

DECISION AND ORDER

Decision Issue Date **Thursday, March 29, 2018**

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): BRENTLANE DEVELOPMENTS INC

Applicant: RICHARD WENGLE ARCHITECT INC

Property Address/Description: 49 & 51 SPRINGMOUNT AVE

Committee of Adjustment Case File Number: 17 168004 WET 17 CO, 17 168020 WET 17 MV, 17 168021 WET 17 MV, 17 168022 WET 17 MV

TLAB Case File Number: **17 256606 S53 17 TLAB, 17 256610 S45 17 TLAB, 17 256612 S45 17 TLAB, 17 256613 S45 17 TLAB**

Hearing date: Wednesday, March 14, 2018

DECISION DELIVERED BY S. Makuch

APPEARANCES

Name	Role	Representative
Richard Wengle Architect	Applicant	
Elizabeth Jong	Owner	
Brentlane Developments Inc.	Appellant	Ian Andres
City of Toronto	Party	Matthew Schuman
Andrew Manson	Party	
Paul Johnston	Expert Witness	
Adam Vandermeij	Expert Witness	

Name	Role	Representative
John Keating	Participant	
Jennifer Wigmore	Participant	
Alexandra Garrison	Participant	
Molly Gardner	Participant	
Rose Cutrara	Participant	
Edwige Jean-Pierre	Participant	
Andrew Tay	Participant	
Jenna Scott	Participant	
Caitlin Ferguson	Participant	
Dave Meslin	Participant	
Harry Lay	Participant	
Helen Lee	Participant's Legal Rep	

INTRODUCTION

The solicitors for Brentlane Developments Inc. (“Brentlane”), agent for the owners of the Subject Properties, appealed the October 12, 2017 decisions of the Committee of Adjustment which refused applications for a consent to sever two lots into three separate lots, and for variances to construct a new three story detached dwelling with an integral garage on each lot.

The Subject Properties are located in the Regal Heights neighbourhood, north of Davenport Road and west of Oakwood Ave., at the intersection of Springmount Ave. and Regal Road. There is a two story duplex currently on each of the properties and vehicular access is now provided to each of the properties from Highview Crescent, by a common private lane at the rear of the properties. The duplexes are significantly elevated above Springmount Ave on the top of the Davenport Escarpment. The three dwellings, garages and driveways would front on Springmount Ave. Three curb cuts are proposed along Springmount Ave, in a manner which would preserve a City owned tree at the front of the Subject Properties.

With respect to the lot severances, no variances are required from the former City of Toronto Zoning By-law, Bylaw 438-86 (the “Old By-law”) or the new City of Toronto Zoning By-law, Bylaw 569-2013 (the “New By-law”). However, variances from both bylaws are required for the construction of the proposed new dwellings.

The variances required under the Old By-law relate to front yard setbacks, side yard setbacks and building height. The variances required under the New By-law relate to floor space index, side yard setbacks, building depth, building height, front yard landscaping and exterior stair encroachments.

BACKGROUND

None of the commenting City departments, Community Planning, Urban Forestry, and Engineering and Construction Services objected to the applications (Exhibit 7, p.27 Appendix C). Indeed, the Community Planning Report states that there are "no concerns" with the consent application and the associated minor variance applications and stated that "many of the proposed variances are the result of the existing grade of the property". Many residents who live in the area objected to the application and attended at, and took part in the hearing, as parties or participants. The City councilor filed a letter of objection. There were two expert witnesses, an arborist and a planner, both of whom supported the applications on behalf of the appellants. The City was a party in opposition at the hearing, and was represented by legal counsel, but called no evidence, although the City Solicitor was authorized to retain an expert. I visited the site, and so informed the parties and participants at the hearing, who raised no objections, and did not request my attendance at the site with their representatives accompanying me.

