Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Friday, September 14, 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): NARGES EHSANI-ARMAKI

Applicant: SHAKERI ALI

Property Address/Description: 476 BRIAR HILL AVE

Committee of Adjustment Case File Number: 17 260559 NNY 16 MV (A0997/17NY)

TLAB Case File Number: **18 111613 S45 16 TLAB**

Decision Order Date: Thursday, July 26, 2018

DECISION DELIVERED BY Ian Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

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

The Request was made by affidavit sworn August 16, 2018.

The Request relates to the decision of the TLAB by Member S. Gopikrishna issued July 26 2018 (Decision).

There is no indication that the Request was served on all the other Parties to the proceeding, heard May 31, 2018.

Service is a condition precedent to a validly constituted Request.

I have reviewed the material canvassed in the Request and concluded, for the reasons set out below, that it is without merit sufficient to warrant relief that might affect another Party or to hear submissions on service or the lack thereof.

As such, I have not made further inquiry into the adequacy of service as I do not find it appropriate to engage the Parties further in the matter through any of the relief vehicles available under Rule 31.6, below recited.

BACKGROUND

In accordance with the Rules, the Decision followed a full day of evidence involving some eleven witnesses and closing argument:

Andrew Ferancik, Applicant/Appellants/owner's land use planner
Christina Cali, Participant, 458 Briar Hill
Michael Arpin, unregistered, 462 Briar Hill
Katharine Dalton, Participant, 488 Briar Hill
Michael Ryval, Participant, 416 Briar Hill
Leslie Demson, Participant, 459 Briar Hill
Judith Tinning, Participant, 469 Briar Hill
Caroline Kernohan, Participant, 471 Briar Hill
Margaret Bennet-Alder, Participant, 490 Briar Hill
Roger Cummins, Participant
Warren Clark, Party, 465 Briar Hill, Party and Requestor.

David McKinnon, a listed Party is not recorded as having participated. The City of Toronto (City) played no role in the Hearing and no witnesses appeared under summons.

For the purposes of the Request, the proceeding itself was convened in full compliance with the TLAB Rules, including a lengthy Notice and preparation period, very extensive filings and associated variances all to construct a new detached dwelling, with garage (Proposal). An intervening Motion request by the Appellant to permit the filing of new material was granted by the Member.

Nothing in this Review turns on any allegation of procedural or other improprieties antecedent to the Hearing.

The Decision by the Member encompasses 19 pages of text, with additional attachments.

The Requestor acknowledges that the Decision is thorough in detail. It is consistent in format to the standard template of the TLAB. It acknowledged, under Jurisdiction, the statutory, policy and applicable tests engaged by the Proposal.

The Proponent correctly details a variety of syntax and other spelling errors in a lengthy list of "Corrigenda of Errors" ending with a reference, at page 16 of the Decision.

I will direct the Supervisor in conjunction with Member Gopikrishna as required, to consider issuing an errata sheet or, if necessary, a revised and corrected decision exercising jurisdiction under the Rules for minor revisions.

On behalf of the TLAB, I wish to thank the Requestor for detailing these aspects; they should not have occurred. A more careful proofing system may have assisted in their avoidance.

I am content that none of the identified typographical errors affected or influenced the substance of the Decision. I have examined these from the perspective of the Rule as to whether all or any of them "would likely have resulted in a different order or decision". I find them not to be in that category.

However, in addition to typographical errors, the Requestor identified "Errors of a Substantive Nature (including misquotations and omissions)" and provided an "Addendum to the Affidavit" that warrant further consideration.

It is these latter two sources, claiming a 'lack of fidelity' in the reasons and 'serious discrepancies' between the 'Participants Statements and the Panel Member's representation of those statements', that require being addressed under the applicable Rule, below.

JURISDICTION

Below are the TLAB Rules applicable to a request for review:

> "**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.
>
> **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

As indicated, there are two substantive components to the Request.

