TORONTO

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REVIEW REQUEST ORDER

Review Issue Date: Wednesday, January 3, 2018

PROCEEDING COMMENCED UNDER subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant(s): JOHNNY CHOWDHURY, WOOD BULL LLP

Applicant: CARLOS SALAZAR

Property Address/Description: 598 SOUDAN AVE

Committee of Adjustment Case File Number: 17 105715 STE 22 MV (A0048/17TEY)

TLAB Case File Number: **17 168128 S45 22 TLAB**

Decision Order Date: Friday, October 20, 2017

DECISION DELIVERED BY Ian James Lord, Chair

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request under Rule 31 of the Toronto Local Appeal Body (the 'TLAB') *Rules of Practice and Procedure* for a review (the 'Review') of a Decision and Order of the TLAB issued October 20, 2017 (the 'Decision').

The Decision dismissed an appeal by Johnny Chowdhury from a decision of the Committee of Adjustment of the City of Toronto (the 'City') which itself dismissed an application for variance approvals applicable to 598 Soudan Avenue (the 'subject property').

The request for Review is made by the Party Johnny Chowdhury (the 'Requestor') through the submission of an affidavit sworn November 17, 2017.

In the first instance, there is no requirement under Rule 31 that the Requestor notify any other party or participant of the request for a Review. No such notification has occurred.

Rule 31.6, below, recites the scope of authority applicable to the TLAB in a review of the decision of a Member. It grants a discretion to apply a number of alternative remedies applicable to the Decision and the request, where circumstances warrant. These range from soliciting additional submissions from the Parties, causing a re-examination of the issues through to and including the ability to 'confirm, vary, suspend or cancel the order or decision'.

Rule 31.7 sets five grounds upon which a review may be requested. Their application, separately or combined, are subject to the qualification that the 'reasons and evidence provided by the requesting Party are compelling and demonstrate' the relevant grounds.

BACKGROUND

The Decision describes a 'work in progress' on the redevelopment of the subject property, including construction that had taken place under approved permits and revisions to the variances in the application that was before the Committee of Adjustment. The Requestor had retained a professional planning witness, Tyler Grinyer; the appeal to the TLAB was opposed by the City and at least one Participant and resident ratepayers association.

There are three reasons asserted by the Requestor for the review:

a) There are inaccurate key facts referenced in the Decision;
b) An error of law or fact was made which likely would have resulted in a different order or decision;
c) An additional corner house, relevant to the subject property within the accepted study area was missed.

These asserted reasons are most closely aligned with the language of Rule 31.7, subsections c) and d), identified below, despite the fact that only c) is cited by the Requestor.

It is necessary to examine the reasons in turn, both individually and collectively.

It is noted that each of the foregoing are further described as 'Dispute Points' related to specific extracts from the Decision of the Member.

It is perhaps worth stating that the grounds for a Review require something more than a 'dispute' over the decision result or application, interpretation or weight attributed to the evidence or some of it.

JURISDICTION

31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:

a) seek written submissions from the Parties on the issue raised in the request;

b) grant or direct a Motion to argue the issue raised in the request;

c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or

d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

a) acted outside of its jurisdiction;

b) violated the rules of natural justice and procedural fairness;

c) made an error of law or fact which would likely have resulted in a different order or decision;

d) been deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision; or

e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

31.8 Where the Local Appeal Body seeks written submissions from the Parties or grants or directs a Motion to argue a request for review the Local Appeal Body shall give the Parties procedural directions relating to the content, timing and form of any submissions, Motion materials or Hearing to be conducted.

CONSIDERATIONS AND COMMENTARY

In the first 'Dispute Point', the Requestor seeks from the evidentiary record to identify that there are example properties exceeding a specified floor space index ('FSI') measure, some of which are corner properties and one of which has an FSI of 1.32, significantly greater than that requested (.81) for the subject property.

The extract from the Decision, while it relates to FSI, comes in the penultimate paragraph of the Conclusions section. On a full reading, the extract is not tied to evidence related only to FSI numbers; rather it is one factor of a number canvased. Moreover, the Requestor's extract support's an earlier descriptive recitation of evidence with which the Requestor's own expert appears to have agreed: namely, that of the 'examples cited of increased FSI granted by the COA, none are on a corner lot like the subject'.

It is the responsibility of the witnesses to accurately assess and relay the evidence and to do so honestly, fully and with candor. In the evidence extracted, there is no finding by the Member and no suggestion from the Requestor at this stage that the Member's recitation of the cross examination of the Requestor's witness, as presented, was in error.

The Requestor amplified the submission by pointing to 'new evidence', namely an additional corner house within the planners study area that was 'missed,' but has an FSI of 1.32. It is patent that the responsibility to bring to the attention of the Member examples of properties supportive of an applicants' cause rests on the Appellant/Requestor and his advisors. Nothing is supplied as to who 'missed' this evidence and nothing can be presumed as to its influence on the Decision.

