Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Wednesday, January 12, 2022

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act

Appellant(s): JANICE THOMAS

Applicant: ARCICA INC

Property Address/Description: 45 TWENTY SECOND ST

Committee of Adjustment Case File Number: 20 222795 WET 03 MV (A0468/20EYK)

TLAB Case File Number: 21 126373 S45 03 TLAB

Hearing Dates: Aug 16, 23, Oct 19, Nov 25, 29, 2021, Jan 6, 2022

DECISION DELIVERED BY Ted Yao

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Arcica Inc (Majid Ahmaditavoosi)	Owner	Amber Stewart
Johnathan Benczkowski	Expert Witness	
Peter Wynnyczuk	Expert Witness	
Janice Sue Thomas	Appellant	
Mitchell Stambler	Participant	
Wanda Jurashek	Participant	
Hank Savinsky	Participant	
Elizabeth and Robert	Participants	

INTRODUCTION AND BACKGROUND

Arcica Inc wishes to demolish the house at 45 Twenty Second Ave and replace it with a new one. The property is south of the GO train tracks, north of Lakeshore and west of Kipling. On November 29, 2021, the parties engaged in mediation session without my presence and reached a settlement. This settlement required the front façade to be revised and rear "overhang" with respect to Ms. Thomas's house to be shortened. Ms. Thomas owns 47 Twenty Second and is the next door neighbour to the north of Arcica's property.

Even though this is a settlement, the TLAB does not "rubber-stamp" what the parties have agreed to and must hear some evidence and be independently satisfied that the four tests under the *Planning Act* are met.

On March 3, 2021, the Committee of Adjustment approved **two** variances in favour of Arcica: a Floor Space Index variance of 0.80 and exterior main wall height of 8.8 m instead of 7 m permitted. Ms. Thomas appealed and so this matter came to the TLAB. This is only the starting point; there was at least one other iteration between the Committee of Adjustment (which I do not discuss) and the settlement of November 2021. Usually, these two variances would frame the discussion However, in this case, to implement the settlement, Arcica requests five variances as follows:

Table 1. Variances sought for 45 Twenty Second

		Required/Permitted	Proposed
From Zoning By-law 569-2013			
1	Max. Floor Space Index	0.60 times the area of the lot	0.72
2	Height of side exterior main walls	7.0 m	7.5 m
3	Minimum front yard setback	7.82 m	5.49 m
4	Front porch	Can encroach 2.5 m into front yard setback	Encroaches 3.55 m
5	Bay window	Can encroach 0.75 m into front yard setback	Encroaches2.63 m

MATTERS IN ISSUE

The variances must comply with s. 45(1) of the *Planning Act* and 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.

The main Official Plan policy is s. 4.1.5 of the Official Plan of the City of Toronto in which the physical form of the development must "fit in" physically with the surrounding neighbourhood.

EVIDENCE

I heard from Mr. Benczkowski, whom I qualified as able to give opinion evidence in the area of land use planning, and Mr. Wynnyczuk, whom I qualified as able to give opinion evidence in the field of arboriculture. I also heard from Ms. Thomas, who testified on her own behalf. Had the hearing not settled, Mr. Stambler, Ms. Jurashek, Mr. Savinsky and Mr. and Ms. Gullins had prepared presentations and research.

Section 45 (18.1.1) order

Normally a change made to the application after the Committee of Adjustment decision requires the proponent to give further notice. Section 45(18.1) of the Planning Act is designed to take care of this eventuality by permitting the TLAB to dispense with further notice if the amendments are "minor". "[1] I note that TLAB has gone both ways on this; fresh amendments were found to be minor in 857 Glencairn168 Strachan and 787 Dundas. Notice was ordered to be given in 25 Hiltz and 37 Wilket Road,

[1] 45(18.1) On an appeal, the Tribunal may make a decision on an application which has been amended from the original application if, before issuing its order, written notice is given to the persons and public bodies who received notice of the original application under subsection (5) and to other persons and agencies prescribed under that subsection.
Exception
45(18.1.1) The Tribunal is not required to give notice under subsection (18.1) if, in its opinion, the amendment to the original application is minor. (s. 45, *Planning Act)*

While “downward” charges are made routinely, there are three new variances (#3, 4 and 5) — all connected with the front façade. These three new variances all deal with the same issue – moving the front wall closer to the street.

On the first day of the hearing, Ms. Stewart announced that Arcica was considering this very amendment in response to a petition in which some 21 persons requested that Arcica do this. The unusual nature of this cannot be overemphasized; that is, residents opposed to the development asked the proponent to seek permission for a **new** variance.