MATTERS IN ISSUE

There are many issues raised in this hearing. They relate to the following: tree preservation and the tree canopy; preservation of the natural landscape; building massing, scale, access and setbacks (front and side yard); regeneration and rejuvenation of the neighbourhood; setting a precedent; flooding; and rental housing protection. In my opinion flooding and rental housing protection are not in issue, as there was insufficient evidence to address these issues. I considered the evidence respecting all the remaining issues set out above. All of the evidence related to either the four tests of the Planning Act for the granting of minor variances, the granting of a consent or provincial policies and plans.

JURISDICTION

The TLAB is exercising jurisdiction with respect to variances under s.45 of The Planning Act which provides the following;

s. 45. (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

The TLAB is exercising jurisdiction respecting consents under s.53 of the Planning Act which provides the following;

53 (1) An owner of land or the owner's agent duly authorized in writing may apply for a consent as defined in subsection 50 (1) and the council or the Minister, as the case may be, may, subject to this section, give a consent if satisfied that a plan of subdivision of the land is not necessary for the proper and orderly development of the municipality.

51(24) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

- (a) the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2;
- (b) whether the proposed subdivision is premature or in the public interest;
- (c) whether the plan conforms to the official plan and adjacent plans of subdivision, if any;
- (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,.

(25) The approval authority may impose such conditions to the approval of a plan of subdivision as in the opinion of the approval authority are reasonable, having regard to the nature of the development proposed for the subdivision, including a requirement,

Finally TLAB's decision under s.2 of the Planning Act must be consistent Provincial policies and The Growth Plan.

EVIDENCE

Mr. Johnston's evidence was both written (Expert Witness Statement, (Exhibit 7) and oral. In his opinion, the consent sought, conformed with the general intent and purpose of the official plan and the zoning bylaw, as well as provincial policies and plans. He pointed out that neither planning staff nor Engineering and Construction Services and Transportation Services and Urban Forestry had any objection to the proposal. In his opinion, the consent is appropriate in light of these reviews, and a plan of subdivision is not required, given the limited number of lots being created and given that no new roads are being created. In his opinion there were no issues related to the health, safety, convenience, or accessibility for persons with disabilities or the welfare of the present and future inhabitants of the municipality and no issues related to provincial interest. He further stated other reasons to support the consent. Among them are the following: that the proposal is not premature as it represents appropriate infill redevelopment in an existing urban neighbourhood. The public interest is served by rejuvenation of the existing neighbourhood. The proposed lots conform to the Official Plan and are consistent with the surrounding lot fabric and the lands are suited to the proposed residential use.

In addition he outlined the reasons Transportation Services had no objections to the consent and listed the conditions Engineering and Construction Services Division and Transportation Services Division recommended and repeated the findings of staff respecting site servicing, storm sewers, utilities and driveways

With respect to the minor variances his evidence was very clear: the variances met the four test of s. 45 and thus maintained the general intent of the official plan and zoning bylaw, were appropriate for the development or use of the land and were minor. In this respect he relied on the evidence, both oral and written of Mr. Vandermeij, the arborist (Expert Witness Statement, Exhibit 1), City Staff's reports, site visits, his analysis of certain characteristics of the neighbourhood, and the relevant policy documents, all of which were contained in his expert Witness Statement (Exhibit 7).

His conclusion that the applications met the applicable Provincial policy documents was based on the proposal regenerating and rejuvenating the neighbourhood.

Mr. Vandermeij's evidence was largely based on an Arborist Report which he prepared, and which evaluated the trees on the site and on certain neighbouring property, and the impact of the development on those trees individually and on a City owned tree in particular.

Resident parties and participants gave evidence largely based on their own observations, experience and reading of relevant documents.

ANALYSIS, FINDINGS, REASONS

My analysis of the evidence is divided as follows: evidence regarding the minor variances and the evidence regarding the consent. My analysis of the minor variance evidence addresses the following: tree preservation and the tree canopy; preservation of the natural landscape; building massing, scale, and setbacks (front and side yard), regeneration and rejuvenation of the neighbourhood and the setting of a precedent. In doing so, I reach the conclusion that the minor variances to permit the three dwelling units should not be approved and, as a result, I further conclude the consent should not be granted and that the proposal is not consistent with provincial policy.

