Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Thursday, March 29, 2018

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): RHONDA WISE

Applicant: STEPHEN LEBLANC

Property Address/Description: 1912 QUEEN ST E

Committee of Adjustment Case File Number: 17 106448 STE 32 MV (A0059/17TEY)

TLAB Case File Number: **17 178838 S45 32 TLAB**

Decision Order Date: Monday, January 15, 2018

DECISION DELIVERED BY Ian James Lord, Chair

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

In a decision issued January 15, 2018 (the 'Decision'), the Toronto Local Appeal Body (the 'TLAB') issued a decision refusing three variances sought from the City of Toronto ('City') zoning by-law 438-86. The Applicant Party requested a review (the 'Review') of the Decision in a timely manner within the limitation period; however, the Applicant was directed, under Rule 31.3, to put the request into proper form.

The affidavit of Stephen Leblanc, sworn February 26, 2018 (the 'Request'), constitutes all the materials filed in support of the Review. There were no attachments.

In response to a City enquiry, a response to the Request was required by March 6, 2018. Timely written submissions were received from legal counsel for the City by the TLAB, undated (the 'City Submissions'). While the City Submissions contained at least one reference to an Exhibit filed in the Hearing resulting in the Decision, there were no attachments nor a sworn affidavit component to the City Submissions.

There was no response to the City Submissions.

Together, the Decision, the Request and the City Submissions formed the basis for this Review.

The obligation in a request for a review of a TLAB decision is set out in Rule 31.4. The listed requirements are applicable to the requesting Party. That subsection of the Rule provides as follows:

"31.4 A Party requesting a review shall do so in writing by way an Affidavit which provides:

a) the reasons for the request;

b) the grounds for the request;

c) any new evidence supporting the request; and

d) any applicable Rules or law supporting the request."

It is noted that the Request does not qualify or assert clause c), nor under clause d) does it expressly reference any applicable Rule, administrative or judicial case law reference, or statutory provision. Despite this, the Review must be conducted and operate under the TLAB Rules and applicable law.

Similarly, the City Submissions are confined to the Request and the Decision alone, with the added submission that planning opinions contained within the Request that are those of the author are "either inadmissible or cannot be given comparable weight to the opinions provided by qualified professionals at the hearing of this matter."

On this latter point I must agree. A Review is not the opportunity to retry the Decision but rather to establish a proper basis warranting any of the relief options that a Review can offer. The Request offered no qualifications or professional claims of the deponent; any offered opinion contained in the Request contrary to the findings on the evidence as recited by the Member can be afforded little weight.

It is the reasons in support of the Request that warrant consideration as to whether they demonstrate appropriate grounds for the Review.

By the same token, commentaries that amount to mere wrote denials, as found throughout the City Submissions, are not that helpful in assessing the veracity and substance of the Request or its reasons in support.

The obligations and authority for direction in the consideration and resolution of the Review are set out, below, under Jurisdiction.

BACKGROUND

The Hearing of this matter took place on December 18, 2017. Two professional witnesses were qualified and heard from: Douglas Dorsey, a registered architect was qualified to give opinion evidence on architecture and urban design matters for the Applicant; Jason Tsang, a staff planner was qualified to provide land use planning opinion evidence for the City. The Appellant, Rhonda Wise also provided lay citizen evidence as the owner.

The Decision presents a brief but thorough synopsis of the evidence and opinion of each witness. It identified, as appears to be the substance of much of the Decision, that: "the key issue was the setback from the rear property line. Specifically, the issue related to the interpretation and application of the Urban Design Guidelines for the area as they relate to the setback."

Taken together, these elements colloquially and directly raise the question of the adequacy of building separation distances.

The Request, paragraph 2, disputes the above quoted definition of the issue, terming it a misunderstanding of a key piece of the evidence critical to the outcome. Namely, the Request suggests that the issue should have been framed as to whether the proposal (and associated necessary variances) 'represented the best design solution with respect to the impacts on the adjacent property'. I group these descriptions of the disputed issue as: "**Review Ground 1 (Setback**)".

A parallel representation in the Request is to the effect that the Member misunderstood, misapprehended or incorrectly made reference to testing impact considerations on property to the west, as distinct from property to the north (my emphasis). I consider this allegation as: "**Review Ground 2 (Impact)**".

A further ground is set out in the Request as being a misreading and misapplication of: the applicable 'Urban Design Guidelines' ('UDG'; Zoning By-law 438-86; the Official Plan direction of the City; Official Plan Amendment 151; and site specific Zoning By-law 607-2013. I call this: "**Review Ground 3 (Statutory Interpretation)**".

