rep.	Ian Flett
Expert Witness	Michael Manett

INTRODUCTION

1069946 Ontario Limited wishes to sever its lot and build two new houses. In order to do so, he requires permission for a severance and variances as shown in Table 1. On April 29, 2021, the Committee of Adjustment refused its application; Mr. De Santis, owner of 1069946 Ontario Limited, appealed and so this application comes before the TLAB for a new hearing.

Table 1. Variances sought for 1032 Kipling		
	Required/Permitted	Proposed north and south lots
From Toronto Zoning By-law 569-2013 (except where indicated)		
Lot area	510 m ²	311.1 m ²
Frontage	13.5 m (44.3 ft)	7.62 m (25 ft)
Coverage	33%	40%
FSI	0.5 times the area of the lot	1.01 times the area of the lot
Side yard setbacks	0.9 m and sum must be at least 2.1 m	0.65 m both north and south for both lots plus sum is 1.3 m
Height (under both Zoning By-laws) ¹	9.5 m for Toronto By-law; 11.31 m for Etobicoke By-law	10.41 m
Side wall heights	7 m	9.03 m
Soffit height (Etobicoke Zoning By-law only)	6.5 m	9.03 m
Max. height front door sill	1.2	1.59
Side yard setbacks for porch and rear deck	0.9 m	0.65 m all around
Max area second floor deck	m ²	21.21 m ² (rear deck) and 4.77 m ² (front porch)

MATTERS IN ISSUE

The owner 1069946 requests a severance; it also requests a set of variances for each of the severed lots; the *Planning Act* has separate tests for each.

I must also consider higher level documents (the Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan); These contain a high level of generality; for example, the Provincial Policy Statement discourages lot creation on prime

¹ Despite the fact that by-law 569-2013 was adopted in 2013, appeals against it are still outstanding so the Buildings Department reviews plans under both by-laws.

agricultural land and prefers municipal water and sewage over private systems. In this case I accept that there is consistency and conformity with these general statements; for example, the owner proposes to build in a settlement area and not on a private sewage system. These policies however are not determinative.

Severance criteria - s 51(24) of the *Planning Act*

The test for a severance is found in a combination of sections 53(12) and 51(24) of the *Planning Act*. S. 53(12) permits an owner of land to apply to the Committee of Adjustment for a severance (called a “consent”), using the same criteria as if the owner were applying for a plan of subdivision. S. 51(24) lists fifteen factors the Committee must have “have regard to”, but the extent of this regard is left to be weighed in the particular circumstances of each severance. Some of the other factors to be considered are also stated in a general way, such as “the welfare of the present and future inhabitants”. I find others are inapplicable in a small-scale redevelopment, the factors that are typically most relevant in a built-up area, such as in Toronto, are sections 51(24)(c) and (f):

- Official Plan conformity; and
- the “dimensions and shapes” of the lots.

Variance tests - s 45(1) of the *Planning Act*

The variances from Zoning By-law 569-2013 must cumulatively and individually:

- 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.

Official Plan

The *Planning Act* requires compliance with the Official Plan for both issues. For a severance, I must have regard whether it “conforms” to the Official Plan, whereas for the variances, I should be of the opinion that the variances “maintain the general intent of the Official Plan”. Second, the “dimensions” of the lots appear specifically as a criterion in section 51(24)(f) of the *Planning Act*; whereas for variances, I am to consider the “prevailing size and configuration of lots”. The tests are similar but not identical.

Site visit

For context, I have visited the subject property, walked the area and familiarized myself with the surrounding neighbourhood. However, my findings and ruling are only based upon the evidence that has been presented during this hearing.

Owner's obligation

The obligation is on the proponent (1069946) to demonstrate to the decision-maker that the tests are met on the balance of probabilities; there is no right to a variance or a severance.

EVIDENCE

I heard from Michael Manett, 1069946's planner, whom I qualified as expert witnesses. There were no other witnesses. Although there was no opposition, I have an independent obligation to assure myself that all *Planning Act* tests are met.