First, the 'errors of a substantive nature (including misquotations and omissions'.

Second, the 'need for clarification on points of law and obiter remarks (Addendum)'.

I address each of these categories in turn. It is noted that they are raised with reference to Rule 31.4 a) and b), above, as 'reasons' and 'grounds', respectively.

It is instructive that no reference is made to Rule 31.6, indicating the relief that is requested from the Review.

As well, no reference is made to Rule 31.7, whereby the request might be provided a frame of reference as to the nature of the error committed, sufficient to adjudicate on the standard expressed: namely, whether the 'reasons and evidence provided by the Requesting party are compelling and demonstrate grounds which show' one or more of the listed categories of review error.

Despite this, I have considered the substantive components offered, have considered the following components and make several findings of relevance to the disposition of the Request:

A. **Alleged Errors of a Substantive Nature (Including Misquotations and Omissions)**.

1. General

Typographical errors and errors in name references, while regretful, are not by themselves a proper subject matter for a Rule 31 Review insofar as a specific vehicle exists under the Rules for such consideration. On this aspect of typographical errors, the 'test of compatibility with the Official Plan' is an issue made clear at the outset (p.4); there is no issue or allegation that the Member misdirected himself as to the pursuit of this issue. As well, the reference to the witness Arpin, is accepted as an error in description, gender and name, on the strength of the Requestor's advice. Ms. Maria Arpin is not listed as a Participant; however, her testimony appears not to have been challenged.

2. Substantive Error 1. (Evidence of Ms. Katharine Dalton)

In making submissions on the suggestion that the Member should have considered more focused densities related to the north side of the street, the Requestor is not adding new, previously unavailable evidence, but rather is a challenge to the emphasis placed in issue before the Member.

This comes dangerously close to re-arguing the evidence, something a review Decision must avoid unless the substantive relief justified, as discussed below, warrants such a reconsideration.

There is no dispute that the variance under consideration was a move from the by-law base of 0.35 x fsi applicable to the location of the Proposal. However, there is no error in law in a misdescription as the error cited, namely the record of whether the matter before the Committee of Adjustment at 454 Briar Hill was an approval or a refusal , if the Requestors assertion is correct, is an error of fact.

A factual error that is not demonstrated to be germane, instrumental or a foundation element, is not a matter for Review relief. In my view, there must be a connection, a semblance of relevance of connection to and being instrumental to the determination made before a factual misdescription or reference can require Review relief.

In reading the whole of the paragraphs identified respecting Ms. Dalton’s evidence and its treatment, and indeed reading the Decision as a whole, the Member clearly identified and was cognizant of the distinction that the witness had made respecting location. The Member considered whether the density increase was minor or not, and came to a different conclusion than the witness, Ms. Dalton. This was within his prerogative.

I accept that the law in Ontario is to the effect that a decision maker is to provide a replicable road map of the manner in which a decision is reached with the view to concluding and communicating the reasons for the resolution.

What is not required is a punctilicious description of every stop or vesper encountered on that route. The fact that the Member may not have recorded every submission made orally or in writing is not definitive as to whether the conclusion reached on a matter is

correct. It is sufficient if the substances of the objection is identified, the evidence entertained and a rationale for its disposition, as here, is provided.

There is no factual error that would likely have resulted in a different order or decision.

5. **Substantive Error 2. (Evidence of Ms. Leslie Demson)**

In raising the subject of the misdescription of the evidence as to the Proposal's 'main front door', the Requestor properly identifies that the Member's use of the descriptor 'above the ground' is at worst an error of fact - or more likely a reference point ambiguity. The paragraph read as a whole clearly refers to design elements and the purported departure from street norms. The Member, reading the paragraph in its entirety, is referencing the evidence on the height of the design feature, not its absolute elevation.

Moreover, the Member was clearly cognizant of Ms. Demsons concern for the façade and the contribution she felt that the integral garage made to its perception or height. The Member's description acknowledges that issue.

