

INTERIM DECISION AND ORDER

Decision Issue Date Monday, June 27, 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(s): MICHAEL GOURLEY

Applicant(s): STAMBUK HOMES

Property Address/Description: 42 CEDARVIEW DR

Committee of Adjustment File
Number(s): 21 221133 ESC 25 MV (A0326/21SC)

TLAB Case File Number(s): 21 245618 S45 25 TLAB

Hearing dates: May 24, 2022, June 13, 2022 & June 14, 2022

DECISION DELIVERED BY TLAB Panel Member T. Yao

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Michael and Nicole Gourley	Owners/Appellants	Zachary Fleisher
Ryan Guetter	Expert Witness	
City of Toronto	Party	Sara Amini
Kevin and Laura Moran	Parties	Brad Teichman
Antonio Volpentesta	Expert Witness	
Nick Rhamey Smith (Weston Consulting)	Observer	
Pamela Mashke	Observer	
Paul Terry	Observer	

INTRODUCTION AND SUMMARY

Decision of Toronto Local Appeal Body Panel Member: T. Yao
TLAB Case File Number: 21 245618 S45 25 TLAB

Nicole and Michael Gourley have a partially built house at 42 Cedarview and request two variances to build it in a different location (set out in Table 1). The reason is an error by the Buildings Department.

Table1. Variances sought for 42 Cedarview Dr			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Building Length	17 m	28.28 m
2	Building Depth (this variance has been altered since the COA meeting)	19 m	Originally 51.58 m, then as a result of discussions with the City, this is now 40.59 m
3	Rear deck height (this variance is deleted)	1.2 m	deleted

The application before the Committee of Adjustment was for the larger depth variance and was denied. The Gourleys appealed and this matter then came before the TLAB. Since the Committee of Adjustment refusal, the City and the Gourleys “settled” on the variances in Table 1. The neighbours to the north (the Poleras) did not participate in this TLAB hearing, but the Morans, the neighbours to the south, did, advocating that the TLAB refuse the City/Gourley numbers outright. Alternatively, the Morans suggested a counterproposal of their own, aligning the Gourleys’ rear wall with their own.

Summary of this decision

The options presented to me were to move #42’s rear wall to align with **either**:

- the rear wall of the house to the **north** (46 Cedarview), with a depth variance of 40.59 m; or
- the rear wall of the house to the **south** (40 Cedarview), with a resultant depth variance of 33.69 m, i.e., moving the house about 6.9 m closer to the street).

My finding is to that the location 2.0 m closer to the street (instead of the Morans’ 6.9 m) better meets the tests under the *Planning Act*. I reject the depth variance supported by the City and the Gourleys because it does not meet the tests, for reasons I outline below.

The “settlement”

On March 7, 2022, the City agreed to a “settlement” in which the new house would align with the house to the north. Unlike a full settlement, not all the relevant

stakeholders were in agreement; the Morans felt that the new location would reduce their privacy, as the three south facing windows would look directly at their rear deck (Figure 2, page 6).

Moreover, a settlement requires that all the parties agree to the facts that support the result agreed upon. Council's instructions to settle were given to the City Solicitor in December 2021, immediately after the Committee's refusal. Mr. Fleisher's law firm announced the settlement in March 2022 and Mr. Guetter (planner for the Gourleys) and Mr. Volpentesta (planner for the Morans) both took into consideration this settlement. In any event, this tribunal retains the right to reject any settlement; parties cannot oust the independent duty of the TLAB to come to its own opinion under s. 45(1) of the *Planning Act*.

At this hearing, the City took no position with respect to the *Planning Act* tests, brought no witnesses and the design it supported was contested; the Morans saying that the variances were too large and too impactful, the Gourleys arguing the opposite.