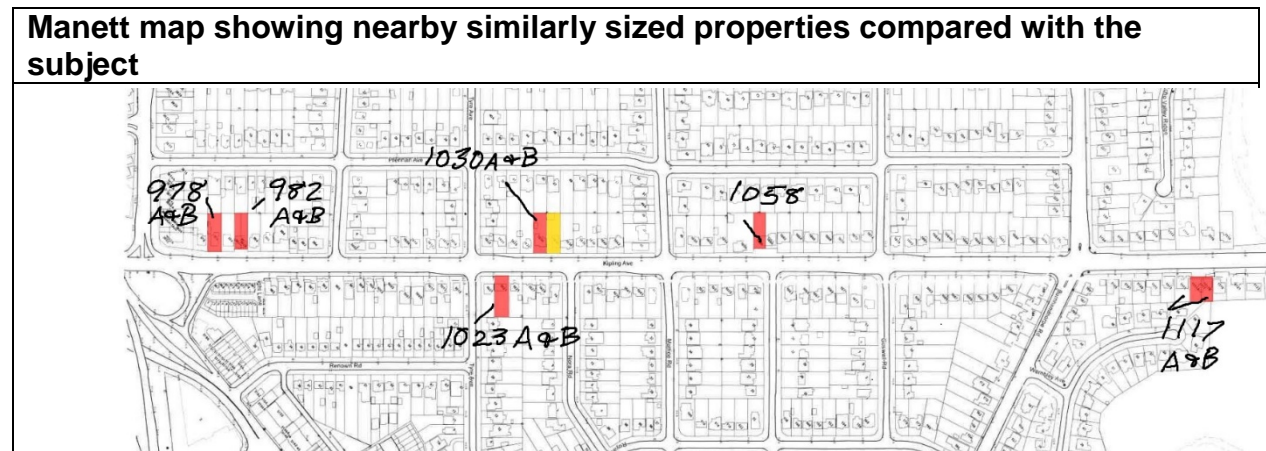
ANALYSIS, FINDINGS, REASONS

My view is that the chief issue is the size of lots, that is, their frontage and area, which are factors for both the severance and variances. The proposed lot sizes must fit in with the prevailing sizes of other lots in the vicinity. Mr. Manett, 1069946's planner did not supply me with a lot study or similar comprehensive information on lots in the relevant neighbourhood of Kipling-fronting properties. He put forward three main arguments in support of the severance:

- at least four severances are in the near vicinity, including one next door and one across the street;
- his client is compelled to grant about 10% of his lot to the City for a future Kipling Ave road widening which he says is a considerable public benefit; and
- the lot is about 750 m north of the Kipling Ave subway station and because it is in a transit friendly location, it complies with certain sections of the Provincial Policy Statement and Official Plan policies.

Other Kipling Ave severances

Mr. Manett's map of the neighbourhood is shown below. Properties shown in red are flagged by Mr. Manett; I have added the addresses in handwriting. The flagged properties total 5 severances and one historic single 25 foot wide lot, all in red. 1069946's property is yellow. In four of the five severances I have the original decisions: two from the Committee of Adjustment and two TLAB decisions. There is no information on the fifth severance, 1117 A and B Kipling.



In the four submitted cases the owners received frontage, lot area and FSI variances, and some received height or soffit variances². They are summarized below:

			Lot width	FSI	Building Height	Soffit height
982 A and B	COA	July 2014	7.62 m	0.69	None	7.0 m
978 A and B	COA	June 2017	7.62 m	0.73	None	None
1030 A and B	TLAB (unopposed)	Jan 2018	7.62 m	0.95	10.42 m	8.37 m
1023 A and B	TLAB (unopposed)	June 2019	7.62 m	0.74	None	6.86 m
Subject	TLAB (unopposed)	Dec 2021	7.62 m	1.01	10.4 m	9.03 m

² The Toronto By-law regulates main wall heights; in addition, the Etobicoke by-law regulates soffit heights, which cannot exceed 6.5 m.

The first (2014) decision contains a 1992 Etobicoke zoning amendment for an area south of Burnamthorpe (the schedule delineating the target area was not enclosed) introducing an 9.5 m height limit and a Floor Space Index of .50. The 2014 applicant obtained an FSI increase but did not seek a height variance.

The next decision (2017) appends a City of Toronto planning report in which Travis Skelton, the community planner, stated “no concerns”.

The third and fourth decisions (2018 and 2019) were decisions by different TLAB members and in both the applicants were unopposed. Both these decisions are for properties north of Tyre — hence the dimensions for the mandatory widening are different. The first two owners conveyed a 2.76 m strip; the second two conveyed a 4.89 m strip. Mr. Manett was also the planner in the 2018 case.

Both TLAB decisions placed emphasis on the “public benefit” of the road widenings; The 2018 decision maker stated after the widening the neighbourhood character is “gradually going to change”.³ The 2019 decision maker stated a concern that the proposed lot width was “almost half” the by-law requirement, but that the public benefit among other considerations “assuaged” his concerns⁴.

