

DECISION AND ORDER

Decision Issue Date Wednesday, April 13, 2022

PROCEEDING COMMENCED UNDER Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant: 2547611 ONTARIO INC
Applicant(s): STEVEN QI

Property Address/Description: 79A FOCH AVE
Committee of Adjustment File
Number(s): 21 111433 WET 03 CO (B0010/21EYK), 21 111437 WET 03 MV (A0054/21EYK), 21 111438 WET 03 MV (A0055/21EYK
TLAB Case File Number(s): 21 230196 S53 03 TLAB, 21 230197 S45 03 TLAB, 21 230198 S45 03 TLAB

Hearing date: April 5, 2022

Submission of City data in excel format: April 11, 2022

DECISION DELIVERED BY TED YAO

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
2547611 Ontario Inc (Harman Lubana, Sunny and Agit Lubana)	Owners	- Russell Cheeseman
Steven Qi	Expert witness (planning)	

INTRODUCTION

2547611 Ontario Inc wishes to divide its lot at 79AFoch Ave into two lots, tear down the existing bungalow, and build a pair of two storey semi-detached houses. In order to do this, it needs a decision from a severance granting body, and in addition, the variances in Table 1.

Table1. Variances sought for 79A Foch			
		Required	Proposed (Part 1, southern lot, Part 2 northern lot)
Variances from Zoning By-law 569-2013			
1	Minimum lot size	332.5 m ²	259 m ²
2	Min. Frontage	9 m	6.8 m.
3	Coverage	33% of the lot area	36% of the lot area
4	FSI	0.4 times the area lot area (103 m ²)	0.76 of the lot area (94 m ²).
5	Exterior side yard setbacks	1.5 m	0.9 m
6	Height to mid-point of roof (By-law 67-1979) ¹	7.5 m	8.99 m
7	Side exterior main wall height.	7.5 m	7.98 m.
8	Soffit height (Section 320-42.1.B.(2)) ²	6.5 m.	7.98 m.
9	Soft landscaping	75% of the front yard landscaping	66%

BACKGROUND

The Committee of Adjustment refused the application on Oct. 14, 2021. 2547611 appealed and so the appeal came to the TLAB.

MATTERS IN ISSUE

This case involves a request for a severance and variances and the *Planning Act* has separate tests for each. The Provincial Policy Statement and The Greater Golden Horseshoe Growth Plan are also applicable considerations but contain a high level of generality. For example, the Provincial Policy Statement discourages lot creation on prime agricultural land and prefers municipal water and sewage over private systems;

¹ There are previous versions of the zoning by-laws, including By-law 67-1979 and the Etobicoke Zoning Code (1959). Because there are still appeals against present zoning by-law, plan examiners study compliance with both the present and former zoning by-laws, sometimes resulting in additional or duplicative variances.

² This section is from the Etobicoke Zoning Code: 320-42.1. One-family detached dwellings. [Added 1992-01-20 by By-Law No. 1992-21]. Insufficient material was given to me to determine the precise date of this consolidation.

these policies are not relevant. I find that these documents offer little guidance for this case because of their high level nature and because of the location of 79AFoch within a settlement area with municipal water and wastewater systems.

Severance test

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)³ lists fifteen factors the Committee of Adjustment must have “have regard to”, but the extent of this regard is to be weighed in the particular circumstances of each severance.

Some of the other factors to be considered are also stated in a very general way, such as “the welfare of the present and future inhabitants”. Others are inapplicable in this case, such as the adequacy of municipal services and road system. Still others are rarely a deciding factor for a single lot severance adding only one additional dwelling unit, such as the adequacy of school sites, although in some cases this issue may arise. The factors that are typically most relevant in a built-up area such as Toronto are sections 51(24)(c) and (f): “official plan conformity”; and the “dimensions and shapes” of the lots.

Variance Tests

The variances from Zoning By-Law 569-2013 (and predecessor by-laws) 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 of the City of Toronto

³ Criteria

51(24) In considering a draft plan of subdivision, 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;
- (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; . .
- (f) the dimensions and shapes of the proposed lots;

The *Planning Act* requires compliance with the Official Plan for both a severance and variances. For a severance, the *Planning Act* requires me to have regard as to whether it “conforms” to the Official Plan, whereas for the variance test requires that I find the variances “maintain the general intent of the Official Plan”. Under s. 4.1.5 of the Official Plan, I am required to ascertain if lot sizes and shapes of the new semis on undersized lots respects and reinforces the physical character of the neighbourhood, and this character includes the “prevailing size and configuration of lots”⁴.

