

REVIEW REQUEST ORDER

Review Issue Date: Tuesday, October 02, 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): DEAN JASON PODOLSKY

Applicant: MARIN ZABZUNI

Property Address/Description: 629 RUSHTON RD

Committee of Adjustment Case File Number: 17 244120 STE 21 MV

TLAB Case File Number: **18 137538 S45 21 TLAB**

Decision Order Date: Thursday, August 09, 2018

DECISION DELIVERED BY LAURIE MCPHERSON

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (the Review) under Rule 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB) made by Dean Podolsky, a Party and Applicant to the above noted matter (Requestor).

The Request was made by affidavit sworn September 14, 2018. There were four attachments to the affidavit- a Letter outlining the reasons for the Request; Notice of Decision for Committee of Adjustment (Committee) Minor Variance - 616 Rushton Road; Notice of Decision for Committee Minor Variance - 614 Rushton Road; and, Decision of the Ontario Municipal Board (OMB), 592 Rushton Road.

The Request relates to the decision of the TLAB by Member Ian Lord issued August 17, 2018 (Decision).

A response to the Review was received on September 21, 2018 on behalf of 15 people who were Parties/Participants to the Hearing, although not all attended (Response Submission). In addition, the City of Toronto (City) was a Party however no response to the Request was received.

The Decision, the Request and the Response Submission formed the basis of this Review.

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Under Rule 31.4 of the TLAB Rules of Practice and Procedure, a Party requesting a review shall do so in writing by way of 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 refer to any new evidence supporting the request that was not available at the time of the Hearing or an applicable Rule or law supporting the request. The reasons for the Request as summarized in the letter attached as Schedule ‘A’ to the affidavit are below:

- “1. Neighbours’ emotional appeals and unsupported opinions was favoured to professional evidence and expert opinion;
- 2. The decision did not, in our view apply precedent decisions from the OMB and COA for the neighbourhood, which have recognized that the neighbourhood character has evolved to allow for redevelopment consistent with the proposal that was the subject matter of the hearing; and
- 3. The City of Toronto came in full support of our proposal which we were able to obtain after providing for reductions and amendments to our proposed plans that the City deemed appropriate and consistent with the planning objectives for the neighbourhood.”

Under Rule 31.7, the Requestor must demonstrate that the reasons and evidence provided by the requesting Party are compelling and demonstrate one of the grounds set out under Jurisdiction below, including an error of fact or law that likely would have resulted in a different decision which would appear to be the grounds that the Requestor is relying upon.

The letter indicates that the Requestor is “prepared to further compromise our plans” and “propose that a fair and just decision that could be determined on a review would be to withdraw the request for added length, thereby leaving permitted length at 17.0, but allow a modest increase over the currently approved GFA. This would take the GFA down to 0.619 and 288.1 m²”.

As previously noted by the TLAB (Review Request Order 1912 Queen St E – March 29, 2018), 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. These obligations and authority are set out under Jurisdiction, below.

BACKGROUND

The hearing on this matter took place on August 9, 2018. The appeal was initiated by the Applicant in response to the Committee’s decision to refuse the Applicant’s request for minor variances. A number of modifications to the application were made during and subsequent to the Committee decision. Three Parties appeared including the Applicant/Appellant, the City and Mr. B Kalvin. The Applicant called one witness, Ms. A.

Kosloski, qualified to give professional expert testimony as a Registered Professional Planner. The City and Mr. Calvin called no witnesses but participated in questioning, clarifications and submissions. Two Participants were heard as well as a City Councillor, Mr. Colle, who was not the ward Councillor. The City and the Appellant reached a settlement based on revised variances and additional conditions. The decision stated that Mr. Calvin, the Participants who spoke, and Mr. Colle did not support the settlement. Mr. Calvin and the Participants opposed several of the variances, notably to building length relief, the requested floor space index requested and the platform or deck size permitted above the second storey level. In addition, Mr. Calvin raised an issue regarding a deck size increase which does not affect the matters in the Request.

The Decision summarized the evidence of Ms. Kosloski, called on behalf of the Appellant, and noted the variances where there was no issue. The Decision summarized the concerns of the Participants and Mr. Colle. The Decision, under the Analysis, Findings and Reasons Section noted that:

“A settlement between two of the Parties is to be given great weight – all the more so when supported by the only professional land use planning evidence that was heard. That said, there are elements of the evidence and circumstances here that remain of concern”.

The Decision continues to note areas where the Member either agreed or disagreed with the evidence provided on each variance and the reasons why. As noted in the Decision, the Member was not satisfied that the proposed building length variance and the proposed gfa/fsi variance met the required tests particularly with regard to Official Plan considerations.

The Member allowed the appeal in part. The member refused the building length variance and reduced the fsi from 0.66 to 0.55. A number of conditions were imposed including standard conditions and others related to the setback for an accessory garage and added restrictions on platforms and decks. The Applicant was given eight months from the date of decision to provide a revised site plan consistent with the decision after which the appeal would be dismissed and the variances refused.