The Gourleys' house is fully framed and will now need to be demolished. I presume all parties wish to move on with respect the previous building permit, which does not concern the TLAB. It is clear from the opposition letters responding to the original (larger) depth variance, that any active City position would be seen as "taking sides". There was a concern among many that the variance process was being used to circumvent the usual established procedure. They asked for a solution that supports the principle that the Committee not be influenced by as-built construction. I agree with those neighbours, as do the three lawyers in this hearing.

In the result, I do not treat this case as a settlement, nor do I treat the 40.59 m depth variance proposal as being entitled to deference to be given to the City and Gourleys' joint position. I repeat that the present construction under the permit is to be ignored and these reasons cannot be based on the cost of rectification nor is the City or the property owners to be "punished" because of construction already started.

Council's instructions were: "This Motion will also authorize the City Solicitor to resolve the matter on behalf of the City in the City Solicitor's discretion." I note this instruction was consistent with 1.1 (d) of the *Planning Act*, which is: "to provide for planning processes that are fair by making them open, accessible, timely and efficient", and 2(n): that there is a provincial interest in the resolution of planning conflicts involving public and private interests.

THE LEGISLATIVE AND POLICY FRAMEWORK

The Provincial Policy Statement and the Greater Golden Horseshoe Growth Plan must be considered, but they 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 and so on. I do not find these policies offer much guidance for this case, which involves only the most appropriate placement of a house on land within an urban settlement area.

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.

With respect to the Official Plan, s. 3.2.1 Housing and s. 4.1.5 Neighbourhoods are key. Both sections require the physical form of the development to “fit in” with the surrounding neighbourhood, and to “respect and reinforce” the physical character of the neighbourhood.

Right to develop

The obligation is on the proponents, the Gourleys, to 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. Guetter and Mr. Volpentesta, both whom I qualified as able to give opinion evidence in the area of land use planning. I did not hear from anyone else.

I made a site visit. Although my views are not evidence, they give context to help me understand the testimony of the witnesses.

ANALYSIS, FINDINGS, REASONS

“Application which has been amended from the original application”

As set out above, this application is being amended. The Gourleys asked that I make an order that the change in the depth variance request is minor and therefore, no new notice need be given. The relevant parts of the *Planning Act* are in footnote 1.¹

¹ Amended application

(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.

The jurisprudence is that if a variance is diminished, as it has been in this case, an order will be made routinely. I will make an order dispensing with further notice as I find the change is downward and therefore meets the test of being minor. I further note that all parties were aware of this change.

Definitions

“Building length” is the distance from the front wall to the rear wall. Building depth is the distance from the front yard setback line to the rear wall. Thus, for a building 17 m long, the maximum “as of right” building depth is 19 m, which permits the building to be moved forward and back, within a “play” of 2 m.

The front yard setback is the minimum distance the house has to be set back from the street; in most of the City, this is the average of the front yard setbacks of the houses on both sides.² But in the Cedarview neighbourhood of the former City of Scarborough, the front yard setback line is a standard 6 m, which all properties meet easily.

Views to Morans’ deck and rear yard

In Figure 2 (next page), I show the viewing distances from the Gourley Z-shaped house to the Morans’ house. Distances from the garage wing are circled; the sightline to the deck is marked by Xxx’s.³ Based on these distances and the fact that the nearest part of the Morans’ house to the Gourley windows is the Morans’ garage, I find that the Morans’ privacy is minimally impacted.

While there is some overlook, both witnesses agreed that this was somewhat inevitable in an urban situation. This has been noted in other TLAB decisions (116 Mona Dr, 103 Heath, 193 Woodsworth, all three granting variances.). I do not find that the degree of overlook is of an “unacceptably adverse” nature, sufficient to make the variance not a “minor” one under the *Planning Act*, and thus will result in a denial of a variance. This having been said, my decision to approve a shorter depth variance is in the direction of reducing overlook into the Morans’ rear yard.