It is clear that a fundamental misdirection as to the matters in issue can result in a loss of jurisdiction and can amount to a failure to provide natural justice (alleged in Review Ground 1 (Setback)).

An error of law or fact which likely would have resulted in a different decision can warrant Review and correction (alleged in Review Ground 2 (Impact)).

As well, the failure to correctly apply proper principles of statutory interpretation and construction can amount to an error of law (alleged in Review Ground 3 (Statutory Interpretation)).

It is instructive to the conduct of the Review that the Request asserts none of the following:

a). lack of procedural fairness;

b). new evidence;

c). false or misleading evidence arising after the hearing.

JURISDICTION

The following Rules apply on a request for review of a decision of the TLAB:

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

The Member had before her on appeal three variances, all sought from By-law 438-86. Two of these dealt with parking.

There were two Parties, the Applicant and the City. It was noted that: "the City did not take issue with the parking variances at the hearing."

This left the dispute over the sole remaining variance framed by the Zoning Examiner as follows:

"1. Section 8(3) Part II 4(A), By -law 438-86

The minimum required building setback from a lot in a residential or park district is 7.5 m.

The altered mixed-use building will be located 5.33 m to a lot in a residential or park district."

I accept that whether framed as a setback from the rear property line or a setback from a property line between zone districts, the matter in issue was the aspect of permitting a reduced building setback from a required standard of 7.5 m to the proposal, at 5.33 m.

The proposal described in the Decision consisted of a complex of building form, three storeys in heights running north from the Queen Street property line with specific design features. Residential properties in a different Official Plan designation and zone category lie to the north.

From establishing that the relief requested pertained to the building setback, the tribunal set out on a journey to ascertain the relative merits and demerits of a reduced building set back. In so doing, it must weigh the relative merits expressed through the evidence as to facts, opinions and applicable law and policy. Ultimately, the decision is discretionary. It must trace, in a replicable route of applied relevant considerations and interpretations, applicable law and policy.

Review Ground 1 (Setback).

The Request, at paragraph 13 recites what are claimed to be manifest errors of fact and law which, if avoided, would have led to a different result - and thereby denied natural justice to the Applicants who were unsuccessful in the Decision. The 'errors' asserted in the main (a-k) involve a challenge to the panels' reasoning, interpretation of the factual application and its implications and to the Members' application of law and policy. As such, there are in that list, aspects of all three of the 'Grounds'.

It is necessary to examine the Members' findings of fact and law and then consider whether they have been adequately challenged in a manner that is compelling and demonstrates any of the grounds above alleged, to warrant intervention.

The Member made the following observations and findings:

1. The architect considered the proposal 'superior' to as-of-right zoning permission which would have allowed a building closer to the west property line (p.3 of 13);
2. The architect distinguished between the 7.5 m setback from a residential district in the zoning by-law and the 7.5 m setback established in the Urban Design Guidelines opining to the effect that the latter did not 'require' a building setback (p.4 of 13);
3. The architect considered that leaving 'space' to the west while pushing the addition somewhat north (into the setback) was a 'better transition' to the 'west' (p.4 of 13);
4. The architect asserted the proposed design was more respectful to the north in scale, overview (fewer windows), views and light and that it was the role of the angular plane and its construction that established this relationship of no impact (p.5 of 13);
5. The City planner recited that the Official Plan requires that Mixed-Use buildings create a sufficient transition to adjacent Neighbourhood designated properties (in this case to the north) and that the proposal at 5.33 m was 'sub-standard', 'inadequate' and insufficient. Further, he stated that the required "Avenue Studies", in section 2.2.3 1 of the Official Plan and elsewhere, needed to address: 'ii) appropriate massing, scale, siting and organization of buildings; iii) appropriate scale transitions to adjacent areas' (p.6, 8 and 9 of 13);
6. On November 27, 2012, Council adopted Urban Design Guidelines ('UDG'),that cover the subject area (p.8 of 13);
7. Official Plan Amendment 151 (OPA 151) was enacted thereafter and applies the UDG as an 'implementation tool' 'to ensure appropriate building scale in relation to transition between new development and adjacent neighbourhoods'; it included the policy direction in section 2.4 e) to'identify setbacks, stepbacks, height and built form to mass development appropriately within the local context' (p.6, 7, 8, 9 and 12 of 13);
8. Zoning By-law 438- 86 applies as per the Zoning Examiner, above. (p.2,7 of 13)
9. The planner stated and the Member accepted that site specific Zoning 607-2013 By-law enacted after OPA 151, applies to support the 2012 Urban Design Guidelines as mandated by OPA 151 and 'does not deal with the rear setback issue as the base By-law 438-86 already included a 7.5 m setback'(p.7,12 of 13);
10. The planner asserted that the 'rear yard setback' was always intended to create a transition zone between any development on Queen Street and the residential properties to the north and south.'(p. 9 of 13);
11. In the planners opinion, the 7.5 m setback is intended to be a transition zone and the proposal does not meet any of the four tests necessary to support the variance (p. 10 of 13);
12. The Member quoted from section 6.3 of the UDG: "Buildings will not exceed a 45 degree angular plane beginning at a height of 10.5 m measured at a setback from the rear lot line." She accepted this as "a policy for a building setback and not simply a point from which to measure the 10.5 m height for the 45 degree angular plane." Namely, that "the building mass is intended to

