

DECISION AND ORDER

Decision Issue Date Monday, August 22, 2022

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): Tomba Developments Corp.

Applicant(s): Paul Demczak

Property Address/Description: 145 Varsity Rd

Committee of Adjustment File

Number(s): 20 209207 STE 04 CO (B0076/20TEY); 20 209208 STE 04 MV (A0951/20TEY); 20 209209 STE 04 MV (A0950/20TEY); 20 209210 STE 04 MV (A0952/20TEY)

TLAB Case File Number(s): 21 236921 S53 04 TLAB; 21 236922 S45 04 TLAB; 21 236923 S45 04 TLAB; 21 236924 S45 04 TLAB

DECISION DELIVERED BY: *TLAB Vice-Chair A. Bassios*

REGISTERED PARTIES AND PARTICIPANTS

| | |
|------------------------|--------------------------------------|
| Appellant | Tomba Developments Corps. |
| Applicant | Paul Demczak |
| Appellant's Legal Rep. | Di Vona Law Professional Corporation |

INTRODUCTION

This is an Appeal of the Toronto and East York panel of the City of Toronto (City) Committee of Adjustment's (COA) refusal of an application for consent to sever the subject property and associated variances to construct three new dwellings on the proposed resultant lots.

The subject property is located in the Warren Park community of the former City of York. It is designated *Neighbourhoods* in the City Official Plan (OP) and zoned (RS (f18.0; a550; d0.6)) H11 ST3.

Only the Applicant's representatives were in attendance at the Hearing: Matthew DiVona, legal counsel for the Applicant, and Expert Witness Paul Demczak (Land Use Planning);

I advised those present at the Hearing that, as per Council direction, I had attended at the site and the surrounding area and reviewed the pre-filed materials in preparation for the hearing of their evidence.

BACKGROUND

The application seeks to demolish an existing house on the property, severance of the lot into three parcels, and construction of three new single detached houses, each with an integral garage.

THE CONSENT REQUESTED

To obtain consent to sever the property into three undersized residential lots.

CONVEYED – PART 1

The proposed lot frontage is 5.7m on Varsity Rd and the proposed lot area is 240m².

The property is proposed to be redeveloped as the site of a two-storey detached dwelling with an attached garage, a walk-out basement, a front porch and rooftop terrace, requiring variances to the Zoning By-law(s), as outlined below.

CONVEYED – PART 3

The proposed lot frontage is 6.36m on Varsity Rd, and the proposed lot area is 240.8m².

The property is proposed to be redeveloped as the site of a two-storey detached dwelling with an attached garage, a walk-out basement, a front porch and rooftop terrace, requiring variances to the Zoning By-law(s), as outlined below.

RETAINED – PART 2

The proposed lot frontage is 9.5m on Juliana Ct, and the proposed lot area is 321.9m².

The property is proposed to be redeveloped as the site of a two-storey detached dwelling with an attached garage, a walk-out basement, a front porch and rooftop terrace, requiring variances to the Zoning By-law(s), as outlined below.

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REQUESTED VARIANCE(S) TO THE ZONING BY-LAW:

| Variance | Required | Part 1 (Varsity) | Part 3 (Varsity) | Part 2 (Juliana) |
|---|---|---|--|--|
| 10.5.100.1.(1)(B), By-law 569-2013 Max permitted driveway | 2.6m | 2.9m | 2.9m | 3.6m |
| 10.40.30.10.(1)(A), By-law 569-2013 Min required lot area | 550m ² | 240m ² | 240.8m ² | 321.9m ² |
| 10.40.30.20.(1)(A), By-law 569-2013 Min required lot frontage | 18m | 5.79m | 6.36m | 9.15m |
| 10.40.40.70.(2)(B), By-law 569-2013 Min required rear yard setback | 7.66m | 7.35m | | |
| 10.40.40.70.(3)(C), By-law 569-2013 Min required side yard setback | 1.5m | 0.3m (south) 0.66m (north) | 0.3m (north) 0.86m (south) | 0.61m (west) |
| 10.5.50.10.(1)(D), By-law 569-2013 Front yard landscaping | 75% (30m ²) of front yard | 30% (11.9m ²) of front yard | 38% (15.19m ²) of front yard | 42% (27.57m ²) of front yard |
| Variance | Required | Part 1 (Varsity) | Part 3 (Varsity) | Part 2 (Juliana) |
| 10.5.40.60.(1)(A)(i), By-law 569-2013 Platform encroach into front yard setback | may encroach if 2.5m from a side lot line | 0.43m from north side lot line | 0.73m from south side lot line | |
| 10.40.40.40.(1)(A), By-law 569-2013 Floor Space Index | 0.6 (143.37m ²) | 0.82 (198m ²) | 0.81 (196.3m ²) | 0.74 (237 m ²) |

