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**File No. A.069/09 & B.027/09
Planner: B. Debbert**

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| TO: | CHAIR AND MEMBERS PLANNING & ENVIRONMENT COMMITTEE |
| FROM: | JOHN M. FLEMING DIRECTOR, LAND USE PLANNING AND CITY PLANNER |
| SUBJECT: | ONTARIO MUNICIPAL BOARD DECISION 50 JACQUELINE STREET MEETING ON MONDAY, FEBRUARY 27, 2012 |

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| RECOMMENDATION |
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That, on the recommendation of the Director, Land Use Planning, the following report on the decision of the Ontario Municipal Board relating to the appeal submitted by Alan Patton, on behalf of John Brotzel against the decision of the Committee of Adjustment which refused an application for minor variances, and the London Consent Authority which did not make a decision on the application for consent, respecting property at 50 Jacqueline Street **BE RECEIVED** for information purposes.

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| PREVIOUS REPORTS PERTINENT TO THIS MATTER |
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September 27, 2010 – report to Planning Committee recommending that Municipal Council support the Decision of the Committee of Adjustment and recommending that the consent application be refused, and that the City Solicitor and General Manager of Planning and Development be directed to provide legal and planning representation at the Ontario Municipal Board Hearing to support the decision of Municipal Council in response to the appeals with respect to the consent and minor variance.

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| BACKGROUND |
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The attached Ontario Municipal Board decision relates to applications by John Brotzel for a consent to sever a flag-shaped lot, and a minor variance to facilitate the severance of the lot and the construction thereon of a semi-detached dwelling. The requested minor variances before the Board were to maintain a single detached dwelling with a front yard setback of 3.8 metres whereas 4.5 metres is required and a north interior side yard setback of 0.5 metres whereas 1.8 metres is required (retained lot), and to construct a semi-detached dwelling with a lot frontage 8.5 metres whereas 18.0 metres is required (severed lot). As the requested minor variances were revised during the review process, but a concurrent revision to the proposed configuration of the severance was not submitted, a decision on the consent application was not made by the London Consent Authority.

On July 12, 2010, the Committee of Adjustment refused the minor variance application by John Brotzel and in its signed decision stated:

1. *The requested minor variance does not meet the general intent and purpose of the Zoning By-law;*
2. *The requested minor variance does not meet the general intent and purpose of the Official Plan;*
3. *The requested minor variance is not minor in nature;*
4. *The requested minor variance is not desirable for the appropriate development or use of the land, building or structure.*

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The applicant appealed with respect to both the minor variance and consent applications. The Ontario Municipal Board hearing was held on November 23, 2010. The Board allowed the appeal of the minor variance and authorized the minor variances, stating that the variance meets the intent of the City of London Official Plan and Zoning By-law and is minor in nature and desirable for the appropriate development of the Subject Property and the Severed Lot. The Board also allowed the appeal of the consent application, as amended at the Board hearing and granted provisional consent subject to conditions.

This hearing was also the first occasion on which the applicability of the intensification policies contained in Section 3.2.3 of the Official Plan was tested. The third paragraph of that section requires that "Residential Intensification projects shall use innovative and creative urban design techniques to ensure that character and compatibility with the surrounding neighbourhood are maintained as outlined in policy 3.2.3.3 and 3.2.3.4." The aforementioned policies require the applicant to undertake and submit a Neighbourhood Character Statement and a Statement of Compatibility as part of an application for residential intensification. The interpretation presented by the appellant's planner was that the third paragraph of Section 3.2.3 was intended to apply only to applications for Official Plan amendments and Zoning By-law amendments, not to consents or minor variances. City staff submitted that the policy does not differentiate between types of applications as long as the development proposal constitutes residential intensification as defined, and that as a result, the documents required by policies 3.2.3.3 and 3.2.3.4 should have been provided for consideration as part of the application review process. The Board agreed with the City's position that the policy applies to every residential intensification project, regardless of the manner of application that brings such a proposal before the City.

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| PREPARED BY: | SUBMITTED BY: |
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| BARB DEBBERT SENIOR PLANNER COMMUNITY PLANNING AND URBAN DESIGN SECTION | JIM YANCHULA, MCIP, RPP MANAGER OF COMMUNITY PLANNING AND URBAN DESIGN SECTION |
| RECOMMENDED BY: | |
| | |
| JOHN M. FLEMING, MCIP, RPP DIRECTOR, LAND USE PLANNING AND CITY PLANNER | |

February 16, 2012
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Planner: B. Debbert

ISSUE DATE:
Aug. 16, 2011



2011-D16-00 / D09-00

PL100848

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Barb

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: John Brotzel
Subject: Minor Variance
Variance from By-law No.: Z-1
Property Address/Description: 50 Jaqueline Street
Municipality: City of London
Municipal File No.: A.069/09
OMB Case No.: PL100848
OMB File No.: PL100848