In summary, the tests for severance and variance are similar but not identical and overall the Official Plan tests are the most important consideration under the *Planning Act*.

Right to develop

2547611 Ontario Inc must demonstrate to the decision-maker that the tests are met on the balance of probabilities; there is no right to a variance.

EVIDENCE

I heard from Mr. Qi, the owners’ land use planner, whom I qualified as able to give opinion evidence in the area of land use planning.

I made a site visit. Although my view of the site is not evidence, it gave me context to help understand the testimony of Mr. Qi.

ANALYSIS, FINDINGS, REASONS

The most important issues are lot size and area. 2547611 seeks a variance of about two thirds of the required 9 m frontage and a variance of about 77% of the minimum lot area of 332.5 m².⁵

Frontage analysis

⁴ 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;** (Chapter 4, Official Plan)

⁵ The subject property is located west of Brown's Line and south of Albright Avenue. The site has an existing frontage of 13.6 metres and a lot area of approximately 517.48 square metres. The applicant proposes to sever the subject property into two undersized lots each with lot frontages of 6.8 metres and lot areas of 258.74 square metres. The proposed lots would be redeveloped with a semi-detached house with integral garages on both lots, requiring nine variances for each lot. (Author Acting Director, Community Planning, Etobicoke York District)

Since the City did not elect to become a party nor did it nor any of the neighbours appear, this was an unopposed hearing. I am obligated to assess the application with respect to the requirements under the *Planning Act*, nonetheless.

The City's comments to the Committee of Adjustment were:

The lot study analysis shows that the proposed lots would be **among the smallest lots in the broader neighbourhood area**. The majority of lots have lot frontages measuring 7.5 metres to less than 12.0 metres, with only three lots with frontages measuring less than 7.3 metres. There is also a significant number of lots with frontages measuring within the range of 12.0 metres to less than 15.0 metres, the same size as the existing lot frontage at 79 A Foch Avenue. The applications, if approved, **would create increased pressure for future severances on similar sized lots in the area**. Should all lots with a frontage between the ranges of 12.0 metres to less than 15.0 metres be approved for severance, the character of the neighbourhood would change drastically.

The conclusion, that the new lots would be amongst the smallest is true. However, I do not agree that severance would "create pressure" or change the character of the neighbourhood drastically, based on the analysis that follows.

I accept Mr. Qi's study area⁶ for the purposes of this decision. It does demonstrate the truth of the City planner's first sentence quoted. Of the total lots (849), 3.3% are as small as the sought-for lot area.

City data for Foch Ave

Mr. Qi produced three kinds of data: Committee of Adjustment decisions, City property data, (consisting of addresses with lot areas and frontages) and photographs. From the second set of data, to make analysis more manageable, I took only Foch Ave properties (118 properties out of 849) and sorted them by increasing frontage. The smallest 16 are listed in Figure 3.

The list includes "79B" and a new 79A with a frontage of 6.8 m, i.e. as if the severance has been granted. Thus, the new 79A and B are in positions #3 and #4. At position #8 we come to the first 7.62 m. lot, continuing with 36 lots with a frontage of exactly 7.62, then one each at 7.63, 7.64 and 7.65 m. I considered these virtually the same as 7.62 m as it is likely that the original plans of subdivision aimed at the creation of 25 foot lots.

Figure 3. 16 smallest frontage lots on Foch (full discussion on page 9)						
				area (m2)	frontage (m)	
1	78	Foch	Ave	257.38	6.75	TLAB granted a severance March 2019
2	78A	Foch	Ave	257.41	6.76	

⁶ Shown in Figure 4.

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3	79A	Foch	Ave	259	6.78	subject; currently bungalow on 13.56 m lot
4	79B	Foch	Ave	259	6.78	
5	66	Foch	Ave	296.53	7.31	semi and no COA data
6	66A	Foch	Ave	296.52	7.31	
7	45	Foch	Ave	300.31	7.38	semi and no COA data; Number 45A doesn't appear to be in City data base
8	9	Foch	Ave	290.32	7.62	no photo and no COA info
9	9A	Foch	Ave	290.33	7.62	
10	10	Foch	Ave	308.88	7.62	no photo and no COA info
11	10A	Foch	Ave	308.94	7.62	
12	11	Foch	Ave	290.29	7.62	no photo and no COA info
13	11A	Foch	Ave	290.34	7.62	
14	15	Foch	Ave	290.28	7.62	no photo and no COA info
15	17	Foch	Ave	290.33	7.62	no photo; this was a 2016 tear down with 12 variances granted; 290 m2 lot size
16	19	Foch	Ave	290.33	7.62	no photo and no COA info

If we lump all these together, I find:

40% of all Foch lots with a frontage ≤ 7.65 m. (46 out 118)

Using the by-law standards for semis, Mr. Qi obtained:

39% of all lots in the broader neighbourhood ≤ 332.5 m² (minimum lot size for semis), and

31% of all lots in the broader neighbourhood ≤ 9 m (minimum frontage for semis).