| | | | | |
|---------------------------------|--|-------|-------|-------|
| 10.5.80.40.(2), By-law 569-2013 | Lowest point of vehicle entrance higher than elevation of centreline of driveway at lot line (93.81) | 93.55 | 95.55 | 94.41 |
| Private driveway elevation | | | | |

MATTERS IN ISSUE

The subject property is a large, atypical, lot in a neighbourhood that is beginning to experience redevelopment of the existing properties. The matter in issue is whether the application for consent to sever, which is to create three undersized lots, meets the tests of s.53 of the *Planning Act*, and further, whether the variances which are requested for the resultant lots meet the four tests under s. 45(1) of the *Planning Act*.

JURISDICTION

Provincial Policy – S. 3

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

Consent – S. 53

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 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 Zoning By-laws, the TLAB Panel 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 Zoning By-laws;
- are desirable for the appropriate development or use of the land; and
- are minor.

EVIDENCE

A summary of evidence is presented here for the purpose of providing some context for the following sections of this Decision. All of the evidence and testimony in this matter has been carefully reviewed and the omission of any point of evidence in this summary should not be interpreted to mean that it was not fully considered, but rather that the recitation of it is not material to the threads of reasoning that will be outlined in the *Analysis, Findings, Reasons* section below.

Mr. Demczak was qualified to give expert opinion and evidence in land use planning.

Mr. Demczak described the subject property and surrounding context as follows:

- It is an irregular “L” shaped corner lot with frontage on Varsity Rd and Juliana Ct.
- The total lot area is 802.72m²