CITY OF LONDON
PLANNING DIVISION
AUG 22 2011

IN THE MATTER OF subsection 53(14) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: John Brotzel
Subject: Consent - Failure of council to make a decision on the application
Property Address/Description: 50 Jaqueline Street
Municipality: City of London
Municipal File No.: B.027/09
OMB Case No.: PL100848
OMB File No.: PL100908

City Clerk No. _____
Subject PL100848 - Minor Variance - A.069/09 - 50 Jaqueline St. -
Consent - B.027/09 PL100908
AUG 19 2011
Ref. PSIKK
C.C. JPB (Planning Division)
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APPEARANCES:

Parties City of London John Brotzel
Counsel Janice L. Page Alan R. Patton

DECISION DELIVERED BY JAMES R. MCKENZIE AND ORDER OF THE BOARD

There are two matters before the Board concerning a property known municipally, in the City of London, as 50 Jacqueline Street ("Subject Property"): an appeal of a Committee of Adjustment Decision to refuse an application for three minor

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variances, pursuant to Subsection 45(12) of the *Planning Act*; and, an appeal of an application seeking a consent, pursuant to Subsection 53(14) of the *Planning Act*. The latter appeal was filed on the basis of the Consent Authority's not making a decision on the application within 90 days of its receipt.

John Brotzel owns the Subject Property and wants to divide it into two lots. The retained portion ("Retained Lot") would continue maintaining an existing single detached dwelling. The severed portion ("Severed Lot") would be developed with a semi-detached dwelling.

The Subject Property is a flag-shaped lot that wraps-around two adjacent properties to the north, Nos. 48 and 46 Jacqueline Street. The 'pole' portion of the lot abuts the southerly side lot line of 48 Jacqueline and maintains a frontage of 20.12 metres. The existing single detached dwelling is situated on this portion immediately adjacent to 48 Jacqueline. The 'flag' portion abuts the easterly rear lot lines of 48 and 46 Jacqueline and is vacant.

Of the three minor variances sought by Mr. Brotzel, two relate to the existing single detached dwelling and the third relates to the proposed Severed Lot. Notwithstanding legal, non-conforming protections provided in the *Planning Act*, it is the practice of the City of London to bring any property that is the subject of a development application into explicit compliance with its comprehensive zoning by-law. The three variances applied for include:

1. to maintain the existing 3.8 metre front yard setback to the existing single detached dwelling, whereas 4.5 metres is the minimum required;
2. to maintain the existing north side yard setback of 0.5 metres to the existing single detached dwelling, whereas a minimum 1.8 metres is required; and,
3. to construct a semi-detached dwelling on a lot having a frontage of 8.5 metres, whereas a minimum of 18 metre frontage is required for any lot maintaining a semi-detached dwelling.

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The Subject Property is situated in an older suburb of London located south-east of its central area. The surrounding neighbourhood consists mainly of single detached dwellings; however, other dwelling types are sprinkled throughout including duplex dwellings on Jacqueline Street north and south of the Subject Property at Nos. 56 and 44, respectively.

Jacqueline Street is oriented in a north-south direction. The Subject Property is located on the east side of the street directly opposite the terminus of Edna Street which is oriented in an east-west direction and forms a T-intersection with Jacqueline. The Thames River is located immediately north-east of the Subject Property; indeed, the north-east corner of the flag portion of the Subject Property is located within the top-of-bank delineation identified by the Upper Thames River Conservation Authority (UTRCA).

The Subject Property is surrounded on its north, south, and west by other residential properties. A school abuts the Subject Property on its east, at the rear. The G. A. Wheable School formerly operated as a traditional high school and now provides special programming at the secondary level as well as adult education programming. The portion of the Wheable property abutting the Subject Property is largely open space associated with the Thames River.

The Subject Property is designated "Low Density Residential" in the Official Plan, except for a portion in the north-east corner lying within the Thames River valley and under the jurisdiction of the UTRCA – which portion is designated "Open Space." Semi-detached dwellings are a permitted land use in the Low Density Residential policies of the plan.

The zoning of the Subject Property set out in the City's comprehensive zoning by-law corresponds with the Official Plan designations. The portion designated Low Density Residential is zoned "Residential (R2-2)" and the portion designated Open Space is zoned "Open Space (OS4)." The R2-2 Zone identifies semi-detached dwellings as a permitted land use.

Four witnesses testified at this hearing.

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Richard Zelinka is a Registered Professional Planner and Member of the Canadian Institute of Planners and the Ontario Professional Planners Institute. He is a consulting planner and testified in support of Mr. Brotzel's plan. Barb Debbert is a senior planner with the City of London and she testified in opposition to Mr. Brotzel's plan. The Board qualified each as an expert witness.

