Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, November 27, 2018

PROCEEDING COMMENCED UNDER section 53, subsection 53(19), and section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): Jennifer Rachel Kirby

Applicant: Cantam Group Ltd

Property Address/Description: 64 Poplar Rd

Committee of Adjustment Case File Number: 17 213249 ESC 43 CO (B0046/17SC), 17 213262 ESC 43 MV (A0300/17SC), 17 213266 ESC 43 MV (A0312/17SC)

TLAB Case File Number: 18 112946 S53 43 TLAB, 18 112948 S45 43 TLAB, 18 112950 S45 43 TLAB

Date of Request: Thursday, November 08, 2018

APPEARANCES

Role	**Representative**	
Abu Bhuyan	Requester	Eric K. Gillespie Professional Corporation
Jennifer Rachel Kirby	Respondent	

DECISION DELIVERED BY T. YAO

Background

Kathleen Coulter, counsel for Abu Bhuyan, requests a Review of the decision of TLAB Member Mr. Makuch issued September 20, 2018. This decision, adverse to Mr. Bhuyan, refused to grant a severance of land owned by Mr. Bhuyan.

The request is contained in a Notice of Motion dated October 18, 2018 and

supported by the affidavit of Sarah Quildon, Legal Assistant EKGPC, affirmed the same date. The materials are in support of a written motion for oral argument to support the Review Request, which the TLAB has treated as two separate matters. The request for oral argument was denied by Chair Lord on November 2, 2018. He directed that should the parties wish to file further material related to the Review Request, they could do so by November 20, 2018. No one has done so. Accordingly, the Review Request itself is being dealt with. This will dispose of all the elements in the Notice of Motion.

Basis of Review

Rule 31.7 reads in part:

> 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**;
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> b) violated the rules of **natural justice and procedural fairness**;
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> c) made an **error of law or fact** which would likely have resulted in a different order or decision (my bold)

There are two other grounds dealing with new or false information, which are not alleged.by Mr. Bhuyan.

By way of overall summary, Ms. Quildon states:

> 4. In the reasons, the Chair acknowledged that the owner's planner was the only expert to give evidence, and that the expert planner concluded that the consent and variances should be approved. However, the Chair did not accept the planner's evidence for several reasons, **which constitute errors of law or fact and which violate the rules of natural justice and procedural fairness.** (my bold)

It appears that no grounds have been advanced that raise the issue of whether Mr. Makuch acted outside his jurisdiction. Each of the grounds allege both a violation of the rules of natural justice and errors of fact or law.

The Rule as drafted does not require that a violation of the rules of natural justice would likely have resulted in a different order. However, an error of fact or law requires Mr. Bhuyan to provide reasons and evidence that are compelling and demonstrate that the error would likely have resulted in a different decision.

Issues raised by Mr. Makuch's site visit

The Quildon affidavit of October 18, 2018 reads:

> 5. First, the Chair visited the site after the hearing concluded and made findings of fact based on that site visit. The Chair states, "As a result of visiting the neighbourhood I find that the evidence of the residents is more persuasive. The physical character south of the tracks is of large lots and with many trees as well as single dwellings. The proposed variances do no (sic.) respect or reinforce that character."
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> 6. In an administrative hearing, a site visit is not unusual and can be a useful tool for the decision-maker. Parties should be made aware, however, of exactly what the decision-maker witnesses. This is often accomplished by the parties accompanying the decision-maker on the site visit. Parties should also be allowed to ensure the decision-maker sees all relevant aspects of the site, as the decision-maker's perception of the evidence may otherwise be skewed.
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> 7. Most importantly, parties must be able to make submissions on their case after the decisionmaker has collected all of the evidence. If not, parties are denied the opportunity to address any questions or doubts the decision-maker may have.
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> 8. In this case, the parties made their final submissions on the appeal *before* the decision-maker had collected all of the evidence. (italics in original)

Ms. Kirby's response was:

> The applicant argues that the Chair's site visit occurred after the hearing and suggests that this was not fair. We can find no TLAB process or procedure that states such a visit must occur before the hearing. Furthermore, the Chair made several references to the fact that he would be doing a site visit after the hearing while the hearing was taking place. The applicant's counsel never raised concerns, nor did she request that she or her client, be included in the visit itself.

Ms. Quildon's reply affidavit states:

> 2. The appellant [Ms. Kirby] also argues that the owner [Mr. Bhuyan] made no objection to the visit. The owner relies on case law from the Alberta Court of Appeal, which states: "Objecting to questions put by a trial judge whose responsibility it is to decide the appellant's fate, is a delicate task at best, and counsel may be forgiven for not rising to the challenge." (R v Crawford, [2015] A.J. No. 552 (ABCA)). The same principle applies here. Counsel was put in a delicate position, regarding whether to object to the procedures favoured by the decisionmaker who would decide the owner's fate. Furthermore, it was only clear afterwards, on reading the Chair's decision, that the decisionmaker drew conclusions from evidence gathered directly from the site visit.