Mr. Manett said the reduction in size (about 10%) partly contributes to the reason the lot area is deficient — 311.1 m² versus 510 311 m² required. This may be so, but the conveyance does not affect the undersized new frontage, so this issue of lot frontage still needs a justification. 1069946’s lot dimensions show, if we ignore the road widening, each proposed lot would be 386 m², still less than the by-law minimum of 550 m².

I now examine the “public benefit” argument. I agree with Mr. Manett that we need to compare this lot to lots in the interior of neighbourhoods abutting Kipling. In this strip of Kipling fronting properties, there are only five other severances; about one a

³ His opinion is further supported by the fact that there is the public benefit of a road widening being derived from the approval. The character of the arterial road is gradually going to change as a result of its widening and the consents already granted.

⁴ The TLAB had a concern that the property was being over developed given that the proposed lot frontage and area were almost half that required by the By-laws. However, given that the road widening reduced the lot size and was a public benefit, and that the single-family character of the neighbourhood is being maintained, these concerns have been assuaged. (2019 TLAB decision)

year. Since there are about a hundred properties overall, it will take some time to acquire enough land to go ahead with this widening. Today, the front walls of houses on Kipling are in a pretty straight line, so if the City needs to accelerate this process by expropriation, those expropriated owners could claim loss of driveway parking, which would increase delay and expense. I view the words “acquiring over time” to be a prudent management policy, rather than an active support for more severances. I agree there is a benefit to the City but I do not see the benefit as immediate.

The applicable section for road acquisition is in Chapter 2 of the Official Plan and concerns the integration of land use with transportation infrastructure.⁵ It is one of many sections in the Plan that discusses development and there is nothing in the section that says it is to take precedence over other policies. By contrast, the “respect the neighbourhood character” test is described as a “cornerstone”⁶, which Council intended to be the overall most important test. I was not given a basic lot area and frontage analysis or other comprehensive statistics upon which to assess whether the proposed lot frontages and areas respect and reinforce the physical character of this section of Kipling Ave.

Provincial Policy Statements

Mr. Manett cited twelve sections of the Provincial Policy Statement that in his view demonstrated that the proposal was “consistent” with that document (this language is from s. 3(5)(a) of the *Planning Act*).

The sections divide into two main themes: “complete communities”, which is a complete range of housing—all types of brick and mortar housing. This development

⁵ The City’s transportation network will be maintained and developed to support the growth management objectives of this Plan by:

b) protecting and developing the network of rights-of-way shown on Map 3 and Schedules 1 and 2 by:

acquiring over time the additional property needed to achieve the designated width. The conveyance of land for widening may be required for nominal consideration from abutting property owners as a condition of subdivision, severance, minor variance, condominium or site plan approvals;

⁶ 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. (2.3.1 Healthy Neighbourhoods)

is supportive, in that the Provincial Policy supports **detached** housing — the only permitted use in RD zones. But I put more emphasis on the words “range” and “mix”, which suggests that the authors intended to prioritize those types of housing that are not well serviced by the marketplace: for example, affordable housing, secondary units etc., and housing for seniors.⁷

The second theme is transit supportiveness⁸. The property is about a 15 minute walk to the Kipling subway and Go stations as well as having ready access to the Kipling bus service. I agree that the location is transit friendly and policies in both the Policy Statement and Official Plan support the integration of development and transit infrastructure. However, this development assists the Kipling infrastructure transit at its highest by adding a single dwelling unit, which in my view is not by itself sufficient to convince me that general intent and purpose of those documents is maintained.

⁷ 1.1 Managing and Directing Land Use to Achieve Efficient and Resilient Development and Land Use Patterns

1.1.1 Healthy, liveable and safe communities are sustained by:

- a) promoting efficient development and land use patterns which sustain the financial well-being of the Province and municipalities over the long term;
- b) accommodating an appropriate affordable and **market-based range** and mix of residential types (including **single-detached**, additional residential units, multi-unit housing, affordable housing and housing for older persons), employment (including industrial and commercial), institutional (including places of worship, cemeteries and long-term care homes), recreation, park and open space, and other uses to meet long-term needs; . . . (Provincial Policy Statement)

