

DECISION AND ORDER

Decision Issue Date Thursday, August 12, 2021

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990.c. 13

Appellant(s): VENITA INDEWEY, CITY OF TORONTO

Applicant: VICTOR HIPOLITO

Property Address/Description: 90 ASH CRES

Committee of Adjustment Case File: 17 184062 WET 06 CO (B0063/17EYK), 17 184076 WET 06 MV (A0585/17EYK), 17 184077 WET 06 MV (A0586/17EYK)

TLAB Case File Number: 19 162059 S53 03 TLAB, 19 162061 S45 03 TLAB, 19 162062 S45 03 TLAB

Hearing dates: Oct 2 and 3, 2019, Sept 18 and 25, 2020, Dec 4, 2020; Jan 18, Feb 24, April 1, 28, May 27, 2021

Response to request for additional information: July 15, 2021

DECISION DELIVERED BY T. YAO

REGISTERED PARTIES AND PARTICIPANTS

Party/ Owner	Elizabeth Porritt	Russell Cheeseman, Mark Avola
Expert Witness	Bruce Bostock	
Expert Witness	T.J. Cieciora	
Expert Witness	Victor Hipolito	
Appellant	City of Toronto	Derin Abimbola
Expert Witness	Svetlana Verbitsky	
Appellant	Venita Indewey	
Party	Long Branch Neighbourhood Association	Judy Gibson

Decision of Toronto Local Appeal Body Panel Member: T. YAO
TLAB Case File Numbers: 19 162059 S53 03 TLAB,
19 162061,2 S45 03 TLAB

Expert Witness	David Godley
Participant	Steven Vella
Participant	Christine Mercado
Participant	Gerry Quackenbush
Participant	Ron Jamieson
Participant	Sandy Donald

INTRODUCTION

Elizabeth Porritt seeks to sever her property and build two 2 storey homes, one on each lot. In addition to the severances, to achieve her proposal, Ms. Porritt needs the variances in Table 1 below. She was successful at the Committee of Adjustment in May 2019. The City and Venita Indewey, a resident of Ash Crescent, appealed, and so this matter comes before the TLAB.

Table 1. Variances sought for 90 Ash Cr			
		Required/Permitted	Proposed Parts 2 (west) and 3 (east)
Variances from Zoning By-law 569-2013			
1	Frontage	12 m (39.4 ft)	Both Parts - 7.76 m (25.46 ft)
2	Lot Area	370 m ²	Part 2 – 305 m ² ; Part 3– 296.4 m ² Note that the lots are not mirror images because the curved frontage makes Part 2 a deeper lot
3	Floor Space Index	0.35 times the lot area	Part 2: 0.61x Part 3: 0.62x ¹
4	Side Yard Setback	1.2 m	Part 2: 0.62 m (east); 0.9 m (west) Part 3: 0.9 m (east); 0.6 m (west)
5	Side Yard Setback for Eaves	0.3 m from lot line	Part 2 - 0.2 m (east side) Part 3 - 0.2 m (west side)

¹ This is from Mr. Cieciura's handwritten amendments to an undated zoning notice. The July 2019 zoning notice calculates the FSI for part 3 as 0.63 (page 120 of Applicant's document book).

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; 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 90 Ash within a settlement area with 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) lists fifteen factors the Committee must have “have regard to”, but the extent of this regard is left 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, such as the adequacy of municipal services. Still others are rarely a deciding factor for a single lot severance, such as the adequacy of school sites. The factors that are typically most relevant in a built-up area such as Toronto are 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 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.

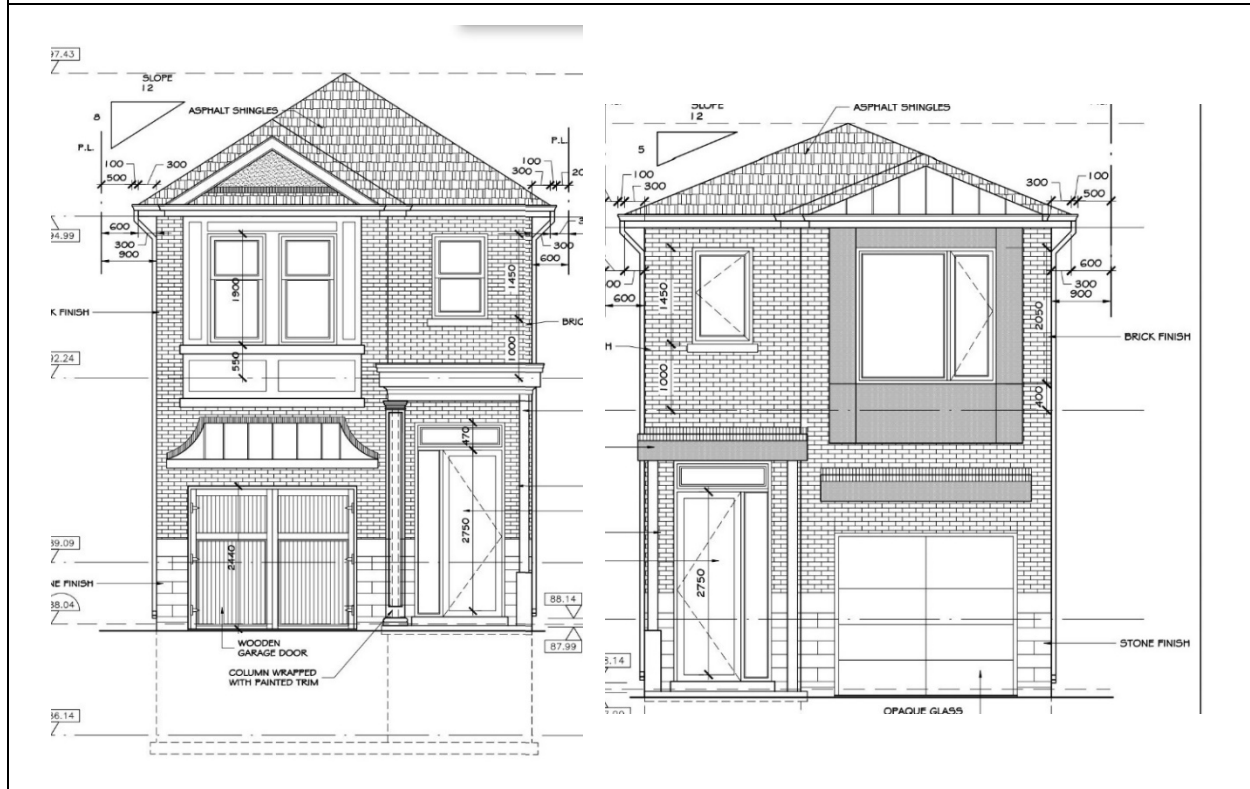
Official Plan of the City of Toronto

The *Planning Act* requires compliance with the Official Plan for both issues. 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 for the City, I am required to ascertain if Ms. Porritt’s development respects and reinforces the physical character of the neighbourhood, and this character includes the “prevailing size and configuration of lots”. The tests for severance and variance are similar but not

identical. There is a second relevant section of the Official Plan dealing with tree canopy and regulation of injury to City trees.