In spite of the expert opinion evidence of Mr. Johnston and of Mr. Vandermeij, I am not persuaded that the minor variances meet the four tests of the Planning Act, or that the consent should be granted. Nor am I convinced that the proposal is consistent with relevant Provincial Policies. In addition, in my view, an approval would set an inappropriate precedent.

Tree Preservation and Tree Canopy:

Evidence of tree preservation and impact on the tree canopy was provided by Mr. Vandermeij and was relied on by Mr. Johnston for part of his planning evidence regarding the official plan. Mr. Vandermeij's evidence was primarily the arborist report he prepared, which outlined in detail the impact of the proposed development on individual trees, and in particular a City owned tree which would be saved.

In my opinion the report was inadequate for a number of reasons. Firstly, it does not provide any evidence that the following official plan policies were considered:

Policy 3.1.2.1 provides that,

“New development will be located and organized to fit with its existing and/or planned context. It will frame and support adjacent streets, parks and open spaces to improve the safety, pedestrian interest and casual views to these spaces from the development by:

d) preserving existing mature trees wherever possible and incorporating them into landscaping designs”.

Policy 3.4: (The Natural Environment) provides that,

“1. To support strong communities, a competitive economy and a high quality of life, public and private city-building activities, and changes to the built environment, including public works, will be environmentally friendly, based on:

d) preserving and enhancing the urban forest by:

i) providing suitable growing environments for trees;

ii) increasing tree canopy coverage and diversity, especially of long-lived native

and large shade trees; and

iii) regulating the injury and destruction of trees.”

The Report does not provide any evidence that the development was designed to take into account the general intent “to preserve existing trees wherever possible and incorporating them into landscaping designs” as set out in policy 3.1.2. 1. The Report was undertaken after the plans for the development were prepared. Thus the report only examined the impact of the design as set out in those plans. No evaluation was undertaken to ascertain if the design “preserved existing mature trees wherever possible” and moreover no study undertaken to develop a preferred design, which preserved mature trees wherever possible. The general intent of designing development to preserve trees where possible was not met.

In addition, no consideration was given in the report, or in Mr. Vandermeij’s evidence in chief, to policy 3.4 which states, in part, that changes to the built form environment will be environmentally friendly based on preserving and enhancing the urban forest by: ...” increasing the urban canopy coverage and diversity... and regulating the injury and destruction of trees.” In my opinion the general intent of this Official Plan policy is to encourage the protection and enhancement of the urban canopy. No evaluation was undertaken as to whether there was a better way to provide access to the site by placing the buildings and parking on the site in a manner that would accomplish this general intent and purpose of these policies. In particular no consideration was given to whether maintaining access from the rear of the properties would preserve more mature trees than the proposed front access.

Secondly, Mr. Vandermeij stated in oral evidence, that he did not evaluate the impact of the development on the tree canopy at all for the purposes of reviewing the plans. He took the design as given, and then considered what trees might be saved; rather than considering how the design might be prepared or altered, so as to achieve the general intent and purpose of the Official Plan policies related to tree and canopy preservation. Indeed, not until he was asked at the hearing, did he put his mind to whether using the existing rear access would result in a reduction in the destruction of the canopy. There was no consultation with the Architect in this regard. He did a calculation of impact at my request over the lunch hour, but I am not prepared to rely on it.

Thirdly, I note that his Report, itself, states that eight new trees are required to compensate for the four trees to be destroyed. Compensation for three of those eight is to be in the form of cash in lieu, with only five of the eight to be planted on site. While ordinarily such compensation is clearly acceptable, as trees may be placed elsewhere in the urban forest, in this case, as will be discussed later, non-replacement of trees in this neighbourhood would not be “respecting and reinforcing” the character of this neighbourhood. I note as well that the report also specifies that trees numbered 6 and 8 will be removed because of their “poor” health. This appears questionable when tree 6 is classified not as in “poor” health but as in “fair/poor” health and tree 8 is classified as being in “fair” health and no analysis is provided as to what might be done, if anything, to restore them.