As I set out in the Analysis portion, this new variance has merit and was supported by planning evidence. But at this point I am discussing notice, which is procedural, not the merits.

My reasons not ordering new notice are twofold. First it would be impractical and unusual. Unlike the Committee of Adjustment notice, given by City staff and presumptively neutral, this notice would have to be given by Ms. Stewart, the lawyer for the proponent. Coming nine months after the Committee hearing, most residents would not understand why they were receiving a second notice from one of the parties. They would phone Ms. Stewart’s office and ask what it meant. Someone in her office would have to provide a detailed and technical explanation of an arcane part of the variance process.

Second, I infer from the scheme of the *Planning Act* that fresh notice should be ordered only when the new variance is effectively a new application, not, as in this case, a proponent who in good faith is trying to respond to neighbours’ concerns. The neighbours, including Ms. Thomas, were given notice that Arcica was seeking FSI and main wall height variances. They fought that application and lost, but let the Committee know that they wanted to be informed of the Committee’s decision. By doing so they were on the TLAB mailing list and could elect to be parties at this hearing.

Fresh notice at this point would be aimed at a mythical neighbour who has not even bothered to attend the Committee of Adjustment or the TLAB hearing. The others, for example Mr. Stambler, Mr. Savinsky, and Ms. Jurashek were at the two and half days of TLAB testimony and have had **actual** notice of this amendments. Indeed they shaped the result.

For these reasons, I find that the amendments are minor and I will make an order dispensing with further notice.

Principles of tribunal deference to a settlement

There is agreement as to the order the TLAB should make under s. 45(1) of the *Planning Act*. My sole task is to make findings to satisfy my duty to ascertain that the four tests have been met.

In assessing whether a settlement is reasonable, it is useful to consider the approach in the Law Society's *Stephen Alexander Cooper*[2]. This is a case from the Law Society Tribunal's Appeal Division, which was hearing an appeal from the Hearing Panel (the trial arm)'s decision. The parties submitted an agreed statement of facts and recommended a penalty of two and a half months, which the Hearing Panel altered to a more severe penalty. In other words, it departed from the agreed-on result. The Appeal Decision said this was an error:

> What motivates that jurisprudence [to hesitate to depart from a settlement and do so only in a judicial way] . . are compelling policy reasons to presumptively accept joint submissions. **The presumptive acceptance of joint submissions promotes resolution, the saving of time and expense, and reasonable certainty for the parties**. If joint submissions are regularly disregarded, there is less incentive to enter into them. (my bold)

This case gives rigour to settlements and fills in gaps in the TLAB's Rules of Practice and Procedure[3], which encourage settlements but do not give guidance as to how a settlement differs from a normal contested hearing. The Supreme Court of Canada also

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[2] *Law Society of Upper Canada v. Stephen Alexander Cooper,* 2009 ONLSAP 7; https://www.canlii.org/en/on/onlst/doc/2009/2009onlsap7/2009onlsap7.html?autocompleteStr=cooper&autocompletePos=1

[3] *19.1 The TLAB is committed to encouraging Parties to settle some or all of the issues by informal discussion, Exchange and Mediation. 19.2 Parties who arrive at a settlement shall Serve the terms of the proposed settlement on all other Parties and Participants and File same with the TLAB at the earliest possible date. 19.3 The TLAB shall give notice to all Parties and Participants of the date, time and location of the settlement Hearing, and shall thereafter conduct an expedited settlement Hearing on the terms of the proposed settlement. 19.4 Where no Person at the Hearing opposes the proposed settlement or where the TLAB rejects an objection the TLAB may issue an order giving effect to the settlement and any necessary amendments.* My note: Rule19.4 is silent about the situation where the TLAB itself opposes the proposed settlement.

has considered this issue. In *Antony Cook*[4], it set out the latest test for rejecting a settlement, which is stringent. *Cook* was an appeal by Mr. Cook from a trial judge's rejection of a plea bargain. The Supreme Court allowed the appeal, stressing the role of the public interest when the joint submission falls within the range of reasonable outcomes.

Disputes at the TLAB do not usually present a "range" of outcomes; it is frequently all or nothing, and the TLAB is not equipped to make modifications to architectural plans, particularly when the proponent is unwilling to make them. Most importantly the TLAB is not dealing with criminal law, for which Justice Moldaver said that plea bargains were "essential".

That having been said, on any reasonable standard of deference, I find the settlement here falls within a reasonable range of outcomes, particularly when I witnessed it coalesce within the hearing.