I do not find it necessary of determinative if the word 'Titanic' was said or implied; the substance of the evidence is recited and was heard. There is nothing so pejorative in the descriptor as to warrant its excise, even if never referenced.

I agree that placing the reference in quotations attributes to Ms. Demson this descriptor.

Whether or not it was actually said, in a substantive sense it appears to tract the tenor and not misstate the evidence. I see no compelling base to search the Digital Audio Recording is search of the actual use of the reference.

Again, the reference to 'five example design feature related' examples is said to not have been addressed. There is no evidence that this material was not received by the Member. Again, not every scrap of paper in the evidence need be identified or cited in the reasons.

Service of the Decision is a matter for the TLAB Rules and the obligation of the Parties, Participants and the public to monitor a file posted on the TLAB website. The Member should more properly have admonished those present as to their responsibility under the Rules and the Public Guide.

I see no tangible error in the reference to the intended distribution method described by the Member for the distribution of the Decision. Although it is an assurance, by the time of the Decision's actual release a different practice of the TLAB was in effect.

Council's establishment of the TLAB mandated an all- electronic communications platform. Since its establishment with Hearings commencing in August, 2017, the TLAB has been able increasingly to meet that obligation.

Indeed, in this circumstance, the parties exercised their rights under the Rules, as is expected and no prejudice is alleged.

B. **Need for Clarification on Points of \law and Obiter Remarks (Addendum)**

In Paragraph 1 of the Addendum, the Request asserts that 'evenhandedness and *attentiveness*' are demonstrably not present in the 'handling of the opposing arguments'.

Even if this were a listed ground for review, which it is not, I respectfully disagree.

In the Decision, the Member not only recounts the evidence of the parties and all participants adverse in interest, but also recites substantive aspects of their answers to questions. In the analysis section, the Member repeatedly returns to these substantive objections and categorizes their import in respect of the prescribed statutory tests for consideration, with which he was charged.

Examples of attentiveness are found on: page 15 of 19 ('impact' and view perception; fixation on numbers, referenced again on page 17); page 16 of 19 (character attributes between the north and south sides of Briar Hill; lack of design 'plasticity'; page 18 of 19, the putative absence of engaging dialogue from the Applicant, (noted with acceptance)).

The Member dealt with these aspects again in Argument, resolving the instructiveness of case authorities in a manner not criticised in the Request.

I find that the Member did exactly what was asked of him as a judicious Hearing Officer: identified the matters in issue, stated the allegations, considered the evidence and arguments, including case authorities, and reached an independent decision. There is no allegation of bad faith or bias and certainly no standard set or supported for these types of review elements - that was even approached.

In Paragraph 2 of the Addendum, the Requestor asks that I review a selection of the Participants Statements and the Members summary thereof against the Digital Audio Recording. I have, above, dealt with the requested 'List of Corrections' and alleged 'misquotations and misstatements'.

I decline to cross-check the language of the Participants Statement to the Digital Audio Recording and to the text of the Decision. Not only is this the obligation of the Requestor to advance where error is to be demonstrated, but also a partial record can be itself misleading.

In any event, to request the Review to embark on this generalized inquiry is entirely too glib an approach. It is not the responsibility of the Review to conduct or instruct the conduct of an inquiry to determine whether generalized allegations hold substance in the mind of the reviewer; rather, the responsibility lies with the Requestor to demonstrate errors of a qualifying nature and demonstrate their authenticity.

This simply was not done. Moreover, the bringing to life of evidence in a Hearing is the responsibility of the witness. This includes the pre-filing and reference to documents and the sifting and winnowing of that which is of importance in the perception of the witness.

In Paragraph 3 of the Addendum, the Requestor raises the nature and disposition of Participant Demson's evidence, oral and written, on the issue of façade design.

Again, the request is made that I review 'Ms. Demson's original Participant Statement', etc., on this subject.

In reading the Decision, it is patently clear that design appearance was a fundamental component of the evidence called in opposition to the Proposal, by this witness and others.