In the absence of any evidence from the architect, or of any discussion by the planner or arborist with the architect, as to whether or how the design of the development took into, or was unable to take into account the preservation of trees and the tree canopy on the site, I cannot see how the general intent of the Official Plan policies respecting, trees, urban forest, and tree canopy preservation, is met, and how the general intent to protect and enhance the urban forest is maintained in this neighbourhood.

Natural Landscape

Evidence regarding the natural landscape was provided by Mr. Johnston. In his oral evidence he describes this area as a “green and leafy” neighbourhood built on the Davenport Escarpment. In paragraph 54 of his Witness Statement he describes the escarpment as a “special landscape which contributes to the unique physical character of the neighbourhood”.

In addition to the official plan policies referred to above, he made reference to Policy 4.1.5 which provides development criteria within neighbourhoods. It states:

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

- b) size and configuration of lots
- c) heights, massing, scale and dwelling type of nearby residential properties;
- e) setbacks of buildings from the street or streets;
- f) prevailing patterns of rear and side yard setbacks and landscaped open space;
- g) continuation of special landscape or built-form features that contribute to the unique physical character of a neighbourhood; ...

No changes will be made through rezoning, minor variance, consent or other public action that are out of keeping with the physical character of the neighbourhood.

With regard to this policy he made no reference as to how a diminishing of the tree canopy would “respect and reinforce” the “green and leafy “ landscape; or how a payment in lieu for tree destruction would meet this intent. Nor did he give evidence as to how building garages and dwellings into the side of the bank of the escarpment, rather than on top of its bank, would “respect and reinforce” the escarpment. Although he gave examples of dwellings built into the escarpment and of curb cuts in the neighbourhood, and stated that private development had occurred “subject to usual zoning, building code and design practices”, he gave no evidence of how his examples met the general intent or purpose of the current official plan. This is of concern when much of the neighbourhood was constructed, as he pointed out, in the 1920’s; long before any environmental preservation policies were likely governing development.

There was no persuasive evidence of how the proposed development respects or reinforces the unique character of the escarpment and the green and leafy character of this neighbourhood. His evidence focused, rather, on existing development. Having had no discussions with the architect or the arborist regarding the natural landscape of the neighbourhood, he was unable to say how the design of the development respected

and enhanced that “special landscape”. Mr. Johnston’s evidence, therefore, was of limited value. Without such evidence, or that of the architect, who was not called to give evidence, I cannot find that the proposed development meets the general intent of these policies of the official plan.

Access

In addition, as a planner, Mr. Johnston could not and did not address relevant urban design policies in the Official Plan. For example, no evidence was given regarding Official Plan Policy 3.1.1. which states:

New development will locate and organize vehicle parking, vehicular access, service areas and utilities to minimize their impact on the property and on surrounding properties and to improve the safety and attractiveness of adjacent streets, parks and open spaces by: a) using shared service areas where possible within development block(s) including public and private lanes, driveways and service courts; b) consolidating and minimizing the width of driveways and curb cuts across the public sidewalk; .. e) limiting surface parking between the front face of a building and the public street or sidewalk;

As a result it cannot be said that the general intent of this policy is met when one exiting private lane, providing access to the proposed properties to be redeveloped, was not taken into account in evaluating the proposal and this lane was replaced by three driveways and curb cuts to a different public street. This policy is of particular concern because in the area surrounding the site there are fewer curb cuts than anywhere in the neighbourhood, (see figure 9 of Mr. Johnston’s witness statement) a characteristic which he did not refer to in his evidence-in-chief.

