

# DECISION AND ORDER

**Decision Issue Date** Thursday, December 30, 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): TOMASZ DEBOWSKI

Applicant: TOMASZ DEBOWSKI

Property Address/Description: 67 MORSE STREET

Committee of Adjustment Case File: 18 144547 STE 30 CO, 18 144554 STE 30 MV, 18 144555 STE 30 MV

**TLAB Case File Number: 19 236325 S45 14 TLAB, 19 236326 S45 14 TLAB, 19 236327 S53 14 TLAB**

**Hearing date:** Monday, September 28, 2020

DECISION DELIVERED BY S. KARMALI

## APPEARANCES

Name	Role	Representative
Tomasz Debowski	Appellant	
City of Toronto	Party	Jason Davidson
Martin Rendl	Expert witness	
Brooke Marshall	Expert witness	

## INTRODUCTION

The Leslieville site in question is a semi-detached home located north of Lakeshore Boulevard, south of Eastern Avenue, one block east of Logan Avenue and one block west of Carlaw Avenue, on the east side of Morse Street. It is situated in a stable residential neighbourhood consisting of detached and other semi-detached homes. The well-designed Morse Street Playground park is across the subject site and block.

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**S53 14 TLAB**

Mr. Debowski, the Applicant, has appealed the planning decision, which refused his request to sever his property into two undersized residential lots. His requests for further relief from Zoning By-law 569-2013 (ZBL) provisions to accommodate the proposed development were also refused. This further relief included (i) maintaining the three-storey semi-detached dwelling with two dwelling units on the retained and constructing a new rear detached garage; and (ii) constructing a new three-storey detached dwelling to the south, on the conveyed lot, while maintaining the existing rear detached garage, which would be on the conveyed lot.

City of Toronto (City) planning staff and several neighbours opposed Mr. Debowski's severance and variance requests at the Committee of Adjustment (COA). The proposed land division was found to be premature, not suitable for the purposes for which it was to be severed, and inconsistent with the policies of the City's Official Plan (OP), namely the employment area policies, which permit certain uses, and particularly so in Core Employment Area(s) (CEA). These areas allow for various uses, including manufacturing, processing, warehousing, offices, and utilities. Residential uses are not permitted in these employment use designated areas. The subsequent variance requests were found not to meet the general intent and purpose of the OP, which is a planning instrument meant to ensure the City evolves, improves and realizes its full potential in areas including land use development.

Mr. Debowski's consent request is the same as it was before the COA. His variance requests have changed toward ZBL compliance. He has opted to remove the proposed rear detached garage on the retained lot behind the existing dwelling, and he has decreased the floor space index of the proposed new home and increased the south side yard setback.

Only if I find that Mr. Debowski's consent request satisfies the requirements stated further below (under 'Jurisdiction') should the variance requests identified in Table 1 be considered and evaluated in terms of the "four tests" for determining whether they are in fact minor variances.

Accordingly, is the consent request consistent with the policy statements issued under the *Planning Act*?

Does the proposed consent have regard to criteria such as health, safety, convenience, and welfare of the present and future inhabitants? Does it have regard for land-use planning criteria?

TABLE 1

By-law 569-2013 Requirement	Part 1 – Conveyed <i>To construct a new three-storey detached dwelling and maintain the existing rear detached garage on the conveyed lot</i>	Part 2 – Retained <i>To maintain the existing three-storey semi-detached dwelling with two dwelling units</i>
Lot frontage minimum is 6.0 metres	4.55 metres (Lot area would be 180.3 square metres)	4.65 metres (Lot area would be 183.8 square metres)
Side yard setback minimum is 0.45 metres	0.305 metres from both the north and south side yard lot lines	0.304 metres from the south side lot line
Floor space index maximum is 0.6 times the area of the lot, or Part 1 is 108.13 square metres Part 2 is 109.81 square metres	0.81 times the area of the lot (146.04 square metres)	0.83 times the area of the lot (152.55 square metres)
Front yard landscaping minimum required as soft landscaping is 75 percent or 11.5 square metres	Not applicable	47 percent (7.2 square metres)

## JURISDICTION

### Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body (TLAB) must be consistent with the Provincial Policy Statement (PPS) and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area (Growth Plan). I have considered the 2014 PPS, the 2020 PPS and the 2019 Growth Plan.

### Consent – S. 53

The 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 *Planning Act* (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 ZBL, I 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 ZBL;
- are desirable for the appropriate development or use of the land; and
- are minor.