The Board also heard from Kate Wilson, who owns and resides at 46 Jacqueline Street, and from Deanna Smith, who owns and resides at 48 Jacqueline Street. Each testified in opposition to Mr. Brotzel's plan.

Subsection 45(1) of the *Planning Act* sets out the jurisdiction for a Committee of Adjustment – and, on appeal, this Board – to authorize a variance to a municipal zoning by-law. A variance may be authorized where the relief sought is minor, is desirable for the appropriate development or use of the land in question, and where the intent and purpose of the zoning by-law and of the official plan are maintained. These criteria are commonly referred to as the four tests.

Likewise, subsections 53(1), 53(12), 53(34), and 51(24) of the *Planning Act* set out the Board's jurisdiction to authorize a provisional consent and those matters to which it must have regard when determining whether to do so.

It should be noted at this juncture that Ms Debbert's evidence was directed exclusively to variance no. 3. She readily acknowledged that variance nos. 1 and 2 relate to existing conditions and do not raise any concern from a planning point-of-view. Likewise, neither Ms Wilson nor Ms Smith made any mention of variance nos. 1 and 2 in their respective testimony. Their sole concern was the location of the proposed semi-detached dwelling on the Severed Lot.

Mr. Zelinka testified that variance nos. 1 and 2 satisfy the four tests. His evidence was not contradicted from either an expert or lay perspective. These two variances relate to a condition that has existed since the existing single detached dwelling was constructed. As such, they stand separate and apart from variance no. 3 and the consent, and they arise only as a consequence of the City's insistence on documenting explicit compliance with its comprehensive zoning by-law. The Board, therefore, adopts Mr. Zelinka's evidence in finding that variance nos. 1 and 2 are minor,

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are desirable for the appropriate development of the Subject Property, and maintain the intent and purpose of both the Official Plan and comprehensive zoning by-law.

The balance of this Decision is directed at variance no. 3 and the consent, and assesses those matters through the four tests of subsection 45(1) and the criteria of subsections 53(1) and 51(24), respectively.

Official Plan Test

Mr. Brotzel filed the application for minor variance and the application for consent in May, 2009. Those applications reflected a development proposal that would maintain the existing single detached dwelling on the Retained Lot and introduce a single detached dwelling on the Severed Lot. The minor variance application sought three variances pertaining to the Retained Lot: the same variances identified as variance nos. 1 and 2 above, and a third variance for a reduced lot area. Public hearings before the Committee of Adjustment were scheduled and adjourned in June and in October, 2009, to facilitate further discussions between Mr. Zelinka, who by that time had been retained, and City planning staff and UTRCA staff.

Subsequent to the October adjournment, Mr. Brotzel decided to revise his development scheme by modestly increasing the size of the Retained Lot and by proposing a semi-detached dwelling on the Severed Lot instead of a single detached dwelling. The increased lot size for the Retained Lot eliminated the need for the same variance as originally applied for; however, the introduction of a semi-detached dwelling triggered a requirement for a new variance for a reduced lot frontage on the Severed Lot, identified as variance no. 3 above. A revised application for minor variance was filed with the Committee of Adjustment in June, 2010. A revised application for consent was not submitted to the City's Consent Authority because the City changed the manner in which it processed related minor variance and consent applications. At the time of the original applications, the City processed related applications concurrently. At the time of the revisions, however, the City had adopted an approach whereby related applications were processed consecutively, with a minor variance application preceding a consent application. Mr. Brotzel, therefore, did not file an amended consent

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application because nothing would have been done with it until his minor variance application had run its course.

On the matter, therefore, of consistency between the consent application and the revised minor variance application, the Board was asked to exercise its powers set out in Subsection 53(35) and 53(35.1) of the *Planning Act* to make a decision on a consent application that has been amended from the original application. The revised minor variance application clearly referenced Mr. Brotzel's intention to pursue a development scheme including a semi-detached dwelling instead of a single detached dwelling. The Board is satisfied that written notice under Subsection 53(35) is not required because the amendment to the original application is minor, pursuant to Subsection 53(35.1), and the Board will base this decision on the consent application as amended. The particulars of that amended application were described in Mr. Zelinka's Witness Statement (ex. 3) and in a Proposed Consent Sketch (ex. 1, tab 14), and, for ease of reference, are set out in Attachment "1" to this Decision.

In December, 2009, between the filings of the original applications and the revised minor variance application, amendments to the City's Official Plan were approved by the Ministry of Municipal Affairs that introduced new residential infill and intensification policies. Those amendments were identified to the Board as Official Plan Amendment No. 438 (OPA 438). The chronology of events is outlined here to highlight the fact that variance no. 3 and the consent have been evaluated against the policies introduced into the Official Plan by OPA 438, notwithstanding that those policies were not in effect at the time of the original applications. While the Clergy principle might otherwise apply – that an application be assessed against the policy regime in effect at the time it is filed – neither Mr. Patton nor Ms Page made submissions regarding its strict application.