Building Massing, Height, Set Backs

In addition I cannot agree with Mr. Johnston’s observations regarding the massing of the three proposed dwellings. As can be seen in figures 13-16 of his witness statement (Exhibit 7) the three dwellings have the appearance of one building, because they are all similar in height, shape, appearance and set back. Their interior side walls are only approximately 2 feet apart according to his oral evidence; and the dwellings are joined by a stairway in the front. Mr. Johnston was able to point out some dwellings that were very close to each other but did not provide examples of dwellings with such similar characteristics being so close to each other. I also note that, although the buildings had only three stories above the top of the escarpment their appearance from Springmount Ave. was of a four to five story building on the bank of the escarpment, which was not typical of the area.

Rejuvenation and Regeneration

With respect to the Provincial Policy Statement and Growth Plan the evidence was that the proposed development was consistent with both, as it was infill which

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contributed to the regeneration and rejuvenation of the neighbourhood. I do not find this a particularly persuasive reason for an approval. Of fundamental concern in this case is whether such a development meets the four tests of the Planning Act for each variance.

The City argued that Provincial policies and plans must be read as a whole. This includes reliance on and consideration of a municipality's official plan. I agree. On this basis, I find that since the variances do not meet the general intent of the City's official plan they are not consistent with Provincial policies or plans. There was no official plan policy referred to in evidence which encouraged regeneration and rejuvenation in this neighbourhood.

Precedent

In addition, in my opinion, approval of these variances would be used in evidence to support further development along the bank of the escarpment on this street on adjacent properties and would diminish the efficacy of the tree preservation policies of the Official plan here and elsewhere

As a result of the above analysis, I cannot agree that the proposed variances meet the general intent of the Official Plan as it relates to the policies referred to above. Moreover, since the general intent and purpose of the zoning bylaw is to implement the policies of the Official Plan, and the general intent and purpose of those policies would not be implemented by these variances, the application fails to meet the test of maintaining the general intent of the zoning bylaw.

I point out, as well, that the variances to the zoning bylaw are not merely technical in nature, as they relate to substantive deviations in height, setbacks, floor space index, and landscape open space. Together these substantially affect the massing and appearance of the buildings as well as the natural landscape of the neighbourhood and thus the character of the neighbourhood. Moreover, in the absence of further analysis regarding the preservation of trees and the tree canopy, one cannot conclude this development is appropriate. In summary, I cannot conclude that the development is appropriate with respect to tree preservation, the natural landscape feature or its built form and access. I do conclude it would set an undesirable precedent and that regeneration and rejuvenation are not grounds for supporting the approval of these variances. .

In my opinion the consent should not be granted. Ordinarily the creation of three lots out of two might not be of concern; but in this case, because of the character of the neighbourhood - green and leafy with the escarpment as a significant attribute - care must be taken to consider the development which is to occur on those lots before a consent is granted.

The following are some of the issues to be addressed before a consent is approved:

whether the proposed subdivision is premature or in the public interest;
whether the plan conforms to the official plan,

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the suitability of the land for the purposes for which it is to be subdivided;

if any affordable housing units are being proposed, the suitability of the proposed units for affordable housing;

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;

the dimensions and shapes of the proposed lots;

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;

Although there was evidence that the proposed lots, themselves, conformed with zoning bylaw, in my view that is not sufficient for an approval of the consent, as there was insufficient evidence that the proposed plan addressed the issues listed above. In particular the plans (Exhibit 10 A, B, and C) are premature without evidence that the development conforms to the official plan, and without addressing access and egress and issues of elevation and affordable housing.

Finally, I wish to point out that, although the parties and participants in opposition to the applications did not frame their evidence and concerns in the precise manner and with the same specific references and analysis I have set out above, their testimony, nevertheless, contributed significantly to my conclusions.

DECISION AND ORDER

The variances are refused and the consent is denied. The TLAB so orders.

X 

S. Makuch
Panel Chair, Toronto Local Appeal