Ruling on site visit

I find the allegations in paragraphs 5 through 8 together with paragraph 2 of the Reply neither compelling nor do they provide evidence demonstrative of a violation of natural justice. The physical character of the neighbourhood evidence was given **at the hearing,** upon which both parties could comment. In my view, from the way it was communicated during the hearing, the site visit after the hearing was not made for the purpose of gathering new evidence but to better appreciate the evidence already tendered within the confines of the hearing.

It would not have been “delicate” to object to the site visit but illogical. The planner presumably went to great lengths to describe the existing physical character of the study area. Had Ms. Coulter wished to, knowing that Mr. Makuch was going to visit the site, she could have alerted him as to what to look for and why this would be important. She did not do so despite having the opportunity. She also could have requested that the parties attend with him, although this would have been an exception to the usual practice and would have raised issues of whether such a visit could have been recorded. I do not think what happened constitutes a violation of the rules of natural justice.

Loss of mature trees

The affidavit of Ms. Quildon continues:

> 9. Second, the Chair held that, "the fundamental issues were the lot width and the loss of a mature tree in the rear yard." However, the Chair previously recognized, during the hearing, that the only real issue was regarding lot frontage. Counsel for the owner only briefly addressed trees during submissions, primarily to point out that the owner would comply with the conditions recommended by Urban Forestry.
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> 10. **The owner was given no notice that trees were a fundamental issue.** Typically, issues would be set out in the appellant’s witness statement, but the Appellant failed to provide a witness statement in this case. The Appellant’s Notice of Appeal did address concerns with the proposed lot frontage but failed to raise an issue regarding the removal of trees.
>
> 11. **Parties must be given notice of the case to meet.** In this case, the owner was not aware that trees were a "fundamental issue" and was not given an opportunity to put in relevant evidence in response. (my bold throughout)

Ms. Kirby wrote:

> 4) The applicant's counsel states that "The owner was given no notice that trees were a fundamental issue.", however, it was the applicant's counsel themselves who

raised this issue in the hearing, rather than the appellant. As well, the affidavit notes that "The Appellant's Notice of Appeal did address concerns with the proposed lot frontage, but failed to raise an issue regarding the removal of trees**." It should be noted that only after this issue was raised by the applicant's counsel did the appellant then speak to this issue, and the Chair subsequently factored this into his deliberations and decision.** Further to this point, the report from Urban Forestry was included in all submitted documents and gave the Chair the necessary context, which he referenced. This report was provided by Urban Forestry themselves, which we believe to be an "expert source". We would argue that the applicant's counsel themselves opened the door to this issue and discussion. (my bold)

The Reply affidavit states:

6. The appellant's response appears to concede that she did not raise the removal of the trees as an issue. It was, therefore, an error of law for the Chair to identify this as a fundamental issue in the decision.

7. Finally, the owner is indeed not submitting new evidence to the TLAB for consideration, but asking the TLAB to consider the evidence already before it. There is no requirement in the Rules that the owner submit new evidence at this time. Instead, the Rules contemplate that: “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.. . made an error of law or fact which would likely have resulted in a different order or decision.”

Ruling on whether Mr. Bhuyan was given notice

I do not see any error of fact or law or failure of natural justice. Once Ms. Kirby filed her appeal, the Committee of Adjustment decision fell away, and Mr. Bhuyan was obligated to meet all the statutory tests under the *Planning Act* for both the severance and the four variances. Ms. Kirby was under no obligation to set out what issues Mr. Makuch would find are “fundamental” in advance of the hearing.

At the TLAB, no-one is required to restrict themselves to the evidence they filed at the Committee of Adjustment. There is specific allowance for applicants to change the variances sought by way of applicant’s disclosure which is after the filing of the notice of the appeal. This is a fresh hearing, so Ms. Kirby was unable to predict all the evidence.

Mr. Bhuyan was represented by competent counsel who could have been expected to anticipate all matters in issue and prepare and present his case accordingly.

Issues related to planner's failure to deal with forestry issues

The affidavit of Sarah Quildon continues:

> 10. Third, the Chair states that the planner gave: "no significant evidence to rebut the Urban Forestry comment." However, the planner was correct to not opine on this matter, since the planner was not qualified to give expert evidence on arboriculture.
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> 11. In fact, **the Chair heard no expert evidence related to removal of the trees or the Norway maple**. No representative from Urban Forestry attended, nor did the Appellant make any attempt to summons such a representative. The Chair made findings related to the removal of the trees, even though no expert gave evidence on the matter. (my bold)

In the previous excerpt Ms. Kirby stated:

> This report was provided by Urban Forestry themselves, which we believe to be an "expert source".