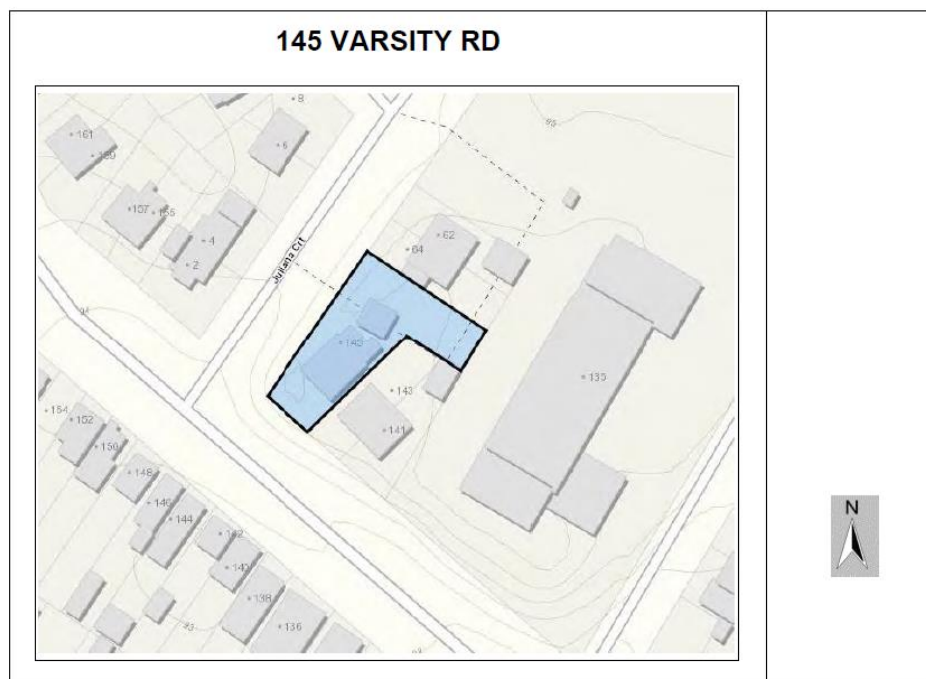


Figure 1: Location Map. Ex 1, Tab 9

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- A two-storey house with detached garage currently exist on the property.
- The surrounding area contains a mix of single detached one and two-storey houses, semi-detached houses, and triplexes.
- Warren Park Junior Public School is located on the same block as the subject property.
- The proposal is to demolish the existing building on the site, to sever the property into three lots and to construct three new single detached dwellings, each with an integral garage.
- Two of the proposed new dwellings are to front on to Varsity Rd and the third onto Juliana Ct.

ANALYSIS, FINDINGS, REASONS

Correct calculation of Lot Frontage

Mr. Di Vona, through evidence elicited from Mr. Demczak, contended that the variances that have been required for the lot frontages of Lots 1 (5.79m) and 3 (6.36m) were incorrectly calculated by the Zoning Examiner. In Mr. Demczak's opinion, correctly calculated, the proposed lot frontages should be described as 6.61m for Part 1 and 6.84m for Part 2.

In the applicable Zoning By-law (569-2013), the determination of lot frontage depends on where the front yard setback is located. The front yard setback is identified in relation to the building, or buildings on abutting lot(s)¹. If, as Mr. Di Vona postulated, the Zoning Examiner made a mistake in taking the lot frontage dimension at the lot line

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(445) Lot Frontage

means the horizontal distance between the side lot lines of a lot, or the projection of the side lot lines, measured along a straight line drawn perpendicular to the lot centreline at the required minimum front yard setback.

(290) Front Yard Setback

means a horizontal distance on a lot measured at a right angle from the front lot line to the nearest main wall of a building or structure.

(455) Main Wall

means any exterior wall of a building or structure, including all structural members essential to the support of a roof over a fully or partly enclosed area.

10.5.40.70 Setbacks

(1) Front Yard Setback - Averaging

In the Residential Zone category, if a lot is:

(A) beside one lot in the Residential Zone category, and that abutting lot has a building fronting on the same street and that building is, in whole or in part, 15.0 metres or less from the subject lot, the required minimum front yard setback is the front yard setback of that building on the abutting lot; and

(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.

instead of the front setback line, this is an error that could have been resolved in in discussion with City authorities in advance of the TLAB Hearing.

The Ontario Building Code Act deals with allegations of error by the plan examiner by making it clear that the Courts are to deal with that issue, not the TLAB. I asked Mr. Demczak during the Hearing whether he had discussed the calculation of lot frontages with the Zoning Examiner and attempted to have the issue resolved and he advised he had not.

I also note that the applications for variances have been revised since the COA Decision and a Zoning Notice reflecting the changes has not been submitted. Any errors that have been made in formulating the variances that are requested of the TLAB are the responsibility of the Applicant.

It is obvious that it is very important to be sure that the requested variances reflect the drawings and the correct dimensions and measurements of the proposed buildings and lots. Of particular importance in this matter is that the consideration of how a proposal “fits” depends on a comparative assessment of the neighbourhood context and relies on a correct description of the dimensions of the proposed lots and the variances required.

As the lot frontages are one of the key criteria in consideration of this consent to sever, I would have expected that either Mr. Demczak or another representative of the Applicant would have attempted to confirm or resolve their dispute regarding the interpretation of the Zoning By-law lot frontage provision with the City’s Zoning Examination authorities.

In any event, the application requests variances for frontages of 5.79m and 6.36m for Parts 1 and 3, as per the Zoning Examiner’s determination, and I am not prepared to approve those frontages, if, indeed, they are stated in error. In other words, I am not willing to approve frontages of 5.79m and 6.36m while evaluating the “fit” as if they were 6.61m for Part 1 and 6.84m for Part 2.