Although not in the majority semis on smaller lots exist in substantial numbers.⁷

The zoning⁸

⁷ . . .this Plan recognizes that some geographic neighbourhoods contain a mix of physical characters. In such cases, the direction to respect and reinforce the prevailing physical character will not preclude development whose physical characteristics are not the most frequently occurring [i.e., semis] but **do exist in substantial numbers** within the geographic neighbourhood, provided that the physical characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood and already have a significant presence on properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood. (s. 41.5 of the Official Plan)

⁸ 8.3. Exception Zone “RM18” applies to a majority of properties within the neighbourhood that are located with the “RM” zone. Exception “RM18” regulates the minimum lot area, lot frontage,

In my view the City planner ought to have given greater consideration to the RM zoning, which contemplates a variety of residential uses, each with its own lot area and frontage. The zoning is RM x18, “RM” meaning residential multiple and the “x18” denoting the specifics for lot area and frontage.⁹ RM permits five types of residential uses, from single detached to fourplexes, including semis and duplexes. On Foch Ave, I find many buildings probably predate the 2000’s era of urbanization, i.e., they do not appear in the Committee of Adjustment data but seem to call for a variance. For example, I find in the next section, that Numbers 61 and 70 Foch are single detached. The x18 standard is 12 m, .and so, so they should be on lots larger than 7.62 m.

Mr. Qi found that **semis** make up 17% of the housing types in the wider neighbourhood (187 out of 849), illustrated this on the map below (Figure 4). The inset shows a breakdown for the immediate and adjacent areas, where the percentages are greater.

lot coverage, maximum height and maximum floor space index for specific 66 building types. In the case of a semi-detached house, exception “RM18” requires a minimum lot area of 665 square metres (on two lots, and requirement is 332.5 for each lot) and a minimum lot frontage of 18 metres (on two lots, and requirement is 9m for each lot). It also permits a maximum lot coverage of 33% and a maximum height of 11 metres. Exception “RM18” also sets out that certain lands, which include the Subject Property, are subject to the former By-laws 1979-67 and 1981-272. (Steven Qi witness statement)

⁹ *10.5.1.10 Interpretation*

(1) Application of General Regulations Section

The regulations in Section 10.5 apply to all lands, uses, **buildings** and **structures** in the Residential Zone category.

(2) Interpretation of the Residential Zone Symbol

The zone symbol on the Zoning By-law Map for zones in the Residential Zone category consists of the letters R, RD, RS, RT or RM, indicating the primary land use permitted in the respective zone

10.80.20.40 Permitted Building Types

(1) Permitted Residential Building Types - RM Zone

In the RM zone, a **dwelling unit** is permitted in the following **residential building** types:

- (A) **Detached House**;
- (B) **Semi-Detached House**;
- (C) **Duplex**, . . .
- (D) **Triplex**,. . .
- (E) **Fourplex**, . . .
- (F) **Apartment Building**, . . .

Figure 4
Existing and approved semis

	semis	#of prop.
Adjacent	22	39
Immediate	8	30
Total	187	849

(Immediate” means same block and “Adjacent” means next contiguous block).



My analysis using photographs

I wanted to integrate the above numbers with photographs, so I paired the list of addresses in Figure 3 with photos taken by Mr. Qi. Figure 3 starts with 78 and 78A, a pair of semis on 6.75 m frontages; the smallest frontages on the street. This was the result of an unopposed 2019 TLAB decision, in which it was said: “[the owner’s planner’s findings] included that the lot sizes, FSI, lot coverage, side yard setbacks, and building heights depths and lengths were similar to those in the neighbourhood”. Mr. Qi repeatedly referred to this decision, and to that extent, this decision could be considered “pressure” for this decision. However, that decision is not the impetus for the result in my decision. The previous TLAB decision is not binding or a precedent; a severance was granted, the owner built, and that building became part of the neighbourhood character.