Where this discussion is important is the precedential value of the 0.72 FSI. Arcica originally sought 0.83; modified to 0.80 and as a result of the settlement, now seeks 0.72. **Ms. Thomas asked me specifically to insert in my reasons the comment that this is not a precedent**. My granting this FSI in the context of a settlement is not the same as making a finding after a contested hearing. Future proponents who suggest that this number might be a "comparable" ought in fairness to include an explanation of the special circumstances of this case. Each case must be decided on its own facts; there is no doctrine of binding precedent at the TLAB.

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[4] The Supreme Court of Canada case is *R. v. Anthony-Cook*, 2016 SCC 43 (CanLII), where it is stated "The public interest test is the proper legal test that trial judges should apply. Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest."
https://www.canlii.org/en/ca/scc/doc/2016/2016scc43/2016scc43.html?autocompleteStr=cook&autocompletePos=1

ANALYSIS, FINDINGS, REASONS

I now explain why I am satisfied that the four tests are met. Figure 2 is the survey of the existing building at #45 Twenty Second, with Ms. Thomas's house at #47 and a second neighbour at #49. South of the subject property is #43, a four to five unit multiplex building. The area's RM zoning permits a range of dwelling types, including multiple-unit buildings.

Figure 2. Survey showing the front yard setbacks of subject and adjacent buildings on the east side of Twenty Second

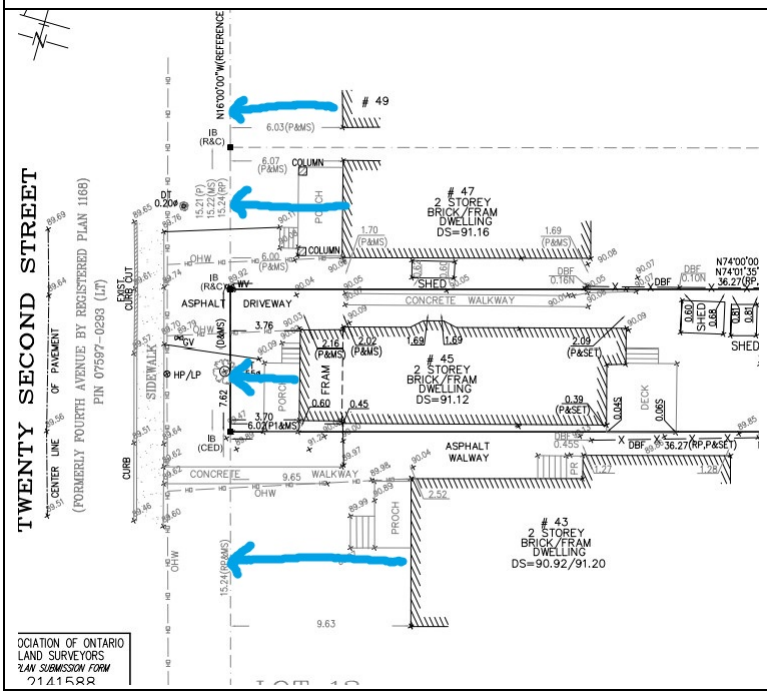
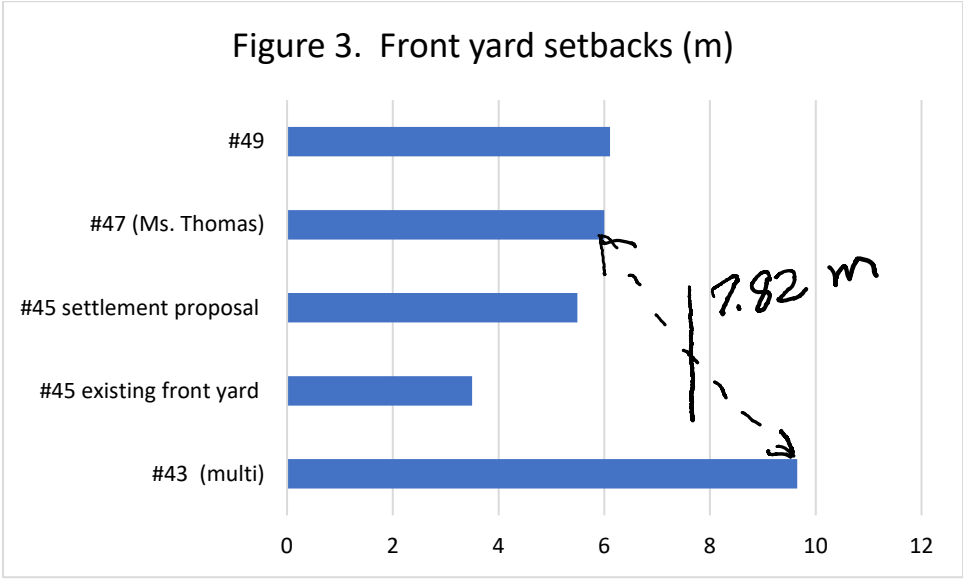