Turning, then, to the policies of the Official Plan, Ms Debbert testified that the proposed development scheme – specifically, the semi-detached dwelling on the Severed Lot having a reduced frontage – did not comply with the policies of the Official Plan, particularly those new residential intensification policies introduced by OPA 438. She drew the Board's attention to a series of nested, hierarchical policies – set out below – to ground her opinion that variance no. 3 does not maintain the intent and purpose of the Official Plan.

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Section 3.2.3, Residential Intensification, states:

Residential Intensification is a means of providing opportunities for the efficient use of land and encouraging compact urban form.

Residential Intensification may be permitted in the Low Density Residential Designation through an amendment to the [comprehensive] Zoning By-law, subject to the following policies and Planning Impact Analysis policies under Section 3.7. ...

Residential Intensification projects shall use innovative and creative urban design techniques to ensure that character and compatibility with the surrounding neighbourhood are maintained as outlined in policy 3.2.3.3 and 3.2.3.4.

Section 3.2.3.3., Neighbourhood Character Statement, states:

An inventory of the urban design characteristics of the structure and the natural environment within the neighbourhood shall be undertaken by the applicant, as outlined in section 3.7.3.1 of the plan. The physical environment of the neighbourhood, composed of its lots, buildings, streetscapes, topography, street patterns and natural environment are some of the elements that collectively determine much of the character of a neighbourhood and its streetscape. A well organized and documented understanding of a neighbourhood's character is an effective tool in assessing the appropriateness of a proposed change and the implications the change may have on the character of a neighbourhood.

Section 3.2.3.4., *Compatibility of Proposed Residential Intensification Development*, states:

As part of an application for residential intensification, the applicant shall be required to provide an adequately detailed statement of compatibility, where it is clearly demonstrated that the proposed project is sensitive to, compatible with, and a good fit within, the existing surrounding neighbourhood based on, but not limited to, a review of both the existing and proposed built form, massing, and architectural treatments as outlined in section 3.7.3.1. of the plan.

Mr. Zelinka and Ms Debbert are each of the opinion that the proposed development scheme constitutes residential intensification as that term is defined in the Official Plan.

Section 3.7.3.1, *Residential Intensification*, includes the following policies:

An applicant proposing a residential intensification development ... shall be required to submit the following detailed reports:

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Neighbourhood Character Statement. A detailed statement of the character of the existing neighbourhood that demonstrates how the proposed development respects the character of the existing neighbourhood shall be submitted by the applicant. This inventory of urban design characteristics shall include [sic] a review of structures and the natural environment within the surrounding neighbourhood...The Neighbourhood Character Statement shall incorporate the following items:

Character and Image...

Site Design...

Servicing...

Compatibility Report. As part of an application for residential intensification, the applicant shall be required to provide a detailed statement of the compatibility of the project, to demonstrate that the proposed project is sensitive to, compatible with, and a good fit within the existing surrounding neighbourhood. The conceptual design of the project shall incorporate the following items:

Built Form Elements...

Massing and Articulation...

Architectural Treatment... [underlining added.]

On the face of the underlined text above, the function of these policies is to identify ingredients deemed necessary to inform a planning conclusion as to how a proposed residential intensification development scheme respects and is compatible with an existing neighbourhood and surrounding land uses.

There is no question that neither a Neighbourhood Character Statement nor a Compatibility Report was submitted with the revised minor variance application. Mr. Zelinka acknowledged as much under cross-examination. He went on to testify, however, that the planning analysis he undertook to support his professional opinion addressed the elements of a Neighbourhood Character Statement and Compatibility Report, just not in the form stipulated by Section 3.7.3.1.

Mr. Zelinka testified that the Subject Property is underutilized given its size and current land use. He told the Board that the introduction of a semi-detached dwelling promotes intensification and is consistent with the Provincial Policy Statement, and reflects a low density residential use that is consistent with surrounding low density

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residential uses. He drew the Board's attention to recently constructed duplex dwellings on Jacqueline Street, testifying that they have not created any deleterious spill-over effects on adjacent properties or on the broader neighbourhood. He also testified that the proposed development scheme facilitates intensification without changing the Official Plan designation or proposing a land use that is not permitted. Its scale, in his opinion, is consistent with and respects its neighbourhood context.

Mr. Zelinka also drew the Board's attention to 44 Josephine Street, (on the first street west of Jacqueline, two houses north of Edna Street, approximately 100 metres from the Subject Property), which maintains a single-detached dwelling in its rear yard, well set back from the street. In that situation, the dwelling on No. 44 is situated immediately adjacent to the rear yard of each abutting property (Nos. 42 and 46). He told the Board that that situation has existed for years without any record of adverse impact on the adjacent properties.