The obligation is on the proponent (Ms. Porritt) to demonstrate to the decision-maker that the tests are met on the balance of probabilities; there is no right to a variance or a severance.

Figure 2.
Front elevations



EVIDENCE

I qualified Mr. Cieciora and Mr. Godley as expert witnesses in land use planning and Mr. Bostock and Ms. Verbitsky as expert witnesses in the field of arboriculture. Mr. Vella, Ms. Indewey, Mr. Quackenbush, Mr. Jamieson, Ms. Mercado, and Mr. Donald testified in opposition to Ms. Porritt. Ms. Smith was a City planner who appeared in response to a summons from Ms. Gibson but Ms. Gibson did not ask that Ms. Smith be qualified as an expert planner. I would have qualified her if Ms. Gibson had asked. I discuss Mr. Godley's expert status in a separate ruling. He also asked for and was granted status as a local knowledge expert.

Member's Site visit

As required by Council for TLAB members, I visited the site for the sole purpose of better assessing the evidence given at the hearing.

ANALYSIS, FINDINGS, REASONS

Background

The property is on the north side of Ash Crescent, one block south of Lakeshore. It is close to 31st St, so it is about 2/3 from the western edge of Long Branch², which is considered to run from 42nd St on the west to 23rd St on the east. The lot has a 15.57 m (51 ft) frontage from which Ms. Porritt proposes to create two 7.76 m wide lots. This application part is standard and readily comprehensible. There is a second severance of a commercially used lot that fronts on Lakeshore. That is, as well as having about 15 m of frontage on Ash, Ms. Porritt's lot has frontage on Lakeshore, currently used for an animal clinic and she has used this application also separate the Lakeshore "lot" from the Ash Cr "lot". The Lakeshore proposed lot measures 7.62 m by 35.05 m deep. The existing house is vacant and boarded; a condition that the neighbourhood residents say has been the case for ten years.

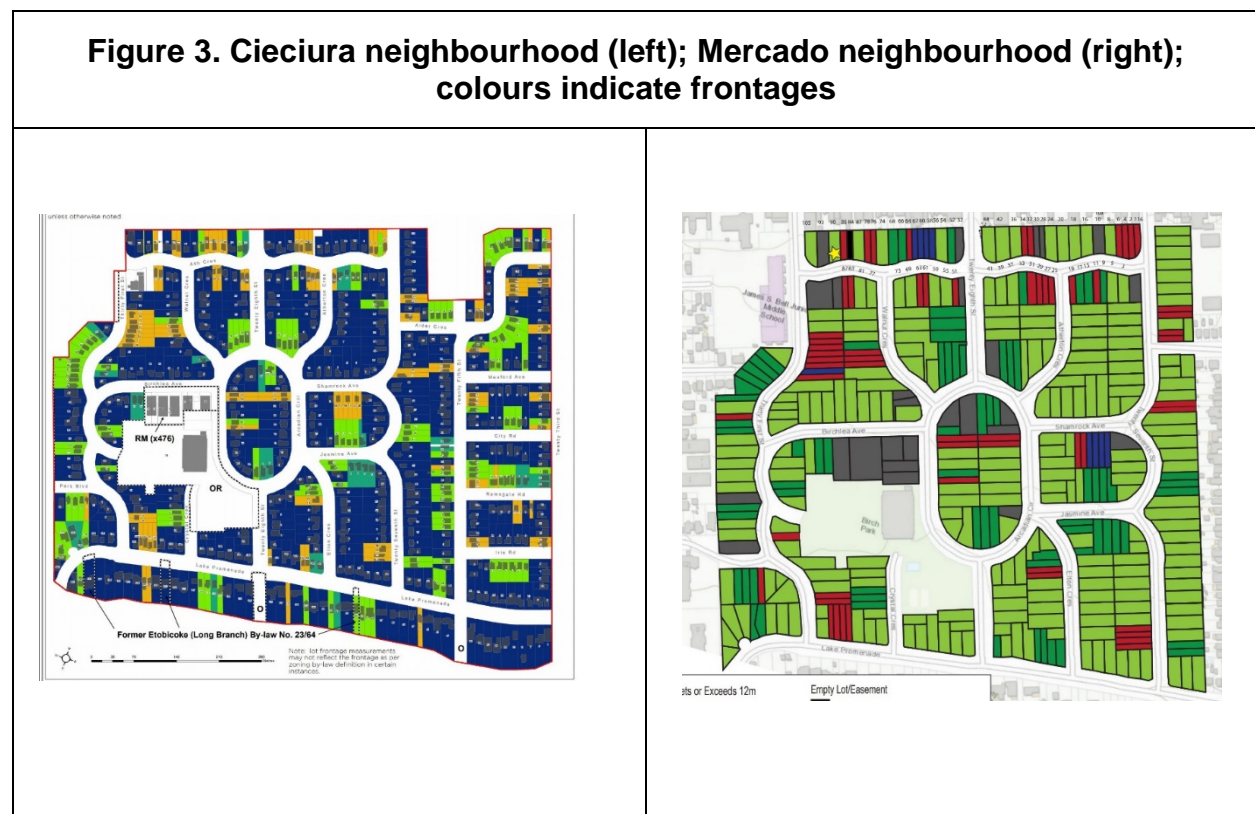
The Committee of Adjustment hearing was held May 17, 2019. On May 29, 2019, Ms. Indewey appealed the three decisions of the Committee in favour of Ms. Porritt (severance and two decisions on the variances for the two new lots). Ms. Indewey is a resident of Ash Cr, across the street and a few doors to the east from the subject property. Her grounds involved a general objection based on an abrupt change to neighbourhood character, which she felt encouraged future severance applications, and impacts to a City-owned silver maple tree. On May 30, 2019, the City of Toronto appealed as well, based only on reasons having to do with the same silver maple tree.

Ms. Porritt revised the application several times, first prior to the Committee of Adjustment hearing to reduce the FSI from 1.04 to 0.92 to 0.67, then on the eve of the Committee of Adjustment hearing to 0.61 times the lot area, which the Committee approved. The houses will each have a gross floor area of about 1970 sq ft, with three bedrooms and four baths. Figure 2 (previous page) shows the front elevations. Ms. Porritt has attempted to vary external materials as much as possible; the left hand garage door will be wood; the right house's garage door made of opaque glass. The main wall heights and overall heights are within what the zoning permits but the left house is 0.9 m higher than the right house.

² Boundaries of the Long Branch Study Area For the purpose of this study, the Long Branch Neighbourhood has been defined as the geographic area encompassing all residential lands bounded by Lake Ontario to the south, the rail corridor to the north, Twenty Third Street to the east, and Forty Second Street as well as Marie Curtis Park bordering both banks of Etobicoke Creek to the west. (Design Guidelines, p 11)

The hearing began on October 2, 2019; with a hiatus in 2020 due to the Covid-19 pandemic. It resumed on Day 3, when Mr. Cheeseman, Ms. Porritt's lawyer, advised me that the driveways had been redesigned to better address the silver maple concern, and the City was no longer in opposition. Mr. Cieciora (Ms. Porritt's planner) and Mr. Bostock (her arborist) testified on Day 3. After hearing them, I requested that the City call its arborist, Ms. Verbitsky, which it did on Day 6. The hearing continued for another four days, to hear the remaining evidence on planning matters raised by those in opposition to Ms. Porritt.