Consent to sever

The standard for approving a consent to sever is that 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 Act and that the application for consent to sever meets the criteria set out in s. 51(24) of the *Planning Act*.

I am satisfied that a plan of subdivision is not necessary as the proposal is a division of an existing legal lot in a long-established area. No adaptation or construction of public infrastructure is required.

Of the criteria listed in s. 51(24) to which I must have regard, I consider compliance with the following to warrant further discussion in this Decision:

- (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.

As the Official Plan contains policy about dimensions of lots, I have folded consideration of both criteria c) and f) above into discussion of the OP.

Official Plan Policy

OP Policy 4.1.5 requires that development in neighbourhoods respects and reinforces the existing physical character of each geographic neighbourhood and lists the particular aspects of physical character to be evaluated.

4.1.5 Development in established Neighbourhoods will respect and reinforce the existing physical character of each geographic neighbourhood, including in particular:

- a) patterns of streets, blocks and lanes, parks and public building sites;*
- b) prevailing size and configuration of lots;*
- c) prevailing heights, massing, scale, density and dwelling type of nearby residential properties;*
- d) prevailing building type(s);*
- e) prevailing location, design and elevations relative to the grade of driveways and garages;*
- f) prevailing setbacks of buildings from the street or streets;*
- g) prevailing patterns of rear and side yard setbacks and landscaped open space;*
- h) continuation of special landscape or built-form features that contribute to the unique physical character of the geographic neighbourhood; and*
- i) conservation of heritage buildings, structures and landscapes.*

The majority of the development criteria listed in OP Policy 4.1.5 relate to the built form compatibility of the proposal and are pertinent to the requests for variances that follow after the request for consent to sever. Of the criteria listed, I consider criterion 4.1.5 b) *prevailing size and configuration of lots* to be the criterion most relevant to the creation of new lots.

In order to meet the criteria set out in the *Planning Act* for the severance to be approved, regard must be had as to whether the proposal conforms to the Official Plan, and specifically to the dimensions and shapes of the proposed lots. Conformity with the Official Plan in this case would include demonstrating that the general intent and purpose of the Official Plan has been met with respect to the prevailing size and configuration of lots (OP Policy 4.1.5 b)).

Prevailing size and configuration of lots.

Mr. Demczak referenced the direction of OP Policy 4.1.5 that the prevailing type and physical character of a geographic neighbourhood will be determined by the most frequently occurring form of development in that neighbourhood.

Mr. Demczak also noted that the Policy recognizes that some geographic neighbourhoods contain a mix of physical characters. In such conditions, the direction

to respect and reinforce the prevailing character will not preclude the development whose physical characteristics are not the most frequently occurring, but do exist in substantial numbers within the geographic neighbourhood. This flexibility is provided only where 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 blocks within the geographic neighbourhood.

In simpler terms, the Policy requires that a proposed development must respect and reinforce specific aspects of what already exists (“prevailing”) in the neighbourhood, such as the prevailing size and configuration of lots. The proposal must fit the neighbourhood overall, but it must also fit the characteristics of the street where it is proposed be located. The Policy also says that development that has characteristics similar to those which already exist in substantial numbers in the blocks immediately adjacent to the proposal should not be precluded even if they are not the most frequently occurring form of development.

The Zoning By-law, which implements the policies of the Official Plan, sets two parameters for dimensions of lots, minimum lot area and minimum lot frontage. Mr. Demczak has described the proposed lots and lots in the neighbourhood in these terms.

Lot Area

I find Mr. Demczak’s identification of the Neighbourhood Study Area, as depicted in the planning justification report (Exhibit 1 Tab 14) to be an appropriate delineation. Mr Demczak’s evidence was that 22% of the “immediate surrounding area lots” (24 lots) have lot areas under that of the proposed. Thus, on Mr. Demczak’s evidence, lots smaller than the proposed are not prevailing, but they do occur in substantial numbers in the neighbourhood.