Finally, Mr. Zelinka testified that the proposed development scheme will not affect the status or the function of the portion of the Subject Property within the Thames River valley system.

For her part, Ms Debbert took no issue with the development scheme's consistency with the Provincial Policy Statement. The Board, therefore, finds that the matters before it, if approved, will be consistent with Provincial Policy Statement.

Ms Debbert testified that Neighbourhood Character Statement and the Compatibility Report are necessary to assess the compatibility of the proposed scheme with the neighbourhood in which it is situated and with its surrounding land uses. Despite maintaining that opinion, she was nonetheless able to complete her own planning analysis of the proposed scheme to arrive at an opinion that it is not compatible with the neighbourhood and adjacent land uses or representative of good planning.

Ms Debbert acknowledged the presence of duplex dwellings on Jacqueline Street, noting that the only difference between a duplex dwelling and a semi-detached dwelling is that the latter tends to be wider. She also testified that construction in a rear yard is inconsistent with the character of the neighbourhood.

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With respect to the aforementioned policies, the Board prefers the evidence of Mr. Zelinka. It finds his analysis more thorough given his consideration of the broader neighbourhood, including properties on both Jacqueline Street and adjacent streets. He identified properties, (Josephine Street, discussed above, and Deveron Crescent, discussed below), with similar on-the-ground characteristics to the proposed development scheme and he investigated those situations in order to draw appropriate inferences. Ms Page pointed out to Mr. Zelinka during cross-examination that the siting of the house at 44 Josephine was due to the fact that a septic weeping bed was located in the front yard, thereby forcing the house to the rear of the property. Mr. Zelinka was not aware of that fact; however, the Board finds it to be irrelevant in any event. Mr. Zelinka examined whether that house in its present location caused any adverse impact on the adjacent properties. None were found, and from that he drew a reasonable conclusion, given the similarities, that the proposed semi-detached dwelling, sited in a similar location on the Subject Property, would also not cause any adverse impact on its neighbouring properties. The Board, therefore, accepts Mr. Zelinka's evidence with respect to the aforementioned Official Plan policies.

Ms Debbert also took the Board to Section 3.2.3.10., *Rear-Lot Development*, of the Official Plan. This section stipulates that rear-lot development – that is, development on flag-shaped lots – shall be discouraged unless the criteria of Section 3.2.3 are satisfied and additional urban design criteria are addressed. Among those urban design criteria is this: "[i]n laying out a rear-lot development, care should be taken to avoid creating front to back relationships between existing and proposed dwelling units." Ms Debbert told the Board that the City is generally not supportive of rear-lot development, and, relying on Section 3.2.3.10., opined that the development scheme would not comply with the intent of this particular policy because the front façade of the proposed semi-detached dwelling will face the rear wall of the existing single detached dwelling.

Mr. Zelinka testified that he examined alternate siting arrangements for the semi-detached dwelling, noting that any orientation different from that proposed resulted in an awkward, functionally less desirable design. He told the Board that the proposed orientation fixes the semi-detached dwelling to being directly and only behind the existing single family dwelling. Finally, Mr. Zelinka testified that the separation distance between the existing single detached dwelling and the proposed semi-detached

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dwelling is greater than what would be required were the existing and proposed dwellings back-to-back in a more conventional residential orientation.

Mr. Zelinka also presented the Board with evidence of a residential development consisting of 18 lots on Deveron Crescent that incorporates rear-lot development with a front-to-back arrangement. While that development is several kilometres east of the Subject Property, it serves as an example of rear-lot configurations facilitating an efficient use of deeper lot depths. Mr. Zelinka testified that he found no evidence of incompatibilities between the front and rear dwellings of that development or of that development as a whole being incompatible with its surrounding neighbourhood.

The intent of Section 3.2.3.10. is to introduce additional urban design criteria as a means of enhancing land use compatibility. The use of the term "should" in the text, as compared to a more directive term, is indicative of a policy serving more as an encouragement than as a requirement or out-right prohibition. In fact, neither rear-lot development, generally, nor rear-lot development specifically having a front-to-back relationship with existing homes is prohibited in the policies of the Official Plan. The Board finds, therefore, that the proposed semi-detached dwelling will not create an adverse impact as a consequence of its orientation to the existing single detached dwelling.

Based on all of the foregoing, the Board finds that variance no. 3 satisfies the official plan test set out in subsection 45(1).

Finally, given the import of the residential intensification policies introduced into the Official Plan through OPA 438, the Board would be remiss if it did not address Mr. Zelinka's evidence with respect to his interpretation of Section 3.2.3.