S. 4.1.5 of the Official Plan



The Official Plan is the most important “implementation vehicle” for Provincial policy³. I start with the “cornerstone” test: s. 4.1.5 of the Official Plan, which directs the proponent to “delineate the geographic neighbourhood” using criteria set out in the Plan. Mr. Cieciora's neighbourhood, shown in Figure 3 left, runs from 31st St on the west to 23rd St on the east. Ms. Mercado, the chief witness for Long Branch Neighbourhood Association, used a smaller neighbourhood, deleting the eastern third of Mr. Cieciora's area.

³ Preamble of the Provincial Policy Statement

I don't find much significance rests on which study area is used. While Mr. Cieciura's proposed neighbourhood was larger, I reach the same "prevailing characteristics" conclusions for each neighbourhood.

S 4.1.5 is reproduced below in footnote 4⁴. In my view it contains three tests:

⁴ .4.1.5 Development in established Neighbourhoods **will respect and reinforce the existing physical character** [Test 1] of each geographic neighbourhood, including in particular:

- a) patterns of streets;. . .
- b) prevailing size and configuration of lots;
- c) prevailing heights, massing, scale, density . . . nearby residential properties;
- d) . . .;
- 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) . . .

[Omitted -- section on how the neighbourhood is defined] . . .

[Paragraph 3]The physical character of the geographic neighbourhood includes both the physical characteristics of the entire geographic area in proximity to the proposed development (the broader context) and the physical characteristics of the properties that face the same street as the proposed development in the same block and the block opposite the proposed development (the immediate context). Proposed development within a *Neighbourhood will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts*. [Test 2] In instances of significant difference between these two contexts, the immediate context will be considered to be of greater relevance. The determination of material consistency for the purposes of this policy will be limited to consideration of the physical characteristics listed in this policy.

[Sections that says materially consistency will be determined by reference to physical character of neighbourhood and discussing lots fronting on major streets omitted]

The prevailing building type and physical character of a geographic neighbourhood will be determined by the most frequently occurring form of development in that neighbourhood.

[Paragraph 7] While prevailing will mean most frequently occurring for purposes of this policy, 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 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

1. Test 1: the development must respect and reinforce the physical character of the neighbourhood. This is the overarching test and is discussed last in this decision.
2. Test 2: this “respect and reinforcing” examination should apply to both the “immediate context” (the immediate block) and the larger neighbourhood (discussed first); and
3. Test 3: This is an exception provision. It applies if there is a “mix of physical characters”. In such a case, the decision maker is not “precluded” from approving the development, notwithstanding it has physical characteristics that are not the most frequently occurring.

The prevailing character is determined by the most frequent “form” of development. Since the test of “prevailing” occurs in b (size of lots), c (massing and scale and density), and e) location of driveways and garages, the Official Plan directs, as a practical matter, the counting of properties in both contexts. I accept either study area as a basis for assessing what is “prevailing”.

Test 2 Larger Neighbourhood

In this section, I use the two maps on page 6. Even a casual glance will show a predominant colour on either map: navy on the left and lime green on the right (colours refer to those used on materials filed electronically). Mr. Cieciora’s navy indicates lots with frontages of **12 m** or greater (59%) or by-law compliant. Twelve metres is the present RD f12 frontage requirement. Ms. Mercado’s lime green colour is chosen for lots **15.24 m** or greater (58%)⁵. Despite the different study areas and choice of “sizes”, the results are similar. Ms. Porritt’s proposal of two 7.76 m lots does not respect these prevailing frontages; and frontages are part of “prevailing size” and thus I find the “respect and reinforce” test is not satisfied within the larger context.

Although this is sufficient to dismiss this application, I will also look at lot areas and density. The present lot area is 610 m² which meets the zoning requirement of 370 m². Mr. Cieciora’s table shows:

1.	Not applicable	14 lots
2.	0.0 - 296.40 m ²	59 lots
3.	296.41 – 370 m ²	80 lots

properties located in the immediate context or abutting the same street in the immediately adjacent block(s) within the geographic neighbourhood. [Test 3]

⁵ Mr. Cieciora found out of 383 twelve m+ lots out of 649 lots; Ms. Mercado found 222 fifty foot + lots out of 379. She used 15.24 m because she considered they were “at risk of severance”.

4.	370.01 – 500 m ²	155 lots
5.	500.01 m ² plus	341 lots
<hr/>		
Total		649 lots.

Thus, noncompliant lots are 21% of the total (139 of 649), that is lines 2 and 3; conversely, compliant lots (over 370 m²) are 76% (lines 4 and 5; 496 of 649) . The proposed lot areas of about 300 m² are not “prevailing” ; lots as small as 305 and 296 m² are not a characteristic of the broader context.

In speaking of density, Ms. Mercado produced a map of lots by FSI. The colour she used for high FSIs (over 0.60), was very scattered and she concluded, “there’s not that many, even for lots of record.” Based on her evidence, I agree with Ms. Mercado that there are not many lots in the neighbourhood with FSI over 0.60. I agree with Ms. Mercado.

Mr. Cieciura did not produce a map but made a spreadsheet of 149 Committee of Adjustment decisions for FSI overage requests. Taking out duplicates and refusals, this left 105 individual homes with a density increase ranging from 1.48 (highest) to 0.353 (lowest). By density increase, I mean FSI increase as granted by the Committee of Adjustment. Ms. Porritt seeks 0.61, which would be 36th out of the 105 in Mr. Cieciura’s list, and since the vast majority of the 500 or so remaining properties in the study area are likely lower than 0.61, I find the sought-for FSI is probably in the upper 6% (36 out of 649), which I find it is at the extreme high end, and not typical of the area.