The next photograph is the subject site 11.2 m, flanked to the left by the corner bungalow at 13.5 m frontage, and to right the two storey house at (79 Foch). I shall discuss the pattern of frontages in the next section. The next largest frontages are 66 and 66A, and 45 and 45A Foch; all four are semis in the 7.31 to 7.38 m range. Incidentally Mr. Qi’s list compiled from City data does not contain a “45A” address so without a photograph one could think that 45 Foch was a single detached house on a 7.31 m lot, instead of being the left half of the semi; so the photos are helpful.

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The numbering on Foch Ave sometimes departs from the pattern where a severance creates an "A" and a "B", based on the old address number. For example, Mr. Qi's 79A and 79B. Contrary to this are 35 and 37 Foch, which are not two detached houses, but each is one half of a semi. Since these appear to relatively recently constructed, I would judge that it was only a quirk of fate that either 35 or 37 was an unused number, or that there was a previous semi.

From 9 to 21 Foch, there are no photos, but one can surmise from the addressing (e.g. 9 and 9A) that about half are either semis or two detached houses, presumably by way of severance.

Mr. Qi's photos start at number 35 Foch. For the next four photos I find semis on 7.62 m wide lots, except for 43 and 43A, which are a pair of detached houses. Similarly, the rest of the photos depict semis except for 61 and 70, which are detached homes. The pattern is clear. In this subset of ≤ 7.65 m wide lots, most are semis.

Figure 5. photos of lots listed in ascending order of lot size (mostly exactly 7.62 m or 25 feet)

<p>78A & B Foch Avenue Photo 53</p> 	<p>79 Foch Avenue Photo 54</p> 	<p>66 & 66A Foch Avenue Photo 38</p> 
<p>45 & 45A Foch Avenue Photo 28</p> 	<p>9, 9A; 10, 10A, 11, 11A, 15,17,19,21 – no picture</p>	<p>35 & 37 Foch Avenue Photo 19</p> 
<p>39 & 39A Foch Avenue Photo 22</p> 	<p>43A & B Foch Avenue Photo 26</p> 	<p>45 & 45A Foch Avenue Photo 28</p> 



Inferences from the pattern of numbering

In my view, the widespread prevalence of “A” suffixes suggests that at some time many of the homes on Foch were created by the severance process. In figure 6 I took the City zoning map and marked the frontages from Mr. Qi’s City data.

Numbers 79A (subject) and 79 (the two storey property to the south) were created in 1971 according to Sunny Lubana, who researched the history. Similar severances probably took place in the lower part of Figure 6 as well as at 74A and 74B, and 78A and 78B (TLAB 2019) across the street.

To recapitulate, the RM zoning permits five uses, of which semis require the smallest frontages. The City noted that the new frontages were “among the smallest”, but based on the photographic analysis, there are other undersized lots containing single detached homes and semis. For both, there are historical examples as well as newly created ones.

Figure 6 Lot frontages on the immediate block (from City zoning map)



The link that the City planner was unwilling to make in the analysis of neighbourhood character, was to amalgamate 6.8 m lots with 7.62 m lots, a difference of 0.82 m (2.7 ft). I am willing to find these lots would make a reasonable agglomeration for purposes of neighbourhood character. If this is done, in my view the severance and variances will not destabilize, but will further the existing neighbourhood character, and “the “dimensions and shapes” of the lots will also conform with the Official Plan as required by sections 51 and 53 of the *Planning Act*.

Other variances

I will briefly discuss the evidence on coverage, FSI and height. Mr. Qi found six other pairs of semis with a higher **coverage** than proposed ¹⁰, and four other pairs with a higher **FSI**¹¹.

The **height to mid-point** variance of 8.99 m is required by By-law 67-1979, a former zoning by-law for Etobicoke. This variance is only needed because the new (2013) zoning by-law is still subject to appeals¹². Because of this, plan examiners have to review projects under both by-laws. 2547611's proposed building height, measured under the new by-law complies with the 11 m height limit, so the variance sought from the 1979 by-law amounts to a "technical" variance, which meets all the tests under the Planning Act. I found the other variances are minor, and as discussed, met the Official Plan and zoning intent. Being residential, the use is appropriate and desirable.

DECISION AND ORDER

I give a consent to subdivide 79A Foch (i.e., I grant a severance) as shown on the R plan filed with the Committee of Adjustment, and authorize the variances set out in Table 1, on the following conditions:

Conditions of Consent Approval

1. Confirmation of payment of outstanding taxes to the satisfaction of Revenue Services Division, Finance Department.

2. Municipal numbers for the subject lots indicated on the applicable Registered Plan of Survey shall be assigned to the satisfaction of Survey and Mapping Services, Technical Services.