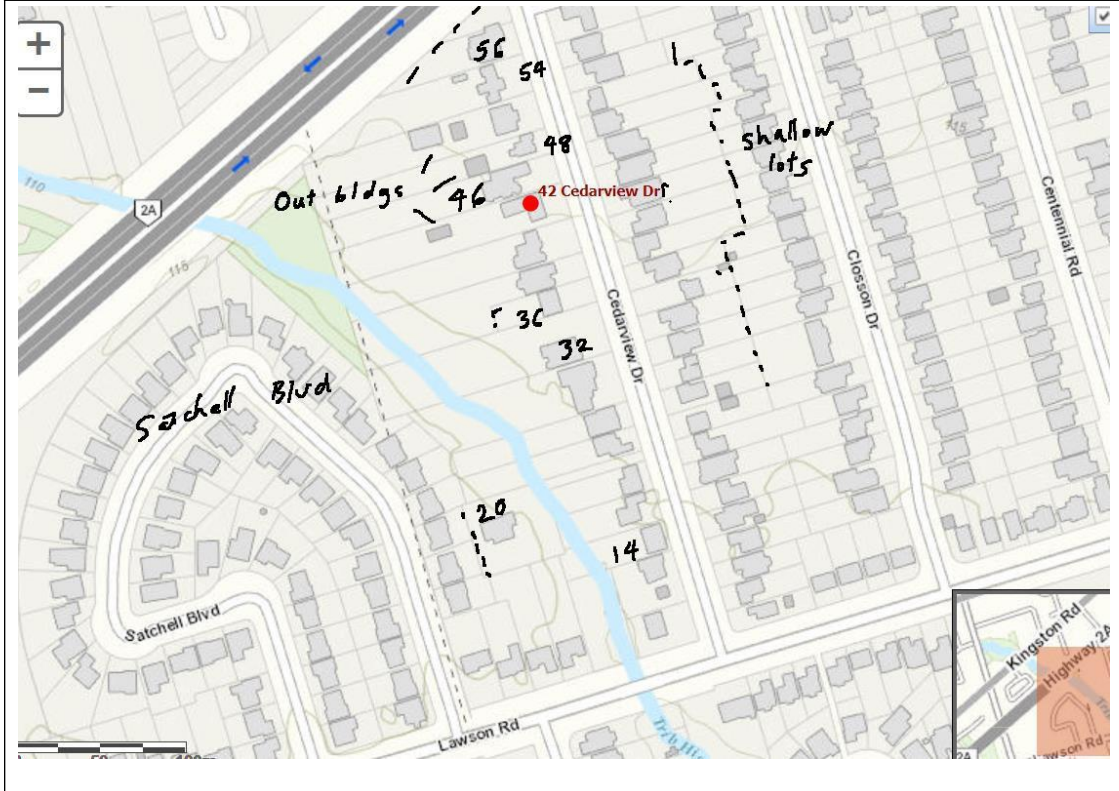
Exception

(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.

² 10.5.40.70 Setbacks (1) Front Yard Setback - Averaging In the Residential Zone category, if a lot is: . . . (B) between two abutting lots in the Residential Zone category, each with a building fronting on the same street and those buildings are both, in whole or in part, 15.0 metres or less from the subject lot, the required minimum front yard setback is the average of the front yard setbacks of those buildings on the abutting lots.

³ . I also used Figure 2 to show the difference between the rear wall alignments with the number 6.9 circled that is the basis of the Morans’ counterproposal, to be discussed later.