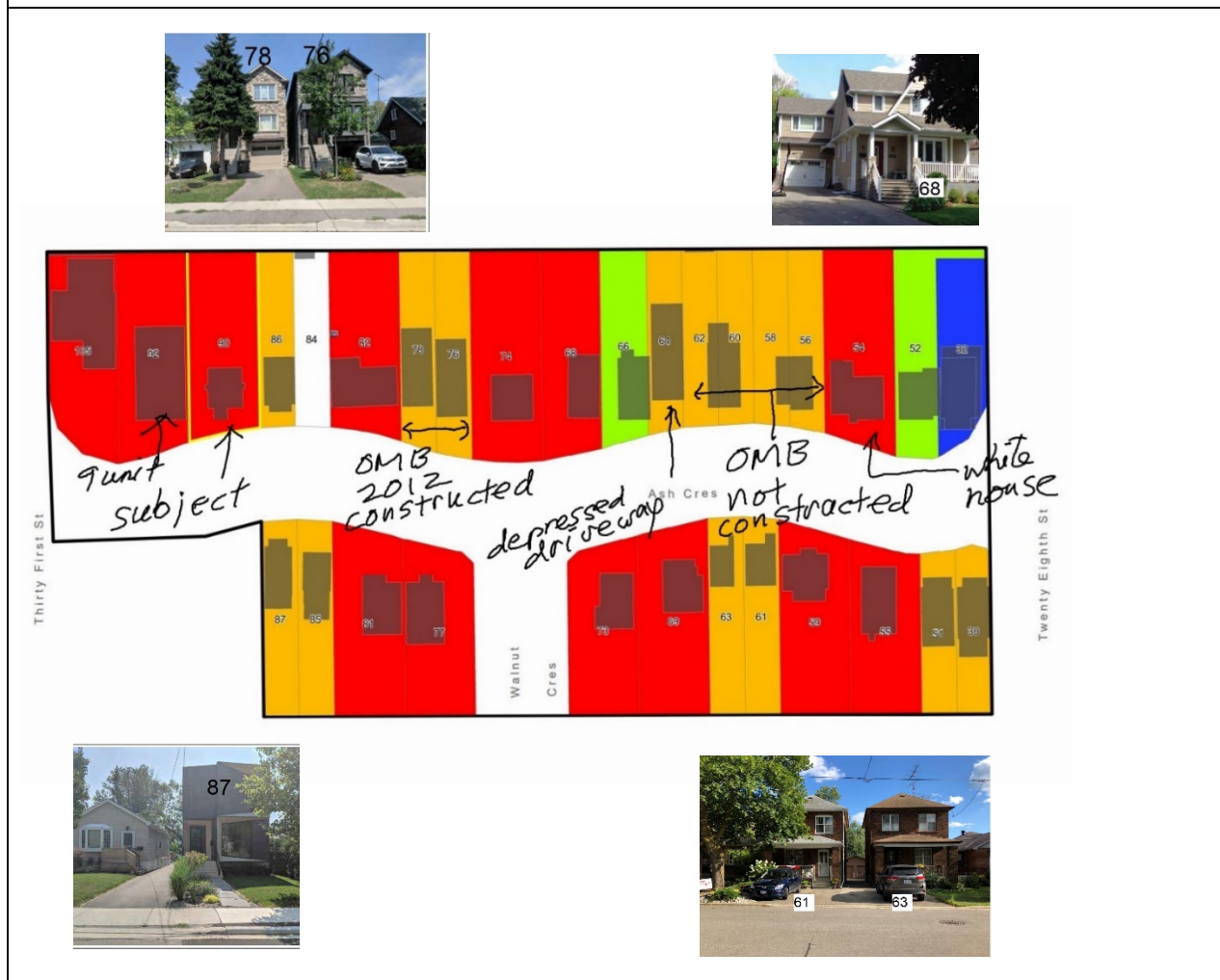
I have reviewed lot size and density, two parameters I am directed by law to examine, and I find the proposed development does not respect and reinforce the existing physical character with respect to these parameters and is not materially consistent with the physical character of the broader context. As such, it does not maintain the general intent of s. 4.1.5 of the Official Plan.

I now look at the evidence for the immediate context, which Mr. Cieciura called the “focused study area”.

Immediate context

Mr. Cieciura’s focused study area is shown in Figure 4 (next page). This is a portion of the map on page 5 but with some of the colours changed. The bottom line is that ochre remains the same (25-26 foot) and navy changed to red (39.4 ft and larger frontages). To recap, a 25 foot lot remains ochre, the navy, indicating a compliant frontage, has changed to red.

Figure 4. Focused study area



Even addresses (e.g., 92, 90, 86, 84) are on the north side of Ash Cr and the City's numbering system has numbers decreasing from right to left. Starting on the left, 92 Ash (arrow with handwritten "9 unit") is a 9 unit apartment sharing a common side lot line with the subject. It has windows facing east and those windows will be impacted by the proposal if it is granted⁶. The next property is the subject property. Next to it is a 25 foot property still in its original building form (ochre, signifying a 25 foot lot). The next property, not coloured in Figure 4, is a through lot to Lakeshore, serving as a driveway to parking for the commercial use to the north (white, "not applicable" in Mr. Cieciura's map).

We next come to 78-76 Ash, which is a pair of homes resulting from a 2012 OMB severance (OMB Member M. A. Mills). This severance (two ochre lots), along with other properties, constitute a reason for granting the Porritt severance, according to Mr.

⁶ The reader may find it helpful to cross reference this with the photomontages on page 14.

Cieciura's planning opinion. I include a photo of the homes. Number 78, (the left one) is beside Mr. Quackenbush, who testified as to the negative experience of living with a long blank high wall and privacy implications of its high rear deck every time he went into his back yard. The next two properties (red) are #74 and #68. Number 68 constitutes in Mr. Godley's (the urban design planner testifying for LBNA) estimation, a "successful" renovation, measured by Long Branch Neighbourhood Character Guidelines (inset photo). The Guidelines say "compatible with the Long Branch character (generous front yard setback, two storey massing, grade related building entrance, integrated front porch, recessed garage)", and I agree. Mr. Cieciura's chart shows this was a circa 2011 construction date, needing an FSI increase to 0.40 (maximum permitted 0.35).

Next comes a lime green property and then five ochre lots. The first ochre lot, number 64 is an older style bungalow, handwritten "depressed driveway" to help identify it. The next four lots 62, 60, 58 and 56 were created by two severances granted by OMB Member Taylor in 2016⁷. to Bernard Cassar, who owned both 50 foot lots. Although these are now legally four 25- foot lots, they are still occupied by the historic bungalows. Next comes # 54, a white painted bungalow on a 50 foot lot, currently before the Committee of Adjustment, whose owner seeks a severance.

Mr. Cieciura's raw numbers are

N/A (1 lot, the lane)	3.2%
0.0 - 7.76 m (14 lots)	45.2%
7.77 - 10.70 m (2 lots)	6.5%
10.71 - 12.00 m (1 lots)	3.2%
<u>12.01+ (13 lots)</u>	<u>41.9%</u>
Total	31 lots

From these numbers, Mr. Cieciura claimed the most frequent frontage was under 7.76 m and therefore Ms. Porritt complies with the "immediate context" test. I disagree and have inserted some photos of three pairs of ochre lots. Numbers 78-76 are the severed lots; #s 61-63 are midcentury low density, with a wide space between them and #87 is a high density (0.59 FSI⁸) ochre lot next to another historic house, also on an ochre lot. The three pairs are 25 foot lots but different.

The lots 62 to 56 are different for another reason. The constant use of "physical" modifying character in s 4.1.5, implies something you can see or touch. The sidebar to s. 3.1.2 of the Official Plan (Built Form) states that "existing context" is what is there now, whilst "planned context" is what is intended in the future. The legal 25 foot lots are

⁷ PL15212 and PL160151.

⁸ Mr. Cieciura's 0.59 FSI differs from Mr. Godley's 0.73. While Mr. Cieciura is probably correct, I note that the Porritt design is different from #87, in which there is no integral garage and there is a wide space between it and #85.

there now, it is true, but Ms. Mercado's observation is that if you didn't know about the OMB decision, you would never know that these lots had been subdivided. I think "physical context" does not imply what needs to be determined by research. If these four 25 foot lots were deleted from the raw numbers above, the 14 smaller lots would decrease and the 50 foot lots would increase. The 25 ft lots would cease to be "most frequently occurring". All this is subject to change, depending on Mr. Cassar's future actions, but on this evidence, I do not find 25 foot lots to be the most frequently physically occurring, and this number would decrease even further if we took into consideration ochre lots with older house forms like #s 61- 63.