Aesthetic design is not a matter directly remitted to the TLAB in the Jurisdiction identified, above. While design attribute arguably can be gleaned from the policy direction of some elements of the Official Plan and prescribed regulatory elements of applicable zoning, it (architectural design) is not within the specific category of elements with which the TLAB has plenary authority.

The Member received evidence on design attributes of the Proposal and clearly considered submissions in that regard, including door heights, the effect of topography, height , massing and scale. Indeed, the site plan and 'elevation plans' are important indicia of the intent of the proposal, as here. However, the entry into of ordered design details, even under a different jurisdiction than is remitted here to the TLAB (Planning Act, section 41) rarely engages the owner or the architect in mandated change. This is the result of a longstanding attitudinal approach in Ontario that ultimate design issues are to be left with the owner, absent a compelling public interest rationale warranting their intervention.

In this regard, intervention for a purpose perceived by the Member or a resident would be 'subjective ', as claimed, if not rooted in a larger public interest rationale defined by public policy. There were no design standards referenced and no express policy or regulation in the Official Plan or elsewhere warranting interference with 'doors, windows, materials etc.', beyond the goal of harmonization. Authorities are replete in the TLAB jurisprudence that 'harmonization' does not require sameness and 'compatibility' does not mandate replication of existing conditions or buildings in proximity.

Design expression remains an important attribute of individual owner's appreciation.

I find no error in the Member commenting on the subjectivity involved and declining to interfere with design elements through elevation drawings, conditions or otherwise. The Member is required to evaluate whether the intent and purposes of the Official Plan, including design policies, are met. Forming an opinion on such matters has an authorized element of 'subjectivity'.

In Paragraph 4 of the Addendum, it is asserted that the Member misconstrued or missed extensive evidence on 'impact' considerations.

In contrast, the Member does analyse the evidence tendered in a broad context.

'Impact' as a relevant criterion to the 'Four Tests' is closely scrutinized in the evidence of the witnesses Demson, Cali, Warren and others from different perspectives, as a full reading of the Decision clearly demonstrates. References such as: numerical size and increases; scale; architectural features; views; prominence, topography and focus, including the accepted tests for impact and case authorities related thereto, abound.

The Member acknowledged that the evidence was not confined to any one element but that the Parties and Participants were in fact commended for having canvassed a wide spectrum of their perceived relevant considerations. At page 17, the Member states:

> "I also appreciate the panoramic nature of the evidence provided by the opposition, which spanned multiple spectra from the architectural concept of plasticity to geometric progressions, to wisdom about the importance of words and the relationship between opinions and facts."

I am not prepared to address the weight that the Member may or may not have placed in various aspects of the evidence in respect of 'impact' or 'context'. In the absence of demonstrable error of a qualifying nature, this responsibility has the appearance of having been addressed by the Member. It was not a relevant consideration that was ignored.

In Paragraph 5 of the Addendum, I have read and reread the referenced paragraph (page 17, paragraph 3) and find no reference to "adverse impact". The paragraph deals with the use of numerical descriptors of increase ('numerical changes') as a basis for meeting the statutory test of 'minor'.

I find nothing in that paragraph that is either 'obiter' or demonstrative of a nature inconsistent with the evidence recited or of case law authority, including that of the Applicants opinion evidence from a qualified planner.

Respectfully, I decline from advancing either a definition of 'adverse impact' in this circumstance or from commenting on the Member's alleged comment on the term 'adverse impact'.

The case authorities are replete with references to the test of what constitutes "undue adverse impact' sufficient to fail the statutory test. That decision arises only upon a finding of the trier of fact in the particular circumstances before him or her, or the COA in the first instance.

In Paragraph 6 of the Addendum, the Requestor again raises generalized questions of interpretation and opinion that are not related to the Request in the sense of either relief or alleged error.