be contained within the diagram (reproduced at paragraph 9 of the Request)" (p.11,12 of 13);

13. The Member found while the architect was of the opinion that the proposal 'represents a better design solution in relation to the property to the west (my underlining)…but that "the Official Plan policies regarding transition are, however, directed to areas such as Neighbourhoods (in this case located to the north) that are of a different intensity and scale"; that (are located) in an area to be protected and that "design attributes do not outweigh the relevant policy context". (p. 12 of 13).
14. The Member agreed with the planner's opinion on the four tests that the proposal failed for proximity to the residential Neighbourhood and would not be in keeping with the character of the area.

In response to paragraph 13 of the Request, I find that the matter of the role of the 7.5 m setback provision was appropriately identified and discussed.

The issue of directional emphasis or accuracy is discussed below under the second Ground.

While there is interest whether the presence of the lane may somehow factor into the appreciation of the actual, real, and true setback, this was not raised by the Request. Moreover, none of the materials identified the geography or relevance of the lane in relation to zoning or Official Plan designation lines as between the Mixed Use 'Avenues' area and the Neighbourhood designation to the north.

The Applicant raised the prospect that the wording of the setback provision in By-law 438-89 differed from that in the Urban Design Guidelines and distinguished it on the basis of the architects' opinion that the latter was never intended to function as a transition policy directive. The evidence of the planner, according to the Member, was to the contrary.

I have no reason to doubt the correctness of the Members finding that on the whole of the policy and regulatory regime, a transition was intended to be provided between designations; a space setback of 7.5 m was lawfully at issue and the proposal wished that reduced.

I do not feel that a sufficient case was made out in the Request that the disagreement as to the intention or purpose of the setback language or the point of measurement of the 7.5 m setback, made a material difference.

There can be no doubt from the extensive public record, that the transition between Mixed Use Areas, especially those on designated 'Avenues', to abutting Neighbourhoods, was very much the concern of very recent Official Plan policy and new implementing zone provisions. With that backdrop, I can see no reason, as well, why a provision in the existing zoning cannot be harnessed as an implementation tool to the same purpose or effect, without the necessity of re-enactment.

The zoning setback was sought to be varied; its purpose was in issue and the appropriateness of the transition distance and its purposes appears to have been identified and fully vetted.

The Member heard the evidence, the design preference merits of the architect and the contrary apprehension of a three storey building proximate to the side and rear yard of premises in a Neighbourhood designation, with parking closer. While it was clearly argued that the scale and massing of the proposal and the existing residential buildings were equal, it was for the Member hearing that evidence to make the evaluation and adjudicate on its implications. That is a judgment matter and not a test for a Review; a motion or rehearing should not be directed for the simple expediency of seeing whether a different Member might come to a different conclusion.

In the reasons provided, I find no misdirection of purpose or error of law on the face of the record that might warrant the need for a reconsideration. I see no denial of natural justice: opposing opinion evidence was tendered and supported and the Member was free to choose between the two. In so doing, a full exposition of the relevant considerations was elicited and a decision made thereon. I see no misunderstanding of the issue, no misreading of relevant documentation and no mischaracterization of the matters in issue.

Review Ground 2 (Impact)

The Review quite properly raises the concern that the decision turned on a misunderstanding of the design rationale for the placement on the lot of the project/addition: namely, the alleged concern for the preservation of privacy of the adjacent Mixed Use building rather than the provision of an adequate transition to the adjacent Neighbourhood, to the north.

Review paragraphs 13 (l, m, n) refer to the matter of impact and building constraints.