The neighbourhood character is multidimensional, not dependent on a single parameter, but includes:

- "prevailing size of lots", meaning their frontage and area;
- prevailing massing, scale, and density;
- prevailing location and design of driveways and garages, directing the proponent to examine whether the garages are integral or detached or off to one side;
- prevailing patterns of side yard setbacks;
- continuation of special landscape features that contribute to the unique physical character of the neighbourhood. Because the City supported Ms. Porritt's tree expert that the silver maple would be "continued", I find that she has satisfied the Official Plan test with respect to special landscape features being "continued".

The term "includes" means that all these parameters must be used together to determine neighbourhood character. There is an absence of detailed discussion in Mr. Cieciura's Witness Statement on parameters other than frontage and lot area, other than to reiterate that Ms. Porritt has not applied for height, rear yard setback etc. variances. He says the proposed height, massing, and scale and dwelling type is "similar" to these immediately abutting the subject; and the proposed integral garages which are of a "similar style".⁹ In my view, there are few other integral garages in the "focused study area".

On page 19, I conclude that the character of the immediate context is still low density, punctuated with wide side yards, lots of landscaping and the majority of homes are not similar to the design proposed. I will discuss this in more detail later. I find from the photographs of the larger area, the statistics adduced by both parties, and the oral

⁹ So, the proposal for two single detached residential dwellings, which would be just one additional, additional to what's already permitted on the site, in my opinion, respects and reinforces the existing physical character of buildings, streetscapes and does little to nothing to change the open space patterns in the area. There are other lots of a similar size and configuration, there are other dwellings that are similar in appearance to what is proposed in this application, and it is my opinion that this will not destabilize the neighbourhood if this application is approved. (Mr. Cieciura, oral testimony)

testimony of Ms. Mercado and Mr. Godley that although the 2012 and 2016 OMB decisions have created a somewhat localized concentration of legal 25 foot lots, I find that when the massing and density are also considered for the small lots, the development does not respect and reinforce the focused study area character, nor is it materially consistent with it.

The Official Plan states:

In instances of significant difference between these two contexts, the immediate context will be considered to be of greater relevance.

I find no significant difference between the two contexts, so I do not need to consider which should be of greater relevance.

Test 3 Mix of Physical Characters

Mr. Cieciora further argues that Ms. Porritt can claim the exception in Test 3 “Mix of Characters”. I find that this argument fails. For this exception to succeed, two other facts are required to be shown:

- The proposed development must be materially consistent with the geographic neighbourhood’s physical characteristics¹⁰ and
- the development’s physical characteristics must exist in substantial numbers or constitute a significant presence.

I reproduce the Official Plan section in Footnote 10. Test 3 introduces two new concepts: “material consistency” and “substantial numbers or significant presence”. “Test 3 is contained paragraph 7 of s. 4.1.5 of the Official Plan. The words “material consistency” have already appeared in paragraph 3:

[A] proposed development . . . will be materially consistent with [both contexts].

This first use of “materially consistent” in Paragraph 3 was in reference to the counting exercise just described. But the second use in Paragraph 7 it cannot have the same meaning, because we are specifically instructed to disregard the most frequently occurring number; (referring to a “development whose physical characteristics are not the most frequently occurring”).

¹⁰ .[Paragraph 7] 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 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. (my bold)

This is a departure from the legal drafting principle of “same word, same meaning”; According to the *Bele Himmell* case¹¹, the Official Plan is not a statute and should not be interpreted as such. Thus, the courts say I need not always use the “same word same meaning” principle. The Official Plan itself states that individual sections should not be read in isolation¹². Putting all this together, I think I am to use broad purposive principles to apply the words “materially consistent” in this second use of the phrase.

A reasonable interpretation is that “material consistency” means the sort of exercise found elsewhere in the Official Plan, such as s 3.1.2 (Built Form). In that section, the Plan states that new development must integrate itself into the existing and planned context, which is the same idea as being “materially consistent”. If the new development cannot do so, it is not materially consistent.

Built Form policy 3b in 3.1.2 speaks to a new development limiting its impact by appropriate “form, scale and proportion of the exterior design”. Policy 3d speaks to “adequate light and privacy”. In connection with these policies, Mr. Cieciora justified the Porritt design by writing that it was “in a traditional style with an integral garage” and “we are of the opinion that these applications and associated variances meet the Long Branch Neighbourhood Character Guidelines”. There is no further detail by Mr. Cieciora as to how the Guidelines are met; this being the sole reference to the Design Guidelines document in his Witness Statement.

With the assistance of SvN Architects and Planners, Council approved these Guidelines on January 31, 2018. This document was designed to assist the decision maker to determine when development is contextually sensitive, gradual, and generally fits with the existing physical character of the Long Branch neighbourhood, which I find is distinctive. The Guidelines’ authors do not support Mr. Cieciora’s conclusion; indeed, they use 76-78 Ash as a case study for “what not to do”. Except for the placement of the front door and the lack of three storey appearance, I find the Porritt front elevations are very similar to 78-76 Ash. SvN wrote with respect to 78-76:

- The former two storey dwelling at 78 Ash was taller than its neighbours but had a strong roof line that was sympathetic to the house on the left (Mr. Quackenbush)¹³.

¹¹ *Bele Himmell Investments Ltd. v. Mississauga (City)*, 1982 CarswellOnt 1946 (ON DC) .

¹² 5.1. The Plan should be read as a whole to understand its comprehensive and integrative intent as a policy framework for priority setting and decision making

¹³ The massing of the original two storey dwelling, while taller than both adjacent houses, is articulated such that there are clear horizontal reference lines defined by the porch roof and the overhang of the front gable. The reference lines of the porch roof aligns with the front eave of

- Elsewhere in the neighbourhood, side entry garages and driveways aided the transitions between volumes; the new blank wall between 78 Ash and Mr. Quackenbush was universally criticized by every resident, including Mr. Quackenbush¹⁴. Mr. Quackenbush also criticized the lack of privacy occasioned by the high rear deck extending close to his property line.
- Concentration of two houses on severed lots emphasizes the densities;¹⁵

I find that the development is not materially consistent with physical character of the area as indicated in the Long Branch Neighbourhood Character Guidelines.

The second new concept is “substantial numbers or significant presence”. This appears in the two part requirement:

- The development’s physical characteristics must “exist in **substantial numbers** within the geographic neighbourhood” and
- Already have a **significant presence** . . . in the immediate context or abutting the same street in the immediate adjacent block[s].”

I will summarize Mr. Cieciura’s submissions and my findings in Table 5. My findings are discussed the “materially consistent” discussion which follows.