Ruling on City Forestry staff not present at hearing

I would characterize this as an allegation of supposed error of law suggesting that Mr. Makuch made a finding on a matter requiring expert evidence without having any arboriculture expert attend at the hearing. Under the section entitled "Analysis", Mr. Makuch writes:

> Although the planner was the only expert to give evidence and he did so concluding that the consent and variances should be approved I do not agree with him for a number of reasons. 1) his evidence was not totally reliable. He stated that the City endorsed the applications; whereas that was not true. Planning gave no comment, engineering commented but did not endorse the applications and Urban Forestry had concerns about the application. 2) He gave no significant evidence to rebut the Urban Forestry comment which was: "Several bylaw-protected trees exist on and adjacent to the site. Approval of the requested Consent will result in the creation of new lots that if built upon as shown will require the removal of several healthy privately owned trees. More trees would need to be removed with the Consent and Variances than if the site was redeveloped with one single family dwelling, with additional trees to be removed that include a Norway maple tree measuring about 50 cm in diameter located in the backyard. This tree is a valuable part of the Urban Forest and should be retained". 3) he did not acknowledge that large lots and trees were a part of the physical character of the neighbourhood, but focused only on residential dwellings as determining that character and 4) included an area north of the tracks as part of the neighbourhood without a persuasive justification.

Mr. Makuch found the planner "not totally reliable" and he explained why. It is clear

from the above excerpt that Mr. Makuch relied both on the written Urban Forestry comment and the "qualified planner's" lack of response and inferences therefrom. He is entitled to assess the evidence of an expert witnesses and entitled to disagree even though the witness is an expert. The application of statutory tests in the light of the totality of the evidence is the responsibility of the TLAB not the expert.

The TLAB has wide powers to admit, beyond those of the Courts. Section 15(1) of the *Statutory Powers Procedure Act* states a tribunal may "admit as evidence at a hearing, whether or not given under oath". Section 16 states a tribunal may take notice of any generally recognized technical facts, information or opinions within its specialized knowledge. The TLAB's specialized knowledge would include City by-laws and policies relating to trees.

The Urban Forestry comment was in the written record. Written comments are evidence. The planner chose not to comment on it. Had Mr. Bhuyan wished he could have got ahead of the issue by retaining his own tree expert. It is not for either Ms. Kirby or the TLAB to instruct Mr. Bhuyan which experts to hire. Mr. Makuch had enough evidence to conclude what he did, he provided reasons, and made no error of law in so doing.

Issues related to the physical character of the neighbourhood

The affidavit of Sarah Quildon continues:

> 12. Fourth, the Chair states that the planner (a) "did not acknowledge that large lots and trees were a part of the physical character of the neighbourhood but focused only on residential dwellings as determining that character", and (b) "included an area north of the tracks as part of the neighbourhood without a persuasive justification."
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> 13. On the contrary, during the hearing, the planner gave evidence that the character of the neighbourhood was of semi-detached and single residences, that there was a variety of frontages and housing styles, that lots were generally smaller north of the tracks, and that south there was a mixture. The planner specifically acknowledged that lot size was part of the character of a neighbourhood and that properties on Poplar Road were generally larger than others in the neighbourhood.
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> 14. The planner also gave evidence that it was his usual practice to do a study of a 250 meter radius, surrounding the area, in order to determine the character of the area. He explained that it was a reasonable area, since it was the area a person could walk in about five minutes.

15. The Appellant and participants argued that the entire Guildwood Village constituted the neighborhood. Importantly, a participant, Bob Taylor-Vaisey, agreed that there were a number of lots in the Guildwood Village which appeared to have frontages under 11 meters.

16. The Chair **mischaracterized the planner's evidence regarding the neighbourhood and failed to address crucial evidence regarding smaller lots in the neighbourhood**. (my bold)

Ms. Kirby states:

5) The applicant's council (sic.) states "The Appellant and participants argued that the entire Guildwood Village constituted the neighborhood. Importantly, a participant, Bob Taylor-Vaisey, agreed that there were a number of lots in the Guildwood Village which appeared to have frontages under 11 meters." This conclusion misrepresents the testimony of Mr. Taylor-Vaisey who, in fact, indicated that they might be 2-3 properties in Guildwood Village with less than a 40' lot frontage and that this would an exception and not the rule based on his review of 14 Registered Plans of Guildwood Village. The inference to 'a number' may have referred to a reference to some properties in the NW corner of Grey Abbey Trail and a subsequent review of those lots substantiates Mr. Taylor-Vaisey's position on the consistency of lot frontages in Guildwood Village.

6) We do not feel there was evidence provided by the planner of "smaller lots" in the Guildwood neighborhood, so when the council (sic.) states this evidence was ignored, we do not agree.