During Mr. Zelinka's cross-examination, he was asked by Ms Page whether this hearing represented the first time that Section 3.2.3 was being tested before the Municipal Board. He responded, "Yes, that's plausible." He was then asked whether the policy set out in the third paragraph of Section 3.2.3 was applicable, as a general principle, to every residential intensification project, regardless of the manner of application that such a project comes before the City. To that question, he responded that it would be unreasonable to apply that particular policy to every residential intensification project, adding that he interprets the policy of that paragraph to mean

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applicable only to those intensification projects arising through an official plan or zoning by-law amendment application. In his opinion, it would be unreasonable to apply that policy to a situation that does not involve a change of land use.

The Board finds no basis in the language of the policy set out in the third paragraph of Section 3.2.3. to sustain Mr. Zelinka's interpretation. He agreed with Ms Page that the three policies of Section 3.2.3. are disjunctive, that each stands on its own. On the face of the language and a plain reading, therefore, the Board finds that his opinion relies on reading intent into the language of the third paragraph.

Zoning By-law Test

Ms Debbert testified that the intent of the minimum frontage requirement for semi-detached dwellings is to provide for a sufficient frontage – or lot width – for the Subject Property to function adequately for that use. She also testified that a sufficient lot width maintains streetscapes by enabling a semi-detached dwelling to be sited with a front-yard setback consistent with that of the other dwellings on the street. In her opinion, variance no. 3 is not in keeping with the intent of the comprehensive zoning by-law because it will not facilitate the siting or positioning of the semi-detached dwelling in a suitable location on the Subject Property. Finally, Ms Debbert testified that a semi-detached dwelling is not compatible with the neighbourhood and surrounding land uses, noting that it is not in keeping with the character of the neighbourhood.

Mr. Zelinka, on the other hand, testified that a semi-detached dwelling is a permitted use. He testified that the 'flag' portion of the Subject Property maintains a generous width – almost two-and-a-half times wider than the required frontage – one easily sufficient to provide area in the front of each unit of the semi-detached dwelling to function as desired. He also emphasized that the on-site location of the semi-detached dwelling is permitted as-of-right, meaning that even if variance no. 3 was not required, Mr. Brotzel could construct a semi-detached dwelling in the exact same location on the Subject Property as is proposed in the development scheme before the Board. To this, Mr. Zelinka added that a single detached dwelling could be constructed on the Severed Lot in the same location as the proposed semi-detached dwelling. Any over-view into the rear yard of 54 Jacqueline from the proposed semi-detached dwelling, especially the

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southerly unit of that dwelling nearest the mutual side lot line, would therefore be identical to the over-view of a legal single detached dwelling.

On this test, the Board prefers the evidence of Mr. Zelinka for the following reasons.

First, by seeking to establish a relationship between the minimum lot frontage and the front-yard setback, Ms Debbert's opinion reads intent into the minimum lot frontage requirement of the comprehensive zoning by-law. Her own testimony was that the intent of the minimum lot frontage requirement is to provide for a lot of sufficient width for a semi-detached dwelling to function adequately. While she did not elaborate on what that means, by specifically mentioning 'function' and not 'location,' the Board infers it to mean the provision of a sufficiently wide lot to enable each unit of a semi-detached dwelling to maintain a driveway and walkway from the street to its front door, as well as side-yard access to a rear-yard amenity area – something that Mr. Zelinka specifically identified and addressed. The ability of a semi-detached dwelling to function adequately, in these particular circumstances, has nothing to do with how far back from the street it is positioned on the Subject Property.

Second, Ms Debbert's opinion is based on an erroneous assumption: that even with a sufficiently wide lot frontage, a semi-detached dwelling would be constructed in-line with the existing houses situated on either side of the Subject Property. That ignores the fact that the comprehensive zoning by-law does not speak in maximums on the matter of setbacks. There is no zoning provision mandating the proposed semi-detached dwelling to be located on the Subject Property or on the severed lot where Ms Debbert believes it should be located. In fact, even assuming a scenario where variance no. 3 was not required – that the frontage of the Severed Lot met the semi-detached dwelling frontage requirement – the semi-detached dwelling could be located as-of-right in exactly the same position on the Subject Property as is currently proposed. This was a point raised by Mr. Zelinka that was not impeached during his cross-examination.

Based on the foregoing, the Board finds that variance no. 3 meets the intent and purpose of the comprehensive zoning by-law.

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Minor Test and Desirable Test

Ms Debbert relied on the same evidence and reasoning in addressing the remaining legislative tests for a minor variance, and the Board will therefore respond to them collectively in this section.

Ms Debbert testified that a semi-detached dwelling on the Severed Lot is incompatible with adjacent uses and not in keeping with the character of the neighbourhood, and therefore the relief sought through variance no. 3 is not minor. For the same reason, she testified that the variance is not desirable for the appropriate development of the Subject Property: it creates an opportunity for a semi-detached dwelling to be constructed, and a semi-detached dwelling is not compatible in her view.