Table 5. Mix of Characters quantitative analysis			
		Mr. Cieciura	My findings
1	1. “Substantial numbers” (larger neighbourhood)	106 25 foot (ochre) lots out of 649 (16%)	22 recent severances out of 649 (3%)
2.	“Substantial presence” (immediate neighbourhood plus next block)	25 ochre lots out of 64 (39%)	6 lots out of 64 (9%); using additional criteria

Substantial Numbers

Line 1, “Substantial numbers” refers to a calculation for the “geographic

the side gabled roof of the adjacent houses minimizing the change in height and roof massing. Guidelines , p 31

¹⁴ . . . the massing of the new buildings does not acknowledge reference lines and results in large, uninterrupted side walls tightly abutting the side lot lines which further stress the discrepancy in height relative to the adjacent homes and may cause issues related to shadow and overlook. p 31

¹⁵ ,. . . as a result of developing two new houses on the severed lot, side yard setbacks are significantly minimized, breaking the established street rhythm and visually emphasizes the increased density along the street. p 32

neighbourhood, which is the larger context. Ms. Mercado found 28 out of 379 (7%)” narrow” lots for her larger neighbourhood. Mr. Cieciura’s starting point was his map on page 6. He aggregated all the 25 foot lots (ochre coloured), which constitute 16% of the 649 lots. Looking at Ms. Mercado’s 7% or Mr. Cieciura’s 16%, I do not find either are “substantial numbers”.

If I am incorrect in this, I look at the further test that the substantial numbers must be “materially consistent with the physical character of the geographic neighbourhood”. Although Mr. Cieciura provided numerous photos of houses with 25-foot frontage lots throughout the geographic neighbourhood, I don’t find this was sufficient for me to conclude much about the “materially consistent” test, and I refer to his evidence that at least 13 severance approvals¹⁶ have been granted for this area. They typically receive density increases in the high fifties or low sixties and this would be materially consistent. Out of these, four pairs are severed lots but unbuilt. I include them, nonetheless. But twenty six lots out of 649 is only 4 % and I find this is too small to form a substantial number.

Significant Presence

Fig. 6. East and West Ash Cres for purpose of determining “significant presence”



The “substantial presence” test allows an enlargement of the focused study area

¹⁶ 38 Arcadian Circle (.58, .64), 2 Ash (.7, .64), 56 Ash and 58 Ash (four from .66 to .69), 76 Ash (.58, .60), 9 Meaford (.68, .69), 5 Ramsgate (.62, .62), 2 and 4 Shamrock (four at .62), 6 Shamrock (.64, .64), 5 Thirty First (.59, .60), 75 Thirty First (.47, .47), 2 Twenty Seventh (.59, .59). There are also 13 refusals.

by adding the “abutting” block, and it seems logical to use all of Ash from Twenty Seventh (diagram previous page), which is what both Mr. Cieciura¹⁷ and Ms. Mercado did. Ms. Mercado found 23 met or exceed the by-law standard, 26 were “narrow lots” and 6 fell in the middle. Since she considered that the six middle ones (lots as small as 9 m, so below the f12) still were Design Guidelines compliant¹⁸, she concluded that there were 26 out of 55 lots (47%). After consideration of whether the 47% are materially consistent, I will find that this number should be reduced; this will be discussed below.

Mr. Cieciura maintained that this smaller neighbourhood had a significant presence of ochre coloured lots. This is true but as in the previous exercise, I find that there are differences amongst the ochre lots. The added portion (East Ash) has three ochre concentrations, which I label as 1, 2, and 3.

1. There are three ochre (25 foot) lots and one lime green one (25 to 35 ft), #s 6, 4, 2, Ash and the end one at 116 Twenty Seventh. Only the last two resemble the subject, although 116 is hard to tell as I only have an end view. This pair results from a severance granted in 2015 by a City mediated process, with a similar densities to the subject: 0.7 and 0.64. These are the two houses on the right, now under construction. The Committee refused a height variance, so I assume that 2 Ash is built according to the height requirement, yet it is noticeably higher than #4. Number 4 (porch enclosure in redwood) looks like renovation of a house that once looked like #6, its neighbour to the west. Number 4 has no record of needing a variance, according to Mr. Cieciura’s chart. I find the two end lots (severances) are unlike the other two, even though all four are ochre coloured.
2. At the northwest corner of the Atherton/Ash intersection, there is a series of four 25 foot lots. None are recent severances so they probably antedate OPA 320 and the Design Guidelines. The house at #30-28 is a pair of semis with a large side yard to the right (see photo). Number 30 Ash presents as a single family semi but is a duplex (this is from Ms. Mercado’s oral evidence that “it’s been there for ages”, which I accept). I find the semis are not similar to the subject.
3. At the southwest corner of Atherton/Ash intersection, there are three 25 foot lots, of which the end one, #29 is like the subject (photo at the top of this page). This property seems to have a long history, with three Committee of Adjustment decisions over a three year period to maintain and legalize a partial third floor addition. I assume from the word “legalize” that there was construction without benefit of a permit. It was granted an FSI of 0.54, refused 0.66 and on the third

¹⁷ Mr. Cieciura produced a different map showing ochre lots on Thirty First and Walnut (Nov 8, 2018 18175-1) but this was not much discussed at the TLAB hearing

¹⁸ P 27 of the Guidelines

application was granted 0.64 as well as a height variance (Ms. Porritt does not seek a height variance and there is no question of illegal construction on her land). However, the Committee granted a variance for only one house at #29 Ash, whereas Ms. Porritt seeks two high-density homes.

Mr. Cieciura counted fourteen 25-foot lots out of 31 in the focused study area, which is West Ash. If we add in the 11 ochre lots on East Ash, we get 25 out of 64, which is a substantial presence. But frontage is only one dimension. I do not find that they are all similar amongst themselves. For example, between #6 and #4 (house with redwood siding) there is a continuity in roof line to the left and a discontinuity to the right. Numbers 6 and 4 have a generous amount of space between them. Neither has an integral garage. This is not so for the severed lots at 2 Ash/116 Twenty Seventh and 78-76 Ash.

I find it is erroneous to only look at frontages; all the characteristics must be examined; this is what the statute and the Official Plan direct.

S. 51(24) of the *Planning Act* lists the criteria for plans of subdivision; this section of the Act has been repurposed for severances. It must cover situations such as the first Pine Beach subdivision exercise (circa 1910), when there were no municipal services, as well as the present 2017 application, which is obviously within a mature community. For raw land, it would be appropriate for Mr. Cieciura to just look at frontages. I find the raw land approach is too crude for this situation and when other characteristics are factored in the number 25 out of 64 drops.

Under a more comprehensive lens, “materially consistent” properties are the two severances (2 Ash /116 Twenty Seventh and 78-76 Ash) and the two single, high density houses (#29 and #66 Ash). This is my finding and I am aware that these are exactly the same properties singled out by the OMB Member Taylor in 78-76 Ash¹⁹ to justify his decision in 2016. The words “significant presence” were not in the version of the 2016 Official Plan. I find 6 out of 64 (9.3%) is not a “significant presence”.