Figure 2 shows the front yard setbacks in blue; but undimensioned. Mr. Benczkowski's second witness statement contains these numbers and I created a new chart in Figure 3 (below). He said #43's setback is anomalously large; in fact, the largest on the block. Figure 3 also shows front yard setback as required by the zoning plan examiner: 7.82 m, which is the average of the setbacks of the north and south neighbours.

Figure 3. Front yard setbacks (m)



Stepping back to look at setbacks comprehensively, the average front yard setback for the east side of the block south of Elder is just a little over 4 m and the other block faces are in the 3 to 4 m range (please see Figure 4 next page; the four averages are the small handwritten numbers.) Thus, the relocation of the front wall forward of the 7.82 m line triggers new variances, but as the Official Plan requires, makes the new Arcica building "fit" better with the physical characteristics of the neighbourhood; i.e., the average setback numbers in Figure 4. This deals with the front yard and I now move to the main wall heights.

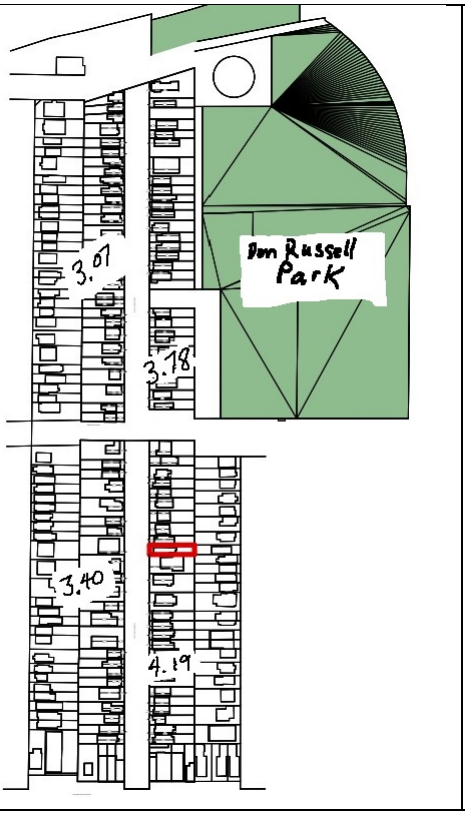


Figure 4. Average setbacks for four sections of Twenty Second Ave

In Figure 5 (next page) I compare before- and after- front elevations. In the zoning by-law, main wall height limitations require that a **pair** of walls be less than 7 m, measured to the bottom of the eaves. The original flat roof design required a variance of 8.8 m for the **front and rear walls**. The settlement façade uses the **side walls** as the designated pair; it may be seen that the eaves of the right drawing (settlement) are lower than the top of the second storey window and need only a variance of 7.5 m. Not only is this number smaller and hence more "minor", but I find the lowered roofline is more sympathetic to the other houses' eave lines and constitute a "desirable" result.

Mr. Benczkowski said that in this older neighbourhood there are many eave lines at this height because the main wall limitation was adopted in 2013 and owners obtained permits before the introduction of main wall height limits. I find these main wall heights (that is in the 7.5 m range) constitute a physical characteristic that is respected and reinforced by Variance 2.

Figure 5. Front elevations: Left (Committee of Adjustment approval); Right settlement

Conclusion

The front yard setback variances are a result of a direct request by objectors and that is the way the planning process should operate, that is, the development's physical form should respond to the consultative process. I have explained how the settlement design is a better "fit", responding to the Official Plan and zoning by-law intent.

I find the variances meet the statutory tests under the *Planning Act*. I also find that the higher level Provincial policies are not applicable when the issues are exclusively architectural design and density.

I wish to thank the parties and participants for reaching a settlement.

DECISION AND ORDER

I find the amendments are minor (s. 45(18.1.1 of the *Planning Act*) so no further notice has to be given for changes to the original application.

I authorize the variances in Table 1 on the following conditions of approval:

1. The proposed dwelling shall be constructed substantially in accordance with the plans filed with the TLAB on January 6, 2022.

2. Submission of a complete application for a permit to injure or remove a City-owned tree(s), as per City of Toronto Municipal Code Chapter 813, Trees Article II Trees on City Streets

X

Ted Yao
Panel Chair, Toronto Local Appeal Body