3. Two copies of the registered reference plan of survey integrated with the Ontario Coordinate System and listing the Parts and their respective areas, shall be filed with City Surveyor, Survey & Mapping, and Technical Services.

¹⁰ 15.9.3.6. Other lot coverage variances approved in the neighbourhood study area include, but are not limited to: • 98 Foch Avenue (Part 1 and Part 2) approved at 39.70% of the lot area; • 78 Foch Avenue (Part 1 and Part 2) approved at 35.20% of the lot area; • 8 Foch Avenue approved at 37.56% of the lot area; • 34 Albright Avenue (Part 1 and Part 2) approved at 38% of the lot area; • 37 Gort Avenue (Part 1 and Part 2) approved at 37.30% of the lot area; and • 22 Jellicoe Avenue (Part 1 and Part 2) approved at 36% of the lot area. (Qi witness Statement)

¹¹ 15.9.4.3. The ongoing trend of development in this area is for new dwellings with larger GFA. In particular, 98 Foch Avenue (Part 1 & Part 2) was approved at 0.76x the lot area, 78 Foch Avenue (Part 1 & Part 2) was approved at 0.67x the lot area, 57 Albright Avenue (Part 1 & Part 2) was approved at 0.76x and 0.75x the lot area respectively, and 60 Albright Avenue (Part & Part 2) was approved at 0.77x the lot area. There are many other examples where GFA variances have been approved in the neighbourhood which are similar to the proposed FSI and the resulting GFA. (Qi witness Statement)

¹² *Bahardoust V Toronto (City)*, 2021 CANLII 102668 (ON LT)

4. Three copies of the registered reference plan of survey satisfying the requirements of the City Surveyor, shall be filed with the Committee of Adjustment.

5. Within two years of the date of the giving of this notice of decision, the applicant shall comply with the above-noted conditions and prepare for electronic submission to the Deputy Secretary Treasurer, the Certificate of Official, Form 2 or 4, O. Reg. 197/96, referencing either subsection 50(3) or (5) or subsection 53(42) of the *Planning Act*, as it pertains to the conveyed land and/or consent transaction.

Conditions of Minor Variance Approval

1. The proposed semi-detached dwelling shall be constructed substantially in accordance with the plans on file by EKP Design Inc.

2. The proposed driveways shall constructed of permeable paving materials.

3. The applicant shall provide a site plan with the following revisions and notations to the satisfaction of the Engineering and Construction Services and Transportation Services, at no cost to the City:

a. Explicitly identify all redundant portions of the existing driveway that are no longer required to be removed; any disturbed areas shall be restored with topsoil and sod.

b. Illustrate a positive slope, minimum 2% and maximum 4% slope, on each section of the proposed driveways, in between the proposed garage door entrance to the edge of asphalt pavement on Foch Avenue;

c. Illustrate whether any existing buildings will be removed;

e. Indicate whether the existing trees will be preserved or removed;

f. Add the following notations to the Site Plan:

i. "All portions of the existing driveway, which are no longer required, shall be removed; and any disturbed area shall be restored in accordance with applicable City standards to the satisfaction of the Transportation Services Division, and at no cost to the City of Toronto."

ii. "The proposed new driveways shall be constructed to the applicable City of Toronto Design Standards at no cost to the municipality."

iii. "The owner must obtain all required permits from the Permits and Enforcement unit of Transportation Services prior to commencing construction, which may include but not be limited to, payment of a Municipal Road Damage Deposit. The owner will be required to contact the Permits and Enforcement unit of Transportation Services in order to obtain the exact particulars of all permits that are required."

iv. "All work within the Foch Avenue road allowance must be done to the satisfaction of the Transportation Services Division, and at no cost to, the City of Toronto."

v. "The owner must obtain written approvals from Parks, Forestry and Recreation Division with respect to any regulated trees."

4. The owner shall submit 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. 5. Where there is no existing street tree, the owner shall provide payment in lieu of planting of one street tree on the City road allowance abutting each of the sites involved in the application. The current cash-in-lieu payment is \$583/tree.

I make an Order under s. 45(18.1.1) of the *Planning Act* that the changes are minor and no further notice is required.¹³

X



Ted Yao
Panel Chair, Toronto Local Appeal Body

¹³ The applicant did not make changes to the plans but the plan examiner specified the wrong number for main wall heights and Mr. Cheeseman asked me for this order, out of an abundance of caution.