Mr. Demczak’s evidence was that the lot areas of Parts 1 and 3 are generally consistent with the lots found on the south side of Varsity Road. On examination of the property data included in the planning justification report, however, I found that the smallest lot on Varsity Rd (the immediate context as defined in OP Policy 4.1.5) is 268m², 27m² larger than the proposed lots on Varsity Rd. The stipulation in the policy for allowing non-prevailing characteristics, such as size of lots, is that they must already have a significant presence on the properties located in the immediate context or abutting the same street in the immediately adjacent blocks. On the basis of the data provided by Mr. Demczak, I do not find this to be the case.

I accept Mr. Demczak’s evidence that the proposed lot area of Part 2 is consistent with properties on Juliana court, which is characterized by a wide variety of lot areas.

Lot Frontage

Mr. Demczak's evidence was that series of lots on Varsity Rd immediately across the street from the subject property have frontages of 7.67m, "comparable" to those proposed for Part 1 and 3.

An examination of the property data included in the planning justification report shows that there are only four lots in the neighbourhood study area with frontages less than 7m. The shortest frontage in the immediate context (Varsity Rd) is 7.67m. Even if I were to consider the Applicant's proposition that the lots on Varsity Rd should be considered to be 6.61m and 6.84m instead of the requested 5.79m and 6.36m, they would still be the smallest frontages in the immediate context. In the area for which I have been provided data, I found only one property with a frontage shorter than Part 1 and two with smaller frontages than proposed for Part 2, (located on Juliana Ct and likely the location of semi-detached houses).

The Applicant did not provide any information regarding previous variance approvals for lot area or lot frontage in this neighbourhood.

I therefore find that the proposed lot frontages for Parts 1 and 3 are not prevailing and are that properties with similar frontages do not exist in the immediate context or adjacent streets or in significant numbers in the broader neighbourhood.

I accept Mr. Demczak's evidence regarding the lot area and lot frontage for Part 2, which fronts onto Juliana Crt, but this has no effect in light of my conclusions regarding Parts 1 and 2.

My conclusion regarding prevailing size and configuration of lots (lot area and lot frontage) is similar to the advice which was provided to the COA by City Planning staff (Exhibit 1, Tab 22). I recognize, however, Mr. Di Vona's contention that the undivided lot, or an alternative severance proposal with only one lot on Varsity Rd, would *also* not reflect the prevailing character of the neighbourhood and the immediate context.

Not "prevailing" but still "fit"?

In recognition that none of the severance scenarios for the subject property (including the option of no severance at all) would meet the OP Policy 4.1.5 b) criterion of "prevailing size and configuration of lots", I have looked to the statement of general purpose and intent which is contained in the preamble to the policy - physical changes to established neighbourhoods must be sensitive, gradual, and "fit" the existing character.

In other words, in this specific circumstance, I shall consider whether the combined features of the proposal still fit the neighbourhood even though the requested lot frontage has not been shown to meet the OP standard for prevailing lot sizes. This consideration relies on the proposition that the proposed buildings fit the context of the neighbourhood well enough that the undersized lots are supportable. i.e., that the consent to sever is justified on the basis of the proposed built form.

Density/ Floor Space Index

Official Plan Policy 4.1.5 c) specifies *prevailing heights, massing, scale, density and dwelling type of nearby residential properties* as criteria for evaluating fit with the physical character of the geographic neighbourhood.

Massing, scale and density are all architectural terms having to do with the size and relationship of a building to what surrounds it. In this context, massing refers to the general perception of the shape and form, as well as size of a building. Scale refers to a building's size in relation to something else, for example an adjacent building or a person. Density, in this context, means the size of the building in relation to the lot on which it is located. In the By-law, FSI is the numerical indicator of what the OP refers to as "density".

A variance for Floor Space Index (FSI) has been requested. The density of the proposal, or the Floor Space Index (FSI) in By-law terms, is the next characteristic I will consider in light of my finding that the proposed lots Part 1 and 3 are undersized and not prevailing. It is important to note that density, or FSI, are not measures of size, but representations of the gross floor area (GFA) *in relation* to the area of the lot.