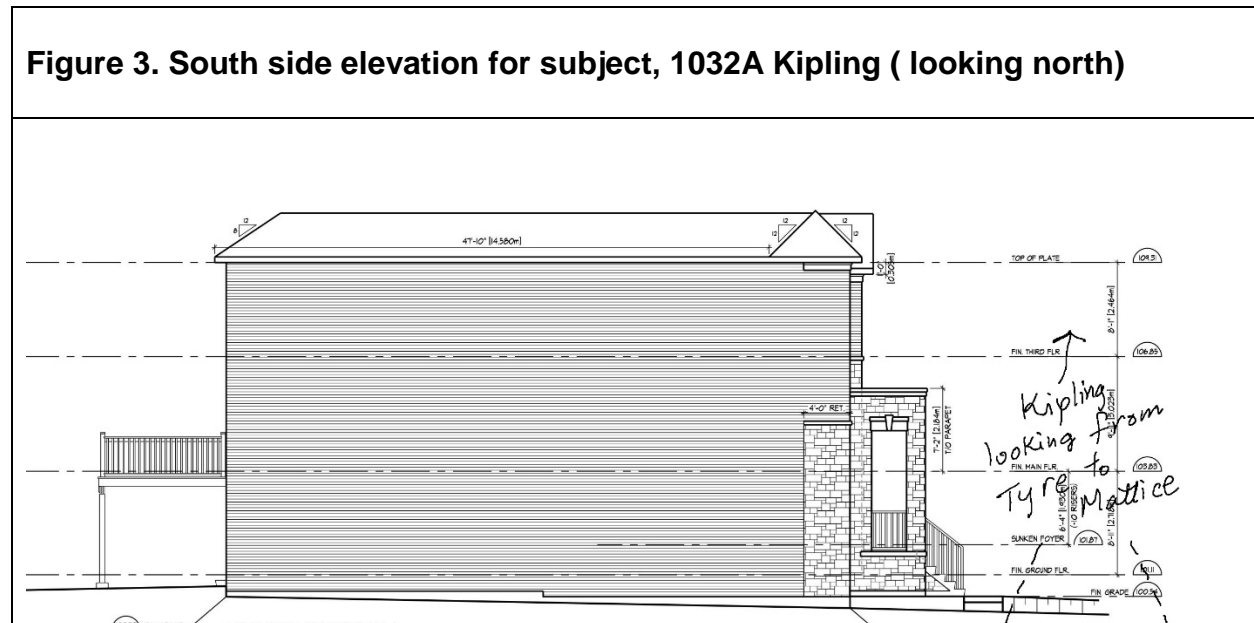
⁸ e) promoting the integration of land use planning, growth management, **transit-supportive development, intensification** and infrastructure planning to achieve cost-effective development patterns, optimization of transit investments, and standards to minimize land consumption and servicing costs;

[Transit-supportive: **in regard to land use patterns**, means development that makes transit viable, optimizes investments in transit infrastructure, and improves the quality of the experience of using transit. It **often refers to compact, mixed-use development** that has a high level of employment and residential densities, including air rights development, in proximity to transit stations, corridors and associated elements within the transportation system. Approaches may be recommended in guidelines developed by the Province or based on municipal approaches that achieve the same objectives]

[Intensification: means the development of a property, site or area at a higher density than currently exists through: a) redevelopment, including the reuse of brownfield sites; b) the development of vacant and/or underutilized lots within previously developed areas; c) infill development; and d) the expansion or conversion of existing buildings.]

Otherwise, the entire section of Kipling from Mattice to Bloor would be similarly entitled to a severance.