Figure 3 City land use map with my annotations

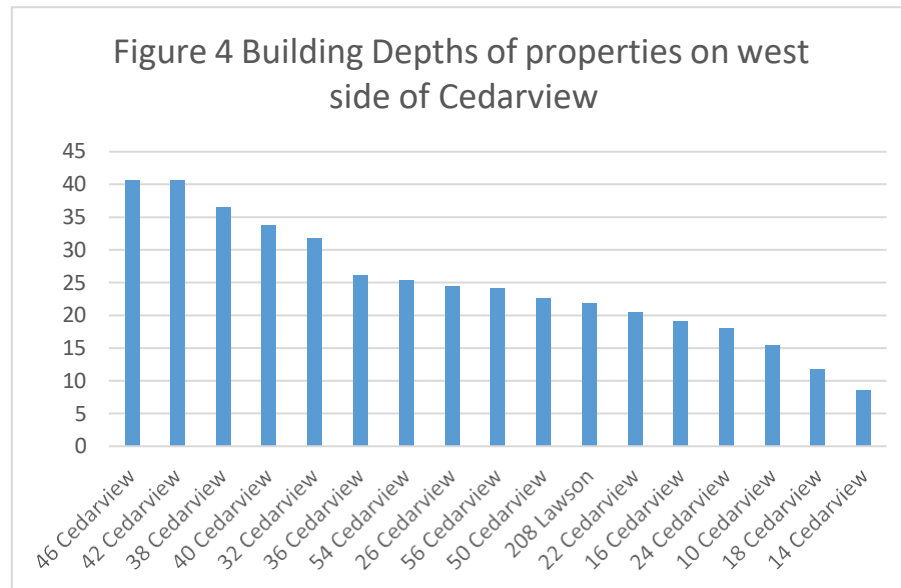


I find this neighbourhood does not consist of properties with uniform physical characteristics. The lots on the east side of Cedarview are half the depth of those on the west side, and on the west side of Cedarvale, #s 56 and 54, and those at the south end are similarly shallow. Number 48 protrudes nearer to the street than its neighbours, as does #14. There are three outbuildings at the rear of #50, #48 and #42. Number 36 appears to be a re-severing of the parent lot #38. Number 20 is a “house behind a house” with a “building depth” (distance the rear wall from the front yard setback line) of close to 98 m. On Satchell Blvd is a more modern subdivision; the difference between it and Cedarvale properties is striking. In short, there is no obvious physical pattern of development, even if the west side Cedarview properties are taken as the appropriate neighbourhood.

As a result, I found the Gourleys’ proposed location can “fit in” to this diverse cityscape if it is moved slightly closer to the street, as I discuss in the next section on building depths.