This was the sum of her evidence with respect to these two legislative tests.

For his part, and drawing on his earlier evidence, Mr. Zelinka testified that variance no. 3 is minor and desirable for the appropriate development of the Subject Property. He again referred to the generous width of the 'flag' portion, noting how it can easily accommodate a semi-detached dwelling. Moreover, he reiterated how the proposed semi-detached dwelling is sited directly and only behind the existing single-detached dwelling on the Subject Property, thereby preserving the view of the Thames River valley lands currently accessible from the rear yard of Ms Smith's and Ms Wilson's respective property.

For the following reasons, the Board prefers the evidence of Mr. Zelinka.

First, the Board finds that Ms Debbert has misapprehended and misapplied the tests. It comes to this finding based on the construct of her professional opinion, which may be characterized as thus: because a semi-detached dwelling is inappropriate, variance no. 3 does not satisfy the legislative tests. A semi-detached dwelling is, however, a permitted use under the zoning classification applying to the Subject Property. How a permitted use is incompatible with adjacent uses or not in keeping with the character of the neighbourhood is beyond the comprehension of this Panel. Indeed, if a semi-detached dwelling were incompatible, one would expect such a use to not be included on the list of permitted uses.

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Second, because Ms Debbert has misapprehended the tests, the Board finds that her evidence is unresponsive to those tests. Her evidence did not demonstrate how or why variance no. 3 is inappropriate for a use that is permitted; she did not explain the adverse consequence resulting from a reduced lot frontage. If her opinion evidence on these tests was applied literally, then any variance for a reduced lot frontage for a semi-detached dwelling – even one for a few inches – would not be minor. It strikes the Board that Ms Debbert has confused the nature of the variance – lot frontage as a function of dwelling type – with the nature of the proposed dwelling type.

Based on the foregoing, the Board finds that variance no. 3 is minor and desirable for the appropriate development of the Subject Property and Severed Lot.

Consent Criteria

Beginning with subsection 53(1) of the *Planning Act*, both Mr. Zelinka and Ms Debbert agreed that a plan of subdivision is not required. The Board accepts and relies on their shared opinion in making that finding.

Turning then to the criteria set out in Subsection 51(24), Mr. Zelinka walked the Board through each of the 13 criteria, noting for each whether it was applicable in the given circumstances or not. He testified that the proposed development scheme responds positively to matters of provincial interest enumerated in subsection 2 of the *Planning Act*, is not premature, and serves the public interest by making efficient use of serviced urban land. He reiterated his opinion that the scheme conforms to the Official Plan, and he testified that it conforms to the adjacent plan of subdivision.

On that latter point, Mr. Zelinka told the Board that the proposed scheme maintains a lotting pattern that is consistent with the existing lotting pattern. The Retained Lot mirrors the lotting pattern of adjacent and nearby properties, while the Severed Lot maintains the existing flag-shape orientation, albeit with a narrower 'pole.' In that regard, Mr. Zelinka emphasized that the proposed development scheme does not introduce a new or different lotting pattern into the neighbourhood.

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Finally, Mr. Zelinka confirmed that the proposed development scheme can be adequately serviced and testified to the suitability of the Subject Property for the proposed development scheme.

For her part, Ms Debbert only identified two criteria as matters of concern. The Board infers from her opinion that the other criteria are either satisfactorily addressed or not applicable in these circumstances.

The first criterion identified by Ms Debbert was subsection 51(24)(c): "[regard shall be had to] whether the proposed plan [development scheme] conforms to the official plan and adjacent plans of subdivision, if any." Ms Debbert testified that the development scheme does not conform to either. The Board has already rendered its findings with respect to conformity with the Official Plan and compatibility with the surrounding neighbourhood and adjacent land uses, and it is therefore unnecessary to revisit those matters in this section.

The second criterion identified by Ms Debbert was subsection 51(24)(f): "[regard shall be had to] the dimensions and shapes of the proposed lots." Ms Debbert testified that proper regard had not been shown to the dimensions (frontage) and shape of the Severed Lot.

The Subject Property is currently a flag-shaped lot. The proposed Severed Lot is also flag-shaped, albeit with a narrower 'pole.' Ms Debbert testified that a flag-shaped lot is not in keeping with the established lot pattern. On this point, the Board finds that a flag-shaped lot is already part and parcel of the established lot pattern. The Board is at a loss to understand how the same shape of lot that exists – and has existed harmoniously in the neighbourhood context for years and years – is not in keeping with the established lot pattern.