Even if I did make the findings as required under Test 3, the words of the Official Plan are “will not preclude the development”, which does not mean the decision-maker must approve the development. The decision-maker still has residual discretion, even if

¹⁹ [OMB Member Taylor in approving severances to Mr. Cassar] At 76 and 78 Ash Crescent there is a recent development at 7.8 m and 8.0 m lot frontages with two storey dwellings over integral garages and about 10 stairs to the front door. At 29 Ash Crescent on a 7.9 m lot is a similar two storey dwelling over an integral garage with about 10 stairs to the front door with a FSI of 0.64 and west side yard setback of 0.2 m and east side yard setback of 0.23 m. As well at 66 Ash Crescent approval was recently given for a new detached dwelling with an attached garage (integral) with a FSI of 0.56. Finally at 2 Ash Crescent Committee of Adjustment approval had been given to a consent application for lots of 7.89 m and a lot area of 291.3 sq m, and 6.51 m and 354.6 sq m.

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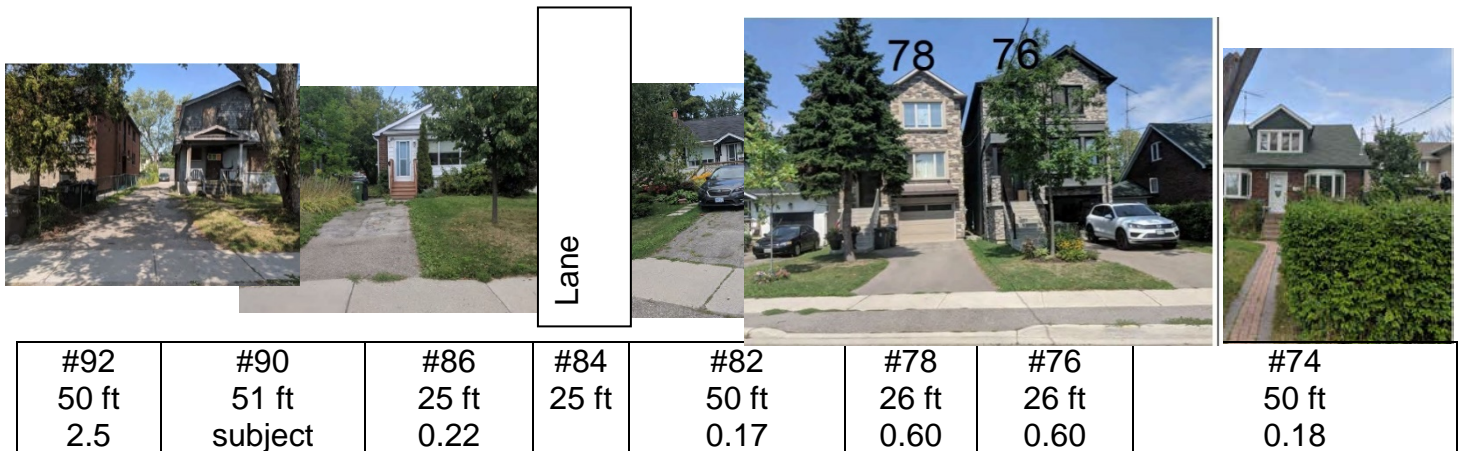
a Mix of Characters is shown, which I find it has not been demonstrated. To conclude, none of the elements of the Mix of Characters tests have been established and this exception cannot be used.

Test 1 Overall physical character

The Official Plan directs the decision-maker to make a finding of a pattern of different characteristics, including nine enumerated characteristics.

In the next series of photo montages, I combine three characteristics: massing (photo), frontage (lot size) and density. I rely on the testimony of Mr. Godley, Mr. Vella and Ms. Indewey for overall conclusions as to the “look and feel” of the neighbourhood as well as a review of the Long Branch Neighbourhood Character Guidelines.

Photo Montages 7 and 8: Ash even numbers north side (Boxes show street number, lot width, and FSI) Left is west. We are moving to the east from 31st, to Walnut then 28th.



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#68 43 ft 0.38	#66 33 0.56	#64 25 ft 0.35			#54 50 ft 0.13	#52 50 ft 0.35	#32
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The built severance is at 78/76; the unbuilt severances are 62/60 and 58/ 56 (greyed boxes). They are bookended by the bungalow with the sunken driveway and the white bungalow.

Photomontages 9 and 10: Ash odd numbers, South Side

Left is east, we are moving west from 28th, to Walnut, then to 31st The subject property is across the street near #87.



#51 25 ft 0.26	#55 50 ft 0.16	#59 50 ft 0.21	#61 25 ft 0.32	#63 25 ft 0.32
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#69 50 ft 0.20		#77 50 ft 0.20	#81 50 ft 0.20	#85 25 ft 0.22	#87 25 ft 0.59	Church parking
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Based on these photos, I find this is a relatively open-space neighbourhood with wide side-yard setbacks and the occasional rear yard garage. It is low density; except for about four properties (78, 76, 66, and 87). The FSLs are predominantly below 0.40 for a redeveloped property like #68, and below 0.25 for undeveloped properties. I note

in particular 61 and 63 with 25 ft frontages but in my view display a very different look and feel from the proposed houses.

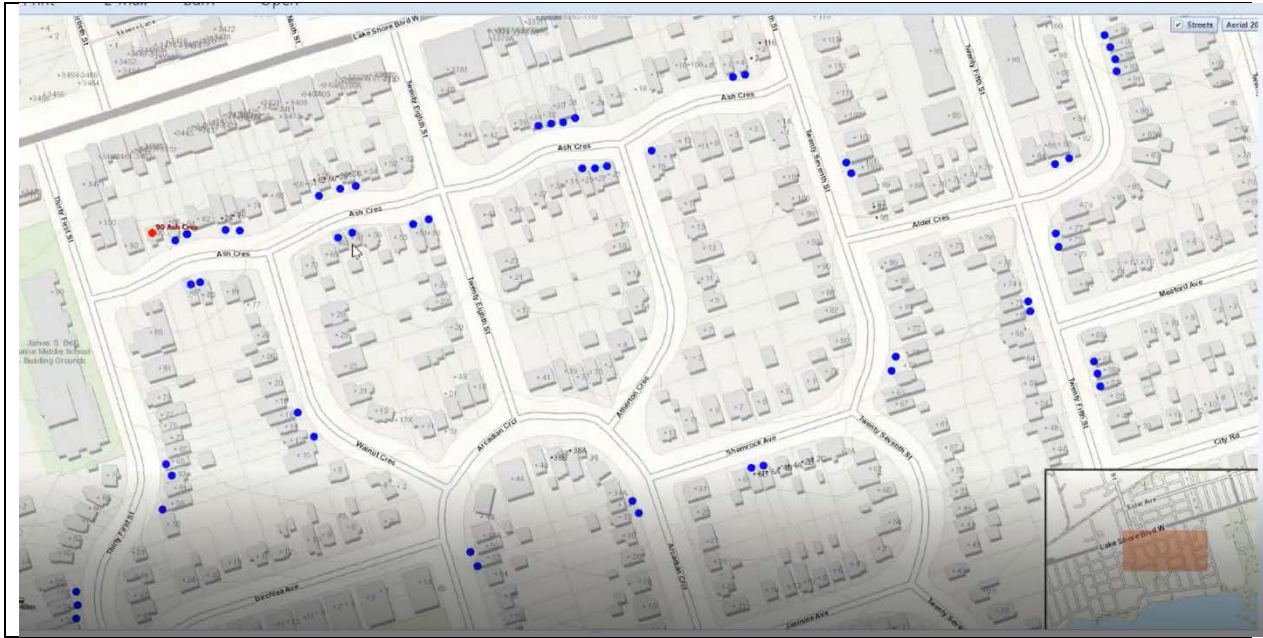
There is a wide separation between the houses, whereas Ms. Porritt only proposes 1.2 m (4 ft). Mr. Cieciora included both 85 and 87 as materially consistent properties on the basis of their 25 foot frontages; 85 plainly has a much lower density and 87 still has a garage at the rear. This pair is not the only occurrence of wide side yards; or side driveways; there are 68, 59, 55 and 51 which have large side yard setbacks, garages in the rear or similar. I also find that the small lots (51, 61-63, 85, possibly 86-84 (lane)) have not resulted in homes with a massing or scale that is similar to what is proposed and should be considered separately from 78-76 Ash Cr (which is similar to what is proposed).