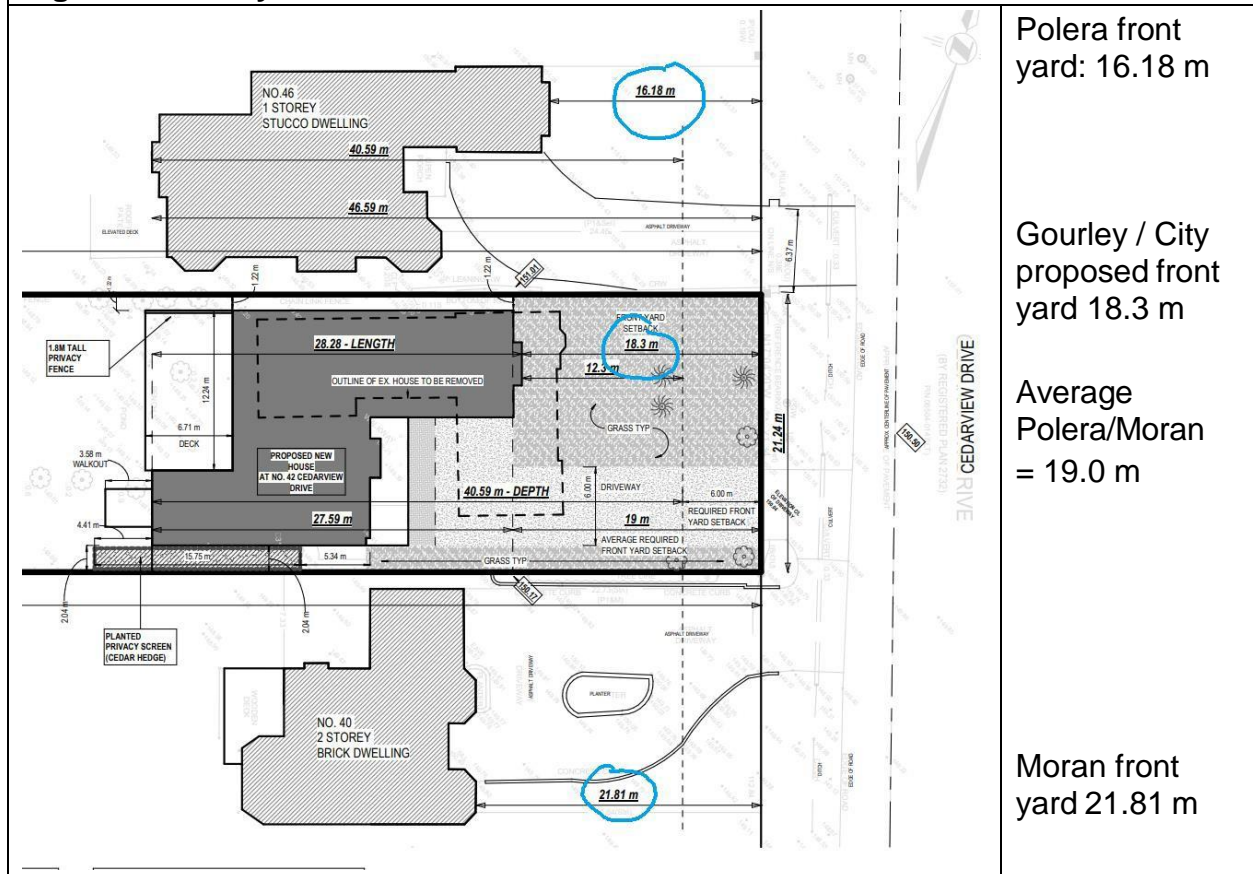
Depths

As Mr. Volpentesta noted, #42 is tied for the longest depth in the neighbourhood. The other longest depth is the Polaras' house at #46 Cedarview, to the north (ignoring the anomalous "house behind a house"). While the City/Gourley proposal may produce a reasonable relationship to the Polara house, the Moran house and indeed the other houses in the immediate block also have to be considered, and I find that the proposed depth does not do this.



These numbers have to be put into a physical context which I show in Figure 5.