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

Review Ground 1 – Evidence Gathering and Diligence

The Request indicates that the owners retained a professional planner and lawyer to represent them at the TLAB hearing and that both reviewed the plans and agreed that the owner had a strong case. Further, the Request claims that the opposing Parties, mostly neighbours in the area who are resistant to change, did not offer professional evidence or supported opinions but instead used emotional conjecture.

I would characterize this as an allegation of error of fact under 31.7 c). The Request indicates that there was support from over 10 neighbours, and that those who came out against the project do not represent the majority of the residents in the neighbourhood.

It is noted that the original application was refused by the Committee. The Member heard the evidence of the professional planner and the opposing evidence of the residents. The Decision details the evidence of the professional planner, and notes where the Member questioned the witness. Specifically with regard to a question of the witness related to fsi/gfa, the Member noted: “When asked specifically on the latter, given its intent to permit density to vary with lot size, as to how exceeding that formula on the subject property met the intent and purpose of the by-law, no replicable answer was discernable” (p. 9). With respect to building length, the Decision indicates that there was no response to the concerns of the neighbours regarding the increase in building depth in the form of reply evidence (p.15).

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It is further noted that the language in the Official Plan to “respect and reinforce the existing physical character of the neighbourhood” and “massing of nearby residential properties” are words of common understanding for which it is not always necessary to receive professional or technical opinion evidence.

The Member’s evaluation of the evidence and its implications is a judgment matter and not a test for a review. I do not find this ground compelling. The decision of the TLAB is not based on the opinion of the majority of residents in an area. The decision is based on the evidence in the context of relevant law.

Review Ground 2 – OMB and Committee Precedents for the Rushton Area

The Request indicates that the Requestor researched previous OMB and Committee decisions to see what could be expected as acceptable development. The Request identifies the decision at 592 Rushton was granted an fsi of 0.74 and a gfa of 286.1 m² with a rear detached garage. The Requestor believes that the decision to permit 592 Rushton to build a larger house on a smaller lot is patently unfair and unreasonable.

Similar to the OMB, the TLAB is not bound under the judicial doctrine of *stare decisis* or precedent. Each application is considered on its own merits based on the specifics of the proposal and its context

The Decision demonstrates that the Member considered the decision at 592 Rushton Road. In relation to Ms. Kosloski’s evidence in this regard, the Member indicated, “She stated that 592 Rushton Road had a lot depth of approximately 5 m shorter than the subject property. No other statistics were stated to adjudge comparability” (p.9). The Decision goes on to state “the one OMB precedent was not compelling” (p.18).

The Request states that the reasoning in the Decision does not explain specifically why the lot was subject to special restrictions. It is up to the Member adjudicating the case to determine the relevance of previous decisions. The Request includes two additional cases to strengthen the argument for more GFA. The Review process is not an opportunity to “strengthen” a case or provide additional information that was available at the time of the Hearing. As I result I do not find this reason an error of fact or law nor is it compelling.

Review Ground 3 – City of Toronto Support

The Request notes that the Applicant spent considerable time and resources to make adjustments to eliminate some of the variances and reduce others. The City became a Party to the Hearing and the Requestor and the City worked together to come to an agreement resulting in the City attending the Hearing in full support of the plans. The Request notes that the project had the full support of the City and the Councillor.

The TLAB is an independent quasi-judicial tribunal established through the City of Toronto Municipal Code, City of Toronto Act and other provincial legislation. It provides an independent public forum for the adjudication of land-use disputes. Hearings are conducted in an impartial manner. While the City of Toronto is an important Party in any TLAB proceeding, the City’s position does not outweigh the position of other Parties. It

is noted that the City did not bring forward a witness to provide evidence in support with settlement. The Member did not accept the evidence of the Applicant's planner and preferred the evidence of the neighbours on the issue of building length and mass. The neighbours' were not party to the settlement and therefore were not bound by it. I do not find this ground compelling.

Response to the Request

The Response submission by various Parties and Participants opposes the Request. The submission references Section 31 of the TLAB's Rules and states that there is nothing in the Appellant's submission that identifies or satisfies any of the criteria governing a review of a TLAB decision under Rule 31.7.

Summary

I am not satisfied that the reasons of the Requestor raise compelling matters which warrant the requirement for further submissions, a direction for a Motion to consider the issue of a rehearing on the merits. I do not find an error of fact, law or process which, if changed, would have resulted in a different decision. The Review process is not an opportunity for a party to re-argue a case or present new evidence. I find that the Member provided clear reasoning in reaching his conclusion. The Member found that two of the proposed variances did not meet the intent of the Official Plan as well as other applicable tests. TLAB decisions are a matter of discretionary judgment of the Member.

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

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 August 17, 2018 is confirmed.

X 

Laurie McPherson
Panel Chair, Toronto Local Appeal Body