I am also directed to look at the “pattern of streets” and accept Ms. Mercado’s evidence on the curvilinear nature of Ash Crescent and its effect on slowing down cars, stepping back the front walls and presenting special views of the residents’ front yards. It creates a rhythm that is part of the character but not captured by the zoning by-law. The proposed sideyard setbacks do not respect and reinforce the physical characteristics of the neighbourhood.

In conclusion, I find the proposal does not conform with s. 4.1.5 of the Official Plan, specifically parameters (c) prevailing heights, massing, scale, density; (e) prevailing design of driveways and garages, (g) prevailing patterns of sideyards. As a result, the tests for severance, ss. 51(24)(c) and (f) (Official Plan conformity and dimensions of the proposed lots) are not demonstrated. I find the variances for lot area, frontage and particularly density do not individually meet the four tests; this is even more so when considered cumulatively. Thus, the application for variances also fails.

City Planning Evidence

Figure 11. Smith map of 7.12 m frontages



Ms. Smith was the City planner with responsibility for this file. In October 2018, she noted that the length variance had been deleted and the floor space index had been decreased from the 0.92 range to 0.67. In a second report dated May 2019, Ms. Smith noted Ms. Porritt had made further changes: "Planning staff are of the opinion that the revised elevations show dwellings which have the appearance of two-storeys and are more in keeping with the existing physical character of the neighbourhood." She also noted a reduction in FSI from about 0.7 to the present 0.61.

In oral testimony she stated that by September 2020, her map supporting her opinion was lost, but she recreated a new map (Figure 9, above), “just to refresh my memory on this file”:²⁰

It appears to me that her analysis was based on frontage alone, and not all the other characteristics that OP 4.1.5 asks her to look at. She refers to Mr. Cieciura's similar analysis, which I have also found wanting in the previous discussion. She later speaks of massing and density, but does not supply any figures, as did Mr. Godley in this hearing. She does not mention side yards, patterns, or location of driveways. She mentions "existing" as if the 2016 severances were now built. She does not say her Department has concluded the "respect and reinforce" standard is met; only that it had "no objection" or "no concerns". This is not a criticism. The City and its staff have no

20 This was just me doing a quick analysis of these lots in the neighbourhood with similar frontages. Here you can see on Ash there are multiple lots that exist that have frontages similar to that [the proponent] was proposing, I'm sure TJ did a similar kind of a demonstration of this in his evidence as well. And then on surrounding streets as well there are lots that exist with similar frontages; there may even be more. This was my non comprehensive quick mapping just to refresh my memory on this file.

obligation to make the case on behalf of a proponent or opponent, unless instructed by Council, who may give such instructions for whatever reason.

I was asked by Mr. Cheeseman to accept Mr. Cieciura's evidence, buttressed by Ms. Smith's evidence. It appears to me that Ms. Smith's position and indeed Ms. Abimbola's attendance over the ten hearing days has been that in the event of planning approval, the owner should be tied to a condition to construct in substantial compliance with the plans. Ensuring that this occurs is an important task. I note that the OMB Member in the Cassar decision granted a density of 0.66 and main wall height variances but I am unable to tell from the decision if this condition was imposed, as conditions were contained in an attachment that did not accompany the decision. If this was not done by OMB Member Taylor, I am sympathetic to the City's concerns.

The City's change of position to "no opposition"

Ms. Porritt applied for planning approvals on June 10, 2017 and initially intended to remove a large City-owned silver maple from her front yard. As this hearing progressed, the City removed a different tree for reasons unknown. This left more room to design a driveway that did not require removal of the silver maple. Although the City appealed Ms. Porritt's approval, it changed its position during the TLAB hearing to "no opposition". In speaking of this change, Mr. Bostock, Ms. Porritt's arborist said:

It is my professional opinion that given the above carefully executed work as supervised by the ISA Certified Arborist, all six stems of [the silver maple] will have a good chance of surviving for the foreseeable future, extreme weather events excluded.

Mr. Bostock's evidence was confirmed by Ms. Verbitsky, the City's witness:

On the east side we see the major difference, that is being considered in redesigning of the new driveway, which is 3.97 distance from the main trunk, which means that the lack of large roots [is] going to be affected, then the other major change would be the depth of the excavation, which [is] 17.5 cm (.57 ft), which is just the top layer of the soil. Another major impact is going to be hand excavation and the certified arborist is going to be on site to observe all that. Also, the design is on an angle, which is within almost 2 m of impact at of that widest point of the circle of the protection zone. And further it's less impact because it is farther from the main trunk of the tree. . . . Turfstone is also going to be less impact on the tree root system.

In opposition, Ms. Mercado and Ms. Indewey cited incidents where the tree protection zone had been breached. Indeed Ms. Mercado asserted she did not know of a single instance of a 50 foot lot severance in which a pre-existing large tree survived. This was shown in a "natural experiment" (my words) in which two large trees faced

each other on opposite sides of the street. At 2 Twenty Seventh²¹, the tree sickened and died. Across the street. at 9 Twenty Seventh the tree is still there. The former is a severance; the latter is the redevelopment of a 50 foot lot with a single house.

Ms. Mercado also put into evidence the City's own documents:

Compaction of the soil in the tree root zone is one of the leading causes of tree decline in Toronto's urban forest. . . .Root destruction can also be caused by changes to the existing grade. Adding soil on top of tree roots can smother them by reducing the amount of oxygen and water they can receive. Only a few centimeters of added soil can have a detrimental impact on tree health. (City's Tree protection policy)

In my view, given that I have found extensive reasons for refusing the severance and variances based on s. 4.1.5 of the Official Plan, it is unnecessary to make findings whether the Long Branch neighbours have overcome the City's evidence. It certainly appears the City has the intention to continue with its preservation of the silver maple.

DECISION AND ORDER

The appeals are allowed and the Decision of the Committee of Adjustment is set aside. The severance is not granted and the variances are not authorized.



T. Yao
Panel Chair, Toronto Local Appeal Body

²¹ This is a severance with FSI of 0.59, given circa 2012 by the Committee of Adjustment.