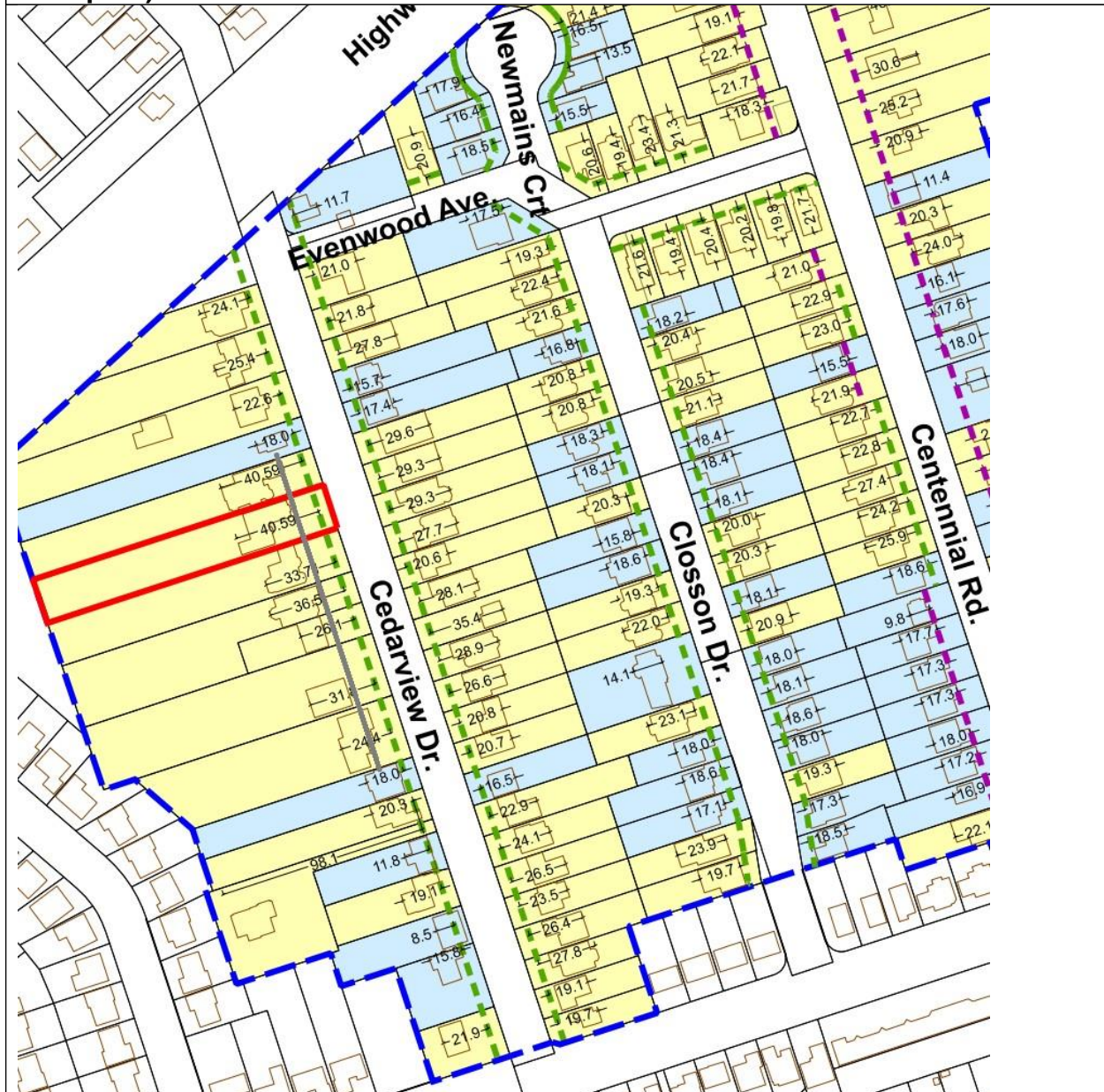
Figure 5. Front yards



As set out previously, in other parts of Toronto the minimum required front yard setback is calculated by averaging the setbacks for the two abutting properties. In this case if we average the front yards for the Polera and Moran properties, the result is 19 m, then the proposed 18.3 m is close. In fact, it is slightly closer to the street, and a third small variance would be required under this hypothesis. A decision maker might grant this because the reason for front yard setback controls is to encourage a uniformity of front walls along a street.

However, the “delineation” of both the immediate and broader neighbourhoods in the Official Plan requires that I look at not just three houses, but the whole block in which the development occurs. The OP requires a comparison with a neighbourhood, which is more than three houses.