In his expert witness statement, Mr. Demczak listed OP Policy 4.1.5 c) as being of particular relevance to this application. He described the physical character of the neighbourhood as being a mix of single detached one and two storey houses, semi-detached dwellings, duplexes and triplexes. He further asserted that the "proposed detached dwellings are consistent with the existing physical character of the neighbourhood, which contains a mix of single and semi-detached building types". I accept the evidence of Mr. Demczak that the proposal respects the prevailing dwelling types, which is one of the characteristics noted. This evidence, however, does not address the prevailing density of the neighbourhood, which is of importance in analyzing the question of "fit" with the existing character. Neither does it address the massing and scale of the proposal.

Mr. Demczak advised that the intent of the maximum residential floor space index in the Zoning By-law is to ensure a dwelling does not have a mass and scale that appears larger than the dwellings in the surrounding neighbourhood. He described the manner in which the proposal is consistent with the various setback provisions of the By-law, maintains front yard landscaping space and a mainly compliant rear yard depth and concluded, on that basis, that the proposed floor space index does not result in excess development "but rather development which reflects the neighbourhood's existing physical character".

What has been omitted from Mr. Demczak's evidence is the recognition that the density criterion in the Official Plan, and the FSI maximum in the By-law, are independent parameters, differentiated from the setback, building length and other provisions that describe what is commonly referred to as the building envelope. The density criterion requires a consideration not only of the overall size of the proposed house (the GFA), of

mass and scale, but also the relationship between the size of the house (GFA) and the size of the lot (lot area).

In order for me to find that the proposal fits the existing character of the neighbourhood with respect to density, I must rely on an adequate description of the prevailing density in the neighbourhood as well as an understanding of the FSI on the proposed lots. The Applicant's Disclosure did not contain any data describing the FSI in the Neighbourhood Study Area. During the Hearing I asked Mr. Demczak if he had obtained any information identifying historical FSI variance decisions, and he replied that he had not.

I acknowledge that it is Mr. Demczak's opinion that the proposal respects and reinforces the character of the neighbourhood and is consistent with the general intent and purpose of the Official Plan (including OP Policy 4.1.5 c)) but his opinion is not sufficient for me to be satisfied that the proposal meets the general intent and purpose of the Official Plan without supportive analysis and explanation. The select photographs which have been included in Exhibit 1 are not sufficient to convey a coherent sense of the prevailing density in the neighbourhood.

I also note that were I to proceed to consider the second test regarding the general intent and purpose of the Zoning By-law, I would find a similar lack of foundation to approve the requested variances of 0.81 and 0.82 FSI.

CONCLUSION

I have found that the proposal does not meet the general intent and purpose of the Official Plan with respect to OP Policy 4.1.5 b) *prevailing size and configuration of lots*. In this somewhat unique situation where the existing lot as well as a potential severance into two lots also do not reflect the prevailing size and configuration of lots in the neighbourhood, I have considered as well whether the proposal results in development that fits the existing neighbourhood despite the deficiency in the proposed lots fronting Varsity Rd.

I have found that there is insufficient evidence for me to be satisfied that the proposal meets the general intent of the Official Plan with respect to OP Policy 4.1.5 c) *prevailing heights, massing, scale, density and dwelling type of nearby residential properties*. Evidence and analysis of the context with respect to massing, scale and density are necessary for a finding that the proposal meets the intent of OP Policy 4.1.5 c) and I have not found that sufficient foundation has been provided by the Applicant for me to find as such.

Although I acknowledge Mr. Di Vona's advice that a more efficient use of this underutilized property is warranted, I nonetheless find that the proposal as submitted has not met the first test of s. 45(1) of the *Planning Act* for the reasons outlined above. In concert with my finding that the proposal does not maintain the general intent and purpose of the OP, I am also not satisfied that the proposal conforms to the OP as required by s. 51(24)(c) of the *Act*, which is a requirement for approval of the application for consent to sever.

DECISION AND ORDER

The Appeal is denied. The Committee of Adjustment decision is final and binding, and the file of the Toronto Local Appeal Body is closed.

A handwritten signature in black ink, reading "A. Bassios." with a period at the end. The signature is written in a cursive style.

A. Bassios
Panel Chair, Toronto Local Appeal Body