In aid of that assertion of misunderstanding and misdirection, the deponent points out that there is no existing building to the west of the proposed development, other than a ‘windowless one-storey garage.’

The deponent then asserts (at paragraph 6) that: “Mr. Dorsey testified that the requested variance would permit a better transition to the adjacent residential neighbourhood to the north.” (stated and underlined in the Request but not in the Decision)

It is certainly possible that a directional reference can get confused. Whether or not that is the case, it is clear from a reading of the Decision that, throughout, the Member was dealing with the issue of an appropriate transition space between a ‘Mixed Use’ and a ‘Neighbourhoods’ Official Plan designation. That focus was repeated on several occasions, some of which are listed, above.

The Member recited the evidence of the architect; that overview was not challenged in the Request. It displays a concern by the architect for design decisions to provide 'space' to the west in an apparent consideration for the development of that parcel, (but whether in its existing or a redeveloped state, it is not clear). The parcel to the west is in a Mixed Use designation and zone permission like the subject property; the policy support for design consideration and 'transition' is not as strong within a similar designation to the subject property.

Privacy and impact considerations were clearly in evidence in both directions from both professional witnesses.

If there is a descriptive directional error in one or more references - and none were specifically identified by either the Request or the City Submissions - I do not see this as anything more significant than a potential clerical error. A careful reading of the Members' references demonstrates that she maintained a clear track of reasoning and reached her own conclusion on the dispute as to design preference, perception of the weight of impact considerations and policy protection priority.

Review Ground 3 (Statutory Interpretation)

The Request places considerable emphasis on the evidence of the architect that the 7.5 m setback reference in the Urban Design Guidelines is functional only to the drawing of the angular plane, and its implications. Namely, that it is merely a point of measurement to discern the start of the angular plan and its projection from an elevation of 10.5 m, designed to limit the impact of the height of the project.

I have reviewed carefully the Members identification and treatment, prioritization, reading, interpretation and application of the documentary extracts available from the materials presented.

I am entirely satisfied that the Member properly instructed herself as to the distinctions between policy and regulatory language and appropriately applied each.

In the face of site specific language prioritizing the need for transition appropriateness between designations, a focus on the adequacy of support for varying the regulatory separator of 7.5 m is fully understandable. Having two disparate opinions to resolve in that contest, where the policy support is strong, fresh, clear, applicable and relevant, it is the job of the tribunal and the Member to apply and resolve the legislative and policy intent.

The determination not to vary the setback in the face of that direction was a matter for the discretionary judgment of the Member. Again, in the absence of any clear misdirection as to applicable policy and the construction of language, the Member was obliged to form a decision on whether the intent and purpose of the Official Plan(s) and the Zoning By-law were met. This was done, as well, within the proper statutory context including the two additional tests of whether the relief was minor and desirable.

I find no misdirection in the characterization of the 7.5 m setback or whether it arises under zoning or the Urban Design Guidelines. A setback is in place in law.

A finding on policy application is for the Member hearing the matter and not for the review authority, in the absence of clear mistake, misinformation or malfeasance.

There was no need to adjudicate on the establishment of 7.5 m as the proper separation distance from a project such as that which was proposed. Rather, the deliberation was whether a reduction from the setback standard set under zoning should be supported. It is a building setback the reduction of which had to be justified in the circumstance of relevant policy direction calling for a transition zone and merit.

Contrary to the submission in paragraph 14 of the Request, nothing in the Decision or the materials provided or supported a consideration of 'fire regulations' as they might play a role in project design. I do not see that reference as a relevant consideration in the Review.

In summary, I am content that the grounds of the request do not raise compelling matters that warrant the requirement of further submissions, a direction for a Motion to consider the issue or a rehearing on the merits.

I belief the Decision traces a replicable course of relevant considerations that placed the Member in the position to properly adjudicate the matter on its merits. I see no error of law or statutory interpretation, or any excess of jurisdiction or denial of natural justice.

The standard for relief on a Review request requires reasons that 'are compelling and demonstrate grounds' listed in Rule 31.7, above.

I find that the reasons raised in the request do not demonstrate any of those grounds for the reasons above stated.

DIRECTION (IF APPLICABLE)

On the basis of the foregoing, no direction under Rule 31.6 is warranted.

DECISION AND ORDER

The Review Request is denied.

The Decision dated January 15, 2018 is confirmed.

X 

Ian James Lord
Chair, Toronto Local Appeal Body
Signed by: Ian Lord