### **EVIDENCE, ANALYSIS, FINDINGS, REASONS**

I have carefully reviewed the oral and written evidence filed in this adjudicative process. My task is to evaluate the evidentiary basis of the consent and variance applications in light of the long-standing land use planning framework in Ontario, which fixes a municipality's official plan as the primary vehicle for implementing provincial policies. This case highlights the pressures the City faces to steward land and the layers of higher-ordered provincial and municipal policies which intricately inform land-use planning decision-making.

The following materials were entered into evidence at the Hearing:

Exhibit 1A: Expert Witness Statement of Mr. Rendl

Exhibit 1B: Responding Witness Statement of Mr. Rendl

Exhibit 2A: Part 1 of Document Disclosure of Mr. Rendl

Exhibit 2B: Part 2 of Document Disclosure of Mr. Rendl

Exhibit 3A: COA Notice of (Variance) Decision for 69 Morse Street (2002)

Exhibit 3B: Various Documents about 69 Morse Street

Exhibit 4: COA Notice of (Consent) Decision for 67 Logan Avenue (2008)

Exhibit 5: Building Data (raw) - Retrieved by Buildings Staff (2020)

Exhibit 6: Provincially Significant Employment Zone – Minister Decision (2019)

Exhibit 7: Growth Plan (2019)

Exhibit 8: Old Toronto Official Plan Part 2 Plan 19.24 – South of Eastern (1995)

Exhibit 9: Old Toronto Official Plan Deleting By-Law 1997-0624

Exhibit 10: Expert Witness Statement of Ms. Marshall

Exhibit 11: Document Disclosure Ms. Marshall

I have had regard to matters of provincial interest concerning the consent application. While I am satisfied that a subdivision plan is not required here since the property is situated in an existing built-up area that Mr. Rendl said is well-serviced, I find the consent request is premature. I arrive at this conclusion after evaluating Mr. Debowksi's consent application against the policies of the PPS, Growth Plan and the City's OP. Based on the evidence I heard, the application cannot succeed for reasons I explain below. Ergo, I need not examine the accompanying consent-contingent variance requests for merit or demerit.

### **Expert Witnesses**

I qualified Mr. Martin Rendl, a very experienced planner, and Ms. Brooke Marshall, a seasoned public sector planner, as expert witnesses in land use planning. Mr. Rendl provided me with opinion evidence in support of the consent and variance requests. In his view, the proposed creation of a new lot and construction of an attached dwelling on the new lot represent good planning. Ms. Marshall, on the other hand, provided me with opinion evidence opposing Mr. Debowksi's requests which she believes are not appropriate for the TLAB forum. In her view, the current land use planning policy framework requires new lots for residential use to formally request a change from employment use to non-employment use. She opined that the consent request does not meet the legislated consent criteria for approval. The thrust of Ms. Marshall's planning evidence concerned mitigating potential risks to human health and safety and damage to property.

### **The Neighbourhood and Existing Land-use Context**

The property is located within the local area lands designated *Core Employment Area* in the OP and zoned Residential (R (d0.6)) under the City-wide ZBL, which sets the rules and regulations that control development. These designations, though currently incongruent, are compatible to the extent that the required permissions are sought.

As mentioned, the property is south of Eastern Avenue and north of Lakeshore Boulevard and is mid-block on Morse Street. The agreed-upon geographic neighbourhood consists of approximately 189 residential properties, including 42-120 and 59-125 Logan Avenue, 22-108 and 31-111 Morse Street, 26-88 and 63-103 1/2 Carlaw Avenue and 523-549 Eastern Avenue, which are surrounded by a land-use context of non-residential, commercial and industrial properties. Equally important, the residential properties represent the cluster identified in Site and Area Specific Policy (SASP) 190, which forms part of Chapter 7 of the OP and directs that "residential uses existing on November 26, 2002, are permitted." Mr. Rendl highlighted that the verb *uses* does not denote development or building. I generally accept this point and would add that *use* and *development* are also not unrelated terms of art in planning.

According to Ms. Marshall, SASP 190 has “capped” ongoing residential lot creation in the area such that a new lot not existing on the specified date would not be permitted. She testified that the proposed severance is, therefore, outside of the scope of SASP 190 and would require permission from the City and provincial authorities to convert lands designated for employment use to residential use. Mr. Rendl, on the other hand, testified that new residential development and intensification have occurred since the specified date in the geographic neighbourhood. He, therefore, concluded residential uses are permitted. He pointed out several of these developments: 67 Logan Avenue, which was approved for severance and variance in October 2008; 142 Morse Street, which is north of Eastern Avenue and approved for severance and variance by the Ontario Municipal Board in 2009; and 117 and 119 Logan Avenue, which is within the geographic neighbourhood and was approved for severance and variance in July 2013.