A request for Review is not an opportunity to either re-argue or challenge evidence recited in the absence of demonstrable and tangible error. Here, if there was an error or shortfall in the evidence, it did not stem from the Member.

Standing on its own, this Dispute Point does not show any inaccuracy in key facts attributable to the Member. It seeks to conjoin distinctly separate elements of the Decision and fails to rise to amount to an error of fact, demonstrable on the record, that is attributable to the Member.

In 'Dispute Point #2', the Requestor provides a sentence from the Decision, in its Conclusions section, where the Member notes acceptance, in argument, of a submission by counsel for the City that "the existing predominant built form governs when determining the prevailing character of the neighbourhood, for application of the (Official Plan tests".

The Requestor asserts that this acceptance references FSI as the sole measure of built form and that such a narrow construction of 'existing predominant built form' is inconsistent with decisions that allow increased FSI measures over the standard set in the by-law. Some eleven decisions, contained in Exhibit 7 to the TLAB Hearing, are attached to the Review request.

On the same theme, the Requestor asserts that no specific reasons were given as to why the planners' evidence was rejected, apart from the assessment process as being 'a subjective decision'.

I have examined this ground closely.

In the paragraph of the extract and all those in the Conclusions section immediately preceding the extract, there is no reference to FSI. An FSI reference in the paragraph that follows relates to a specific property, not an area assessment of FSI, either analytically or subjectively. I am not prepared to read in the narrow definition proposed.

I have examined the 11 Committee decisions referenced. Four are for the same property, two others do not involve FSI relief and of the balance, while engaging FSI relief, none are as large as that which was the subject of the appeal. Moreover none provide any commentary on the role that FSI played in the decision.

It is clear that the policy test in the Official Plan is instructive of whether the application meets its general intent and purpose. That test is a built form that 'respects and reinforces the existing built form of the neighbourhood'. A reading of the Decision in its entirety makes it clear that built form, measured by lot characteristics, 'fit', onstruction to date, FSI and a variety of applied criteria, were the reference points.

It is on this diverse spectrum of considerations that the Decision finds the statutory test of conformity with the intent and purpose of the Official Plan is not met. I find that there is sufficient identification of findings on this variety of built form and character assessment that those references amount to the reasons why the planners evidence was not preferred.

The third 'Dispute Point' is identified as a statement in the Decision that appears more problematic: "Its projected size, especially the FSI, on this specific lot removes it from the category of predominant built form."

Taken in isolation, the reader could be led to the suggestion that the determination of OP conformity turned on the projected FSI of the application.

That aspect, however, is not what the Requestor asserts where it is followed with the statement: "There is no specific by-law holding a corner lot to a different standard only exception of fla(n)king street setback which practically do not apply to this subject property."

The Members reasons do not discuss differing zoning by-law standards for corner lots. That aspect appears to be entirely the construct of the Requestor; it does not appear in the reasons as a support pillar for the Decision. It is true that the Member concludes her reasons with the finding that "the FSI increase is too great on this corner lot to permit this goal (of Provincial Policy) to be met."

That aspect of the Conclusion has to be read in the context of the earlier findings: namely,

"…changes from the original permit would allow a very different structure. As this proposal was built and added to physically and conceptually, it began to fail to meet the tests of complying with the general intent and purpose of the official plan and the zoning by-laws. It becomes less desirable for the appropriate development of the narrow plot of land on which it sits. It loses the "fit" with the surrounding neighbourhood. This is one of the most basic conceptions of what the general intent of the Official Plan neighbourhood designation is, and perhaps the most subjective."

I find that the Members reasons appropriately took into account the relevant criteria to assess Official Plan conformity, and found the application wanting. The deficiencies in scale, massing and built form, all reflected in the FSI increase sought, was found to simply not fit on the particular lot in a manner determined compliant with the prevailing character of the area.

That determination does not appear to have any foundation in regulations affecting flanking streets. The Decision, with reference to: 'especially FSI' and 'the FSI increase is too great', can reasonably be attributed to a specific, composite, built form character reference measure of height, massing and scale on the subject site, rather than a numerical measure attributed to or built upon an area standard, with which it did not comply. There appears to be no evidence of the latter approach referenced in the Decision.

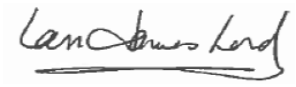
In my view, it is simply too much of a reach to parse some words from the Decision and divorce them from their context. If the concern for the undue influence of one performance standard were pervasive throughout, rather than arriving through disjointed inference, there might be a basis to take the analysis and review a step further. I do not find that theme in the Decision.

In the result, I find no error of law or fact which would likely have resulted in a different order or decision. I find that the Member was not deprived of any new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision.

I find that the Review request in its reasons and evidence are not compelling and do not demonstrate grounds where further action is warranted.

DECISION AND ORDER

The Decision and Order issued Friday, October 20, 2017 is confirmed.

X 

Ian Lord

Chair, Toronto Local Appeal Body

Signed by: Ian Lord