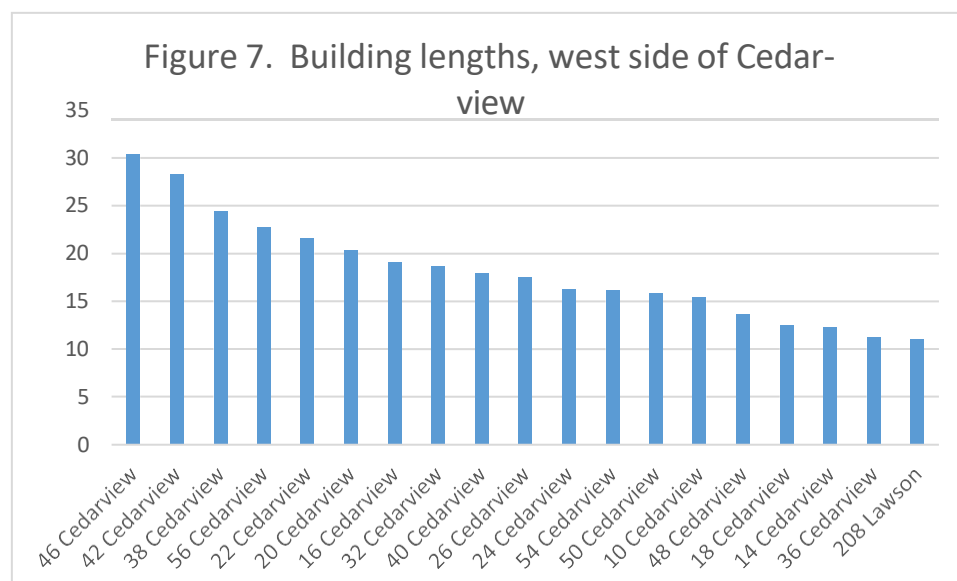
Figure 6 Mr. Guetter's map showing the front yard setback lines (numbers refer to depths)



In Figure 6, the front yard setback line is drawn by Mr. Guetter as a green dotted line. I have added a heavy charcoal line showing that for a stretch of Cedarview from #26 to #46, the houses are somewhat inset. But when the entire block is considered, the green line is a better approximation of uniformity, particularly at the southern and northern ends, and for the opposite side of Cedarview and for the broader neighbourhood.

Accordingly, I find that a variance that places the front wall closer to the dotted green line would better fulfil the intent of the zoning by-law. However, I reject the Moran proposal to move it the full 6.9 m forward. (In Figure 2, page 6, I showed this number with a blue arrow.)

As Mr. Fleisher elicited in his cross examination of Mr. Volpentesta, there are large trees in the front yard, which may be affected if the new location is too far forward. In my view, this would not be a problem so long as the new location is behind the original Gourley house (now demolished). Taking the trees into consideration, as well as the intent of the front yard standard of 6 m, I conclude that the front wall could be 2 m forward of the City/Gourley proposal, and this would best maintain a more harmonious streetscape and overall meet the four tests in the *Planning Act*.



Moving the house forward 2 m produces a new building depth variance of $40.59 - 2.0 = 38.59$ m and I am prepared to authorize a depth variance slightly smaller than what is sought, namely 38.59 m.

Lengths

For lengths in Figure 7 (previous page), I find there is the same ranking as for depths: the Poleras have largest length, next, the Gourleys and third the Morans. In my view, the length variance meets the four tests, given the sideways design of the Gourley house, which is suburban style with a wing to the front with a garage and a one storey wing to the back containing a ground floor bedroom. In making this finding, I also consider the great depth of the lot (143.14 m or 470 ft) and the considerations discussed previously.

In conclusion the depth variance I have amended and the variance for length meet the four tests under the *Planning Act*.

INTERIM DECISION AND ORDER

It is imperative that there be a clear path forward, starting with a prompt decision by the TLAB. I will authorize variances with after receipt of the following:

A landscaping plan should be prepared with caliper sizes, species and locations of the screening. This plan is to be provided to the Morans for their information, but my intention is that they do not have the power to veto the landscaping and halt this process.⁴

An arborist's report should be prepared for the front yard trees in light of the new location of the building and submitted to the City for its approval or non-objection.

I would like this to be completed within two weeks of the issuance of this Order. If there is difficulty only as to timing, not with the substance of this Decision, would the parties please contact me at tlab@toronto.ca. I ask Mr. Fleisher and Ms. Amini to notify me when this is done.

I order that no further notice is required pursuant to s. 45(18.1.1) of the Planning Act.



X

Ted Yao
Panel Chair, Toronto Local Appeal Body

⁴ I do not mean to suggest that the Morans or their experts have been unreasonable in any way in their conduct of this case. They have not been. I do not think a veto is appropriate and I simply mean to be clear about the next step.