The property in question is located in the Toronto Region and Conservation Authority’s (TRCA) Regulated Area of the Don River watershed and the Lower Don Special Policy Area (SPA), a provincially identified area. The Province of Ontario (Province) and the City, on April 27, 2018, executed a Protocol to minimize flood risk and mitigate flood damage to human health or property. A contextual point of the Protocol is to limit new or intensified development beyond existing permissions in the City’s OP. The Protocol directs that where proposed changes to Official Plan policies or land use designations are within the Lower Don SPA, the changes must first be approved by the Province. The same Protocol mentions that development proposals which “conform to” OP policies are permitted to proceed without prior provincial approval and are subject to floodproofing standards and TRCA regulations being satisfied.

Mr. Rendl pointed out that the City’s OP can permit buildings and structures in the Lower Don SPA if they are protected from flooding to at least the 350-year flood level. He also pointed out that the TRCA had no objections to the proposed lot in principle, provided the development on the lot be adequately floodproofed. Still, the TRCA advised that approval from the Province is required for any requested change in land use designation. Ms. Marshall opined that a SPA, an area within a community that has historically existed in the flood plain with provincially-approved site-specific policies, is not intended to allow for new or intensified development if a *community* has feasible opportunities for development outside of the flood plain. She noted that flood protection infrastructure had not yet been completed for the area, and the Lower Don SPA designation under provincial policy remains a requirement.

### **Policy-led Planning System**

The *Planning Act* provides a land use planning system led by provincial policy. It requires that all enacted City by-laws conform to the City’s OP, which is the most important vehicle to implement the PPS. The PPS provides direction on land use and development in Ontario, and the Growth Plan provides geographically-specific land use planning policies for the area in question. The consent matter and its context illuminate the relevance, importance and applicability of these high-level documents for my decision-making.

The Act, for example, purports that the City should have regard for the adequate provision of employment opportunities, the adequate provision of a full range of housing, and the appropriate location for growth and development. The PPS provides that *good planning* – comprehensive, integrative and long-term planning - is best achieved through municipal official plans. The Act, too, states that a decision-maker shall consider whether the consent application conforms to the City's OP. I have, therefore, assessed Mr. Debowski's request to subdivide his lot in light of the policies of the City's OP.

**The Application is not consistent with the PPS and does not conform to the Growth Plan**

The PPS aims to accommodate an appropriate range and mix of residential, employment, park and open space, and other uses to meet long-term needs. It defines development as the creation of a new lot, a change in land use or the construction of buildings and structures requiring approval under the Act. The Growth Plan identifies the property within a defined employment area containing a significant number of jobs. A long-term planning purpose for the area is job creation and economic development. Encouraging residential uses and providing the necessary housing supply based on market-based needs would not be as important for the area. In fact, according to the PPS, employment areas ought to be protected and preserved and supportive of current and projected needs. It is, therefore, entirely up to the City to assess and reassess employment areas identified in its OP to ensure the designation is appropriate for the continuing planned function of the employment area, including where the employment area captures existing residential uses.

For example, the City has prioritized employment uses over residential uses in this area, south of Eastern Avenue. North of Eastern Avenue, however, land use designations exist for Mixed-Use Areas and Neighbourhoods under the City's OP. This part of Eastern Avenue appears to have escaped the CEA designation perhaps because, over time, there was more industry development south of Eastern Avenue vis-à-vis north of Eastern Avenue. I recognize that the City has tried to maintain land use compatibility where there are requested ancillary uses to the primary employment use. In other words, the City is positioned to understand better how to steward land with appropriate controls. In this respect, the PPS recognizes and supports the function of SPAs to protect public health and safety in areas deemed to be flood hazards. Yet, the PPS also provides site-specific policies intended for the continued viability of existing uses, generally on a small scale, not unlike the clustered residential properties identified in SASP 190. I understand viability here to mean maintaining existing development uses, not necessarily expanding them.

Mr. Rendl correctly mentioned that the PPS is to be read in its entirety, and all relevant policies should be applied. He focused on *Building Strong Healthy Communities* policies and opined that the consent application efficiently uses land and uses available infrastructure and public service facilities. He said the application would promote cost-effective development and land use patterns, including minimizing land consumption and servicing costs.