Ms Debbert also testified that the shape of the proposed Severed Lot is inappropriate for its proposed use, being a semi-detached dwelling. Again, the Board is at a loss to understand how the shape of the lot renders the proposed use inappropriate. The shape of the proposed lot is a shape that already exists and the proposed use is one that is permitted in both the Official Plan and the comprehensive zoning by-law. Theoretically, a semi-detached dwelling could be constructed as-of-right

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on the flag-shaped Subject Property were the existing single detached dwelling to be removed.

The only dimension that could be considered problematic from the City's perspective is the proposed frontage for the Severed Lot. The Board relies on its analysis above and on its analysis of variance no. 3 in finding that the dimensions and shape of the Severed Lot are sufficient for the adequate functioning of a semi-detached dwelling. Moreover, the Board finds that proper regard has been given to the criteria set out in subsection 51(24) of the *Planning Act*.

As a concluding remark with respect to both the minor variance and consent appeals, the Board would be remiss if it did not address the matter of a Council Resolution adopted October 4, 2010, directed to the Board advising that Council does not support the development scheme advanced by Mr. Brotzel. Notwithstanding that minor variance and consent matters are delegated to the Committee of Adjustment and the Consent Authority, respectively, Ms Page submitted that the Board is obligated to have regard to the position expressed by Council in that Resolution, pursuant to subsection 2.1 of the *Planning Act*. The Resolution is premised on a planning staff report to the Planning Committee, dated September 10, 2010.

The Board has carefully examined that planning staff report. It was not prepared by Ms Debbert; it was authored by another planner in the planning department and then signed by yet another planner. The only reference to the Official Plan policies engaged during the hearing was to Section 3.2.3.10 – the policy discouraging rear-lot development. Ms Debbert's testimony mirrors the content of the report with respect to that policy and to other planning conclusions as well. Regrettably, the conclusions set out in the report lack any meaningful substantiation or grounded analysis with respect to impact of the proposed scheme. Much is said about how the proposed scheme is different, but nothing is said about how or why its differences will trigger a deleterious land use impact.

There is an established body of jurisprudence with respect to subsection 2.1 of the *Planning Act*, which may be distilled, in part, to a pronouncement that this Board retains its independence when exercising its authority and responsibilities. The analysis of the City's evidence set out through the body of this Decision demonstrates that

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regard has been given to Council's position. On that foundation, the Board concludes that Council's position is not sustainable.

Disposition

Based on all of the foregoing, the Board ORDERS that the subsection 45(12) appeal is allowed and minor variance nos. 1, 2, and 3 are authorized. As well, the Board ORDERS that the subsection 53(14) appeal is allowed and provisional consent is granted subject to the conditions set out in Attachment "2" to this Decision.

This is the Order of the Board.

"James R. McKenzie"

JAMES R. MCKENZIE
VICE-CHAIR

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ATTACHMENT "1"

| | Retained Lot | | Severed Lot | |
|--------------|--------------------------|--------------------------|---|---|
| | Application | At Hearing | Application | Hearing |
| Frontage | 11.12 m | 11.62 m | 9.0 m | 8.5 m |
| Depth | 31.698 m | 36.6 m | North lot line: 31.698 m South lot line: 63.68 m | North lot line: 36.6 m South lot line: 63.68 m |
| Area | 352.4 m ² | 438.6 m ² | 1682.94 m ² | 1597.0 m ² |
| Proposed Use | Single detached dwelling | Single detached dwelling | Single detached dwelling | Semi-detached dwelling |

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ATTACHMENT "2"

CONDITIONS OF CONSENT

1. Pursuant to Section 53(41) of the *Planning Act*, if the applicant has not within a period of one year after notice was given of a decision to grant a provisional consent fulfilled all of the following conditions, the application shall be deemed to be refused.
 2. A certificate fee shall be paid at the London Consent Authority's office in the amount current at the time of the issuance of the Consent Authority's Certificate.
 3. For the purposes of satisfying any of the conditions of provisional approval herein contained, the Owner shall file with the Consent Authority, at a minimum of 3 working days in advance of final consent approval, a complete submission consisting of all required clearances, fees, draft of the proposed electronic transfer and final plans, and to advise the Consent Authority in writing how each of the conditions of provisional approval has been, or will be satisfied. The Owner acknowledges that, in the event that the final approval package does not include the complete information required by the Consent Authority, such submission will be returned to the Owner without detailed review by the City.
 4. The Owner shall submit 2 white prints of a reference plan of survey, showing the subject land which conforms with the application submitted and which shows the dimensions and areas of each part shown on the plan. The approval of the draft reference plan shall be obtained from the Consent Authority, and; 2 prints of the resultant deposited reference plan shall be received.
 5. Prior to issuance of certificate of consent, the Owner shall pay in full all financial obligations/encumbrances owing to the City on the said lands, including property taxes and local improvement charges.
 6. The Consent Certificate shall lapse after 6 months of issuance if the transaction has not been completed.
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