A reading of the TLAB Public Guide, the City Official Plan (especially section 4.1.5) and the (as yet unapproved) Official Plan Amendment 320 will provide some direction as to the relevance of different geographic 'lenses' made applicable to the policy description of the relevant study - to determine relationships and the physical character of an area.

The Legislature has not seen fit to prescribe a specific study area for analysis but has proclaimed, by Regulation, a defined Notice direction, including a geographic area option, in respect of specified Planning Act instruments, including minor variance applications.

To date, there is nothing requiring that a 'study area' (defined by any person to aid in their assessment of the physical area character of an area for purposes of the Official Plan) need be coterminous with the prescribe Notice responsibility under the Regulation.

This Member has not seen that suggestion supported in any jurisprudence.

As in all cases, and as appears to have been exercised in the Decision, it is the responsibility of the Member to weigh all representations of an appropriate study area. It is for the Member to determine its influence on the Application before him, her or the COA, on the bases of relevant considerations on all the evidence heard.

I see no basis or error by the Member in the Requestor's suggestion that proximity of location in the objectors necessarily placed them in a 'different, separate and higher level than other residents in the district'. While that indeed may be the case in respect of some aspects of an application of the relevant tests and may become even more so in the future by policy or regulatory pronouncement, at the moment it is for the Member to assess and weigh the relevance of the evidence.

In this case, I am satisfied this was completed based on proper principles.

In all of the foregoing, to the extent the challenges constitute alleged errors of a factual nature, I find that none are raised that "would likely have resulted in a different order or decision".

DIRECTION (IF APPLICABLE)

I have found that there are errors in the Decision of a typographical and reference nature to named individuals. These should be addressed.

In all other respects, I find no error committed in the Decision that even approaches the qualifying parameters establishing my review authority under Rule 31.7.

The standard I have to consider is:

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 … (emphasis added).

I find that there are no such reasons and evidence, for the above reasons**.**

DECISION AND ORDER

The Review is allowed, in part, and the Supervisor is directed to issue a correcting decision and order in the manner she finds appropriate to rectify the 'Corrigenda of Errors' that are accepted and attached as **Attachment 1** hereto .

In all other respects, the Request for review is dismissed.

X

Ian J. Lord
Chair, Toronto Local Appeal Body

Attachment 1

Corrigenda of Errors

To the TLAB Decision/Order RE: 18 111613 S45 16 TLAB, 476 BRIAR HILL AVE
Dated July 26, 2018
(Note: Paragraph numbering begins with the first full paragraph on page.)
Typographical Errors:

Page 3 (Under "Evidence") paragraph 1 line 3 "Warren Clark" instead of "Jonathon Clarke" paragraph 3 line 1 "Warren" instead of "Jonathan"

Page 4 line 2 from top "proposal" instead of "proposa" paragraph 3 line 3 "Caldow" instead of "Cladow"

Page 7 paragraph 1 line 5 "build" instead of "built"

Page 8 paragraph 2 line 2 omit second "many"

Page 9 paragraph 2 line 1 "Ms. Maria" instead of "Mr. Michael" "Ms. Arpin" instead of "Mr. Arpin" "lives" instead of "lived" line 3 "she" instead of "he" line 5 "Ms. Arpin" instead of "Mr. Arpin" paragraph 3 line 1 "Katharine" instead of "Katherine" "lives" instead of "lived" line 11 "was" instead of "were"

Page 10 paragraph 1 line 1 "lives" instead of "lived" paragraph 2 line 1 "lives" instead of "lived"

Page 11 paragraph 2 line 4 "were" instead of "was"

Page 12 paragraph 1 line 1 "Bennet-Alder" instead of "Alder-Bennett" line 5 "Bennet-Alder" instead of "Alder-Bennett" line 10 "Bennet-Alder" instead of "Alder-Bennett"

Page 15 paragraph 3 line 5 "Bennet-Alder" instead of "Alder-Bennett"

Page 16 paragraph 1 line 5 insert "is" between "importantly" and "not"