Ms. Marshall focused on *Protecting Public Health and Safety* policies. She opined that development is not permitted in the flood plain portion where it would cause danger to public health and safety or property damage. She pointed out that the application would require an amendment to the City's OP policies applying to the SPA lands for provincial approval. As mentioned, the TRCA also made this point. I accept that the proposed new lot would be designated a Core Employment Area, which does not involve residential uses. Yet, the application seeks a further residential use for development purpose.

Mr. Rendl stated that the consent request is consistent with the PPS and conforms to the Growth Plan. The latter instrument is generally about accommodating forecasted growth and growing in a way where people can live, work, shop and access nearby services. He added that if the request is considered a conversion of lands, it would meet the criteria enumerated in the Growth Plan. I view these criteria as not unrelated to the land use compatibility criteria of the PPS.

Mr. Rendl testified that there is a need for residential development (and use) to prevent incompatible industrial and employment uses into the neighbourhood's interior. However, as I will come to later, the City's OP states that uses that would attract the general public into the interior of employment lands and possibly disrupt industrial operations are generally not permitted in CEAs.

He testified that the proposed use of approximately 180.3 square metres of development would not impact the overall achievement of the Growth Plan's employment objectives. Mr. Rendl also testified that there is enough supply of employment lands in the area to accommodate any forecasted growth. In other words, the proposed residential use for which municipal services are available would have little to no impact on the continued existence of employment uses.

I accept that while the Growth Plan requires municipalities to plan for a mix of housing types, land uses, and employment opportunities, it also identifies this residential cluster of an area within a provincially significant employment zone. This kind of zone is intended to identify employment areas and protect them longer. In my view, it is the mandate of the City to measure, as appropriate, the sufficiency of employment lands. Therefore, I am not persuaded that the consent would not adversely affect the overall viability of the employment area and related Growth Plan policies.

Ms. Marshall emphasized the policies of the Growth Plan that direct municipalities to plan for the preservation of employment lands through their official plans. She implied that the land in question is required for employment purposes over the long term. If it were not required for this overall purpose, then requesting a conversion of lands may not be an unreasonable first step for Mr. Debowksi. She highlighted that the newly created lot would need to be converted to residential use by the Province if I approve the consent.

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I prefer Ms. Marshall's PPS and Growth Plan analysis concerning the consent application. I find that the property is not consistent with the PPS and does not conform to the policies of the Growth Plan as these policies recognize and support the vital function of the SPAs to protect public safety. It is also up to the City and the Province to determine the sufficiency of employment lands for the City.

**Some Provincial Consent Criteria Not Justified**

Mr. Rendl testified that the consent application conforms to matters of provincial interest. He further testified that the proposed new lot would not be critical to preserving the City's employment base. He mentioned that the new lot should not require a conversion to non-employment uses. Ms. Marshall, on the other hand, reiterated that the proposed lot and its situatedness in the Lower Don SPA would require prior approval of the Province for a new residential use. I recognize the provincial interest criteria such as adequate housing and adequate employment are broad in scope and exist within a complex web of priorities, interests and relationships. I also recognize that there is a well-placed emphasis in the planning instruments on the health, safety and welfare interest.

Ms. Marshall pointed to the *Protocol Regarding the Lower Don SPA*, which is consistent with the PPS. According to the Protocol, she opined that protecting public health, safety, and property while mitigating risks from hazards including flooding would remain "the priority" within the Lower Don SPA. I understand that the development application was initiated on April 16, 2018, and the Protocol was signed on April 27, 2018. In any event, the Protocol is informative, not determinative. I accept that it provides pertinent and useful context around the provincial interest for the orderly development of safe and health communities and public health and safety protection.

Mr. Rendl further testified that the proposed lot would provide compatible infill residential development on an underutilized property. He reiterated that there are available municipal services to develop this lot, which, he said, does not signal the application is premature. Ms. Marshall had a different view. She stated that lot creation in this immediate neighbourhood would be premature and not in the public interest because there is ongoing work in the Lower Don SPA to mitigate flood damage and enhance flood protection. She reiterated that approval of the Province is required since flood mitigation and protection has not been completed yet.

Mr. Rendl stated that the lot would have a shape and dimension consistent with nearby lots. He noted the lot would have access from a public street and public lane and that its creation would not impact school capacity. I agree with these proffered points. On the other hand, I have not heard enough evidence that supports the notion that the new lot would conserve natural resources and meet flood control compliance.

For example, the TRCA highlighted, in its follow-up letter, that approval from the Province is required for any requested change in land use designation. The TRCA also recommended that Mr. Debowski consult with the City and the Province. Mr. Debowski, to an extent, consulted with the Province, which had communicated that any changes to Ministry-approved policy or land use associated with a SPA, like the Protocol, would require the City to seek further approvals from the Province.