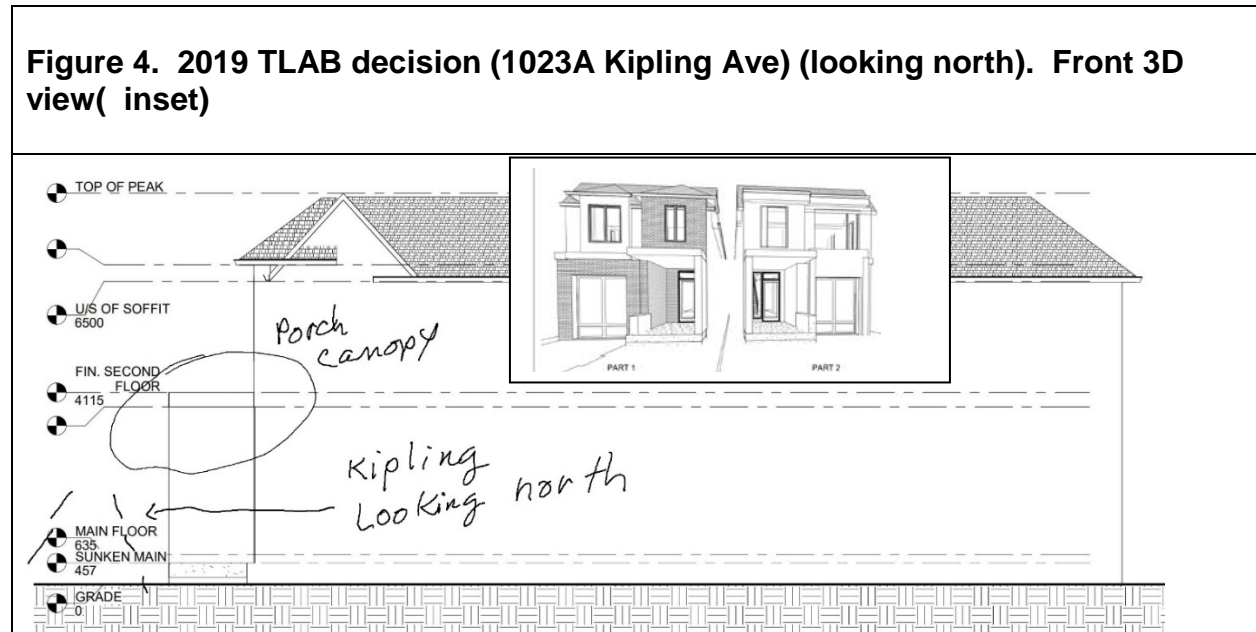
The rear deck and the variances



Up to now I have dealt with the severance and, by implication, the variances for lot frontage and lot area. I now look at the other variances. Above is the proposed south elevation showing a rear deck with an area of 21.21 m² instead of 4 m². The reason, according to the Mr. Manett, is to “mirror”⁹ the design of the 2018 decision. According to Mr. Manett, the owner of that property sold and the new owner is trying to get building approvals based on the 2018 TLAB decision. The other neighbour to the north may or may not be intending this design; no information was submitted. However,

⁹[We have a] deck coming of the main floor, which is the family room – kitchen area and that deck is 21.21 metres squared. Now for the purposes of the zoning by-law, and I’ll go through this when I go through the variances in detail - this deck is considered to be coming from a second floor and therefore requires the variances related to a second floor deck notwithstanding it is coming off the main floor. So that creates the large number of variances that we have are as a result of the configuration of the ah dwelling being above grade and not having a standard basement, so that means we are counting the basement as a first floor, which then raises everything and the deck platform extensions at the back and the porch at the front are considered to be [the] second floor extensions. . . .This basically lines with the dwellings that are created and approved to the south [Mr. Manett then discussed their similar building heights of 10.4 m] so they would effectively mirror each other. . . .

my reading of the 2018 decision does not tie the holder of the severance to any specific plans¹⁰, so I reject Mr. Manett's rationale. The diagram below shows the same elevation for the plans approved in 2019. The front shows a canopy over the porch (circled). I inserted the architect's 3D drawing. There is no deck leading to the rear at any level.



1069946 proposes a rear porch 3.3 m above grade, almost 11 feet. I find that this variance would create overlook and privacy concerns and is not minor nor desirable for the appropriate development of the property.

Even if this deck is excised, Table 2 shows a jump in all the performance standards over the other decisions, except for the 2018 TLAB decision. While this case

¹⁰ The TLAB, therefore, approves the consent as set out in the Revised R Plan, dated March 23 and attached as Schedule 1, subject to the conditions contained in the Memorandum of Development Engineering, dated December 16, 2016, attached as Schedule 2, and subject to the standard consent conditions agreed to by Mr. Manett on behalf of the applicant, and attached as Schedule 3. The variances set out above, are also granted, subject to the conditions set out in the Memorandum from Urban Forestry dated September 21 2017, attached as Schedule 4. The TLAB so orders. (Final paragraph of 2018 decision)

is unopposed, I still must have a specific justification for each of those variances pursuant to s. 45(1) of the *Planning Act* and I find the "mirror" argument insufficient.

Conclusion

1069946's obligation is to show that the reduced lot frontages respect and reinforce the character of Kipling avenue in the vicinity.¹¹ The planner in the 2019 TLAB decision furnished the decision maker with lot study, which allowed that decision maker to assess whether the proposed lots fitted with the neighbourhood's character; this evidence was not furnished in this case. I cannot accept Mr. Manett's assertion that a neighbourhood is "in transition" is a sufficient basis to carry out the obligation on me to determine the general intent and purposed of the Official Plan and zoning.

Although the road widenings are a public benefit, it will be realized in the future. There are insufficient documented widenings to assume that Kipling will be widened imminently and thus any changes in character of the neighbourhood from this widening are speculative and cannot be considered as a neighbourhood characteristic at present.

DECISION AND ORDER

The severance is not granted and the variances are not authorized. The appeal is dismissed and the decision of the Committee of the Adjustment confirmed.



Ted Yao
Panel Chair, Toronto Local Appeal Body

¹¹ 4.1.5. Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular: . . .b) prevailing size and configuration of lots;