Mr. Debowski believes creating a new lot would have the effect of creating a new residential use. Ms. Marshall contests this. She testified that a newly created lot would be designated Core Employment Area and would require the new lot to be converted to residential use by way of a conversion request should I decide to approve the requested consent.

### **The Consent Does Not Conform to the City's Official Plan**

As mentioned, the Official Plan is the most important vehicle for implementing the PPS. It is to be read as a whole and balance and reconcile a range of diverse objectives affecting land use planning in the City.

Ms. Marshall testified that she is a member of the City's Official Plan Team, which is responsible for providing policy advice to the City's divisions, including its planning division. I give her testimony significant weight. She stated the existing property is in a Core Employment Area overlain by the residential permission of SASP 190. Mr. Debowski could, therefore, request an OP amendment to this SASP to allow for, or provide an exception for, the new intended residential use. An OP amendment must be consistent with the PPS and not conflict with the Growth Plan. Mr. Debowski could also request a conversion of lands, from employment to residential by way of a Municipal Comprehensive Review, a process that ensures the City's OP conforms to Growth Plan policies, including addressing issues of compatibility between non-employment areas and employment areas.

Mr. Rendl repeated that the consent request conforms to the OP. He testified that the site is suitably zoned for Residential, which could permit the proposed use and building, subject to variance approval. Quite the reverse for Ms. Marshall, who reiterated that the proposed use did not exist on or before November 26, 2002. She continued that the Protocol limits new or intensified development beyond existing OP permissions due to the "potential risk to human health and safety and property damage from a flooding event."

Mr. Rendl contended that existing use of the property, including the area of the proposed new lot was materially used for residential purposes on November 26, 2002. He opined that a new dwelling should not be considered a new residential use of the land when said land has been used for and continues to be used for a residential land use. Mr. Rendl further opined that the existing use context would be no different than the planned use context here. He added that even the intent of the City-wide ZBL was to provide for the continued development of residential uses on the subject site rather than encourage the development of employment and industrial permitted uses by the CEA designation under the OP.

The analytical focus, however, is on how the consent application conforms to the OP. Economic health policies, designations and mapping for employment areas were set into motion in 2013, prior to the City-wide ZBL. These policies, designations and mappings would characterize the proposed lot as a Core Employment Area. It is not surprising that some new development occurred within the geographic neighbourhood between November 26, 2002 and December 2013. I note that consent requests have since been on a decline in the area, and incompatible land uses, such as new residential uses, are generally located outside of the CEA. Preserving the City's employment areas for business and economic activities is congruent with the PPS and the Growth Plan.

I agree with Mr. Rendl that a purpose of the CEA designation is to discourage conversion of existing employment uses in the area to residential uses. I disagree with the view that CEA policies and SASP 190 are in a *bona fide* conflict here. While the existing lot is a protected residential use under SASP 190 of the City's OP, the proposed new (conveyed) lot, would be deemed an employment use and cannot currently be saved by SASP 190.

SASP 190 is a further layer of policy direction to the other pertinent policies of the OP, in particular the CEA policies. Based on the evidence, I do not find the consent request conforms to the OP. The proposed conveyed lot, to me, would still seem to properly require a conversion starting with City administrative processes. I find the request for consent is premature, and if approved, could result in unintended consequences for the public interest of which the City plays a significant part.

Furthermore, the area has been identified as a flood plain, and accordingly falls under the regulation of the Lower Don SPA. The City has limited discretion in the regulation and management of areas subject to natural hazards. Provincial policy generally directs development to areas outside of hazard lands, especially areas subject to flooding, erosion and dynamic beach hazards. The policy further imposes strict requirements for development that may be permitted in a floodplain. I am not completely satisfied that floodproofing of the proposed basement and first floor is an adequate mitigation measure given the context. I am of the view that the Protocol, as Ms. Marshall mentioned, is the appropriate high-level collaborative document that aims to protect the public and minimize risk to people and property. I place weight on this influential document.

Overall, I prefer Ms. Marshall's evidence in this matter. I do not find that the consent application satisfies the applicable statutory requirements for approval. Accordingly, the revised variance applications are not applicable and cannot warrant further consideration.

I would like to thank the Parties for their courtesy and civility during the hearing as well as for their patience in the outcome of this matter.

## **DECISION AND ORDER**

The Appeal is denied and the consent and variance requests are refused.

**X**

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Sean Karmali  
Panel Chair, Toronto Local Appeal Body