Ms. Qilldon’s reply affidavit states:

8. In the Decision, the Chair specifically states: “The neighbour’s evidence was that the character of the neighbourhood is one of large lots, with no lots narrower than twelve meters and this resulted in the Portia St. lots being approved at a minimum of twelve metres frontage. This evidence was uncontradicted.”

9. With respect, the Chair made an error of fact with regard to the evidence. There was a great deal of discussion on this point at the hearing and, in her response, the appellant concedes that Mr. Taylor-Vaisey gave evidence that, at a minimum, there were several properties in the neighbourhood narrower than twelve meters. Additionally, there were a number of properties identified on the Guildwood Community Zoning Map, entered as Exhibit 4, which were likely narrower than twelve meters.

10. It is, in part, because of this particular issue, that the owner moves for oral submissions on the request for review. This is a complex issue and, in the owner’s view, the TLAB and the parties would benefit from oral submissions.

Ruling

Assuming Mr. Taylor-Vaisey's evidence was that "there might be 2-3 properties in Guildwood Village with less than a 40' lot frontage and that this would be an exception and not the rule based on his review of 14 Registered Plans of Guildwood Village" and additionally "there were a number of properties identified on the Guildwood Community Zoning Map, which were **likely** narrower than twelve meters", does this constitute an error of fact. It is clear from the Mr. Makuch's decision that the number and distribution of lots larger and smaller than 12 m frontage was a fundamental issue. The fact that statements such as:

> The neighbour's evidence was also that the large lot frontages created the character of the neighbourhood which consisted of the properties on Poplar Rd and it (sic) neighbouring streets south of the railway tracts (sic.).
> The evidence of the residents was that the Guildwood Village was a neighbourhood of large lots with many trees and a significant tree on the lot in question.

were placed in the Evidence section instead of the "Analysis, Findings, Reasons" section mean that his recapitulation and summary was provisional, and subject to the process of thought that would take place in the latter section.

Since the number of smaller lots versus large lots was a live issue, Mr. Makuch 's statement:

> The neighbour's evidence was that the character of the neighbourhood, is one of large lots, with no lots narrower than twelve meters and this resulted in the Portia St. lots being approved at a minimum of twelve metres frontage. This evidence was uncontradicted.

could be interpreted that the evidence was not contradicted *to any significant degree*. Indeed, I am puzzled that paragraph 12 of the Reply affidavit is unable to quantify the number of narrower properties in the zoning map; it only says, "likely narrower".

So, I do not feel that the reasons and evidence demonstrate that there was an error of fact. But assuming they do, Mr. Bhuyan must go further and show that this would have likely produced a different result. The ultimate finding is that the variances do not respect and reinforce the existing physical character of the neighbourhood. There is no reasoning submitted by Mr. Bhuyan showing how this supposed error of fact would have likely caused Mr. Makuch to alter his ultimate finding and instead Mr. Bhuyan's counsel requested oral argument to address this issue. Mr. Lord invited her to do so through additional written submissions, but she did not. The onus is on the requester of a review to demonstrate both branches of 31.7 c) — error of fact and likely different result. She has not done so.

Interruptions

The final argument is:

> 17. Finally, the Chair interfered too often in the examination and cross-examination of witnesses, and, in doing so, compromised the fairness of the appeal. Throughout the planner's evidence in particular, **the Chair made numerous interruptions.** (my bold)
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> 18. The Ontario Court of Appeal has held that, "Interventions by the judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial." (R v Valley, [1986] O.J. No. 77 (ONCA) aff'd [1986] S.C.C.A No. 298)
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> 19. Furthermore, the Ontario Court of Appeal has held that, "It is a question of degree. At some point, incidents which, considered in isolation, may be excused as regrettable but of no consequence, combine to create an overall appearance which is incompatible with our standards of fairness." (R v Stewart, [1991] O.J. No. 811 (ONCA) aff'd [1991] S.C.C.A.No.110)
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> 20. In this case, the Chair made numerous interruptions throughout the evidence, which would cause a reasonably minded person to consider that the owner had not had a fair hearing.

Ms. Kirby replies:

> 7) The applicant's counsel states: "In this case, the Chair made numerous interruptions throughout the evidence, which would cause a reasonably minded person to consider that the owner had not had a fair hearing**." This could not be further from the truth. While the Chair did ask questions during the planner's testimony, this was to gain clarification and understanding of the points being made, as was his role.** The Chair did the same when the appellant was providing her testimony. It is well within the Chair's purview to ask clarifying questions. (my bold)
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> 8) The applicant is not providing any new evidence for consideration. We disagree that procedural fairness were violated. Accordingly, we submit that the review is unnecessary, and should not be granted.

Ruling

The case of *R v Valley* makes it clear that it is not just “numerous” interventions that will create an apprehension of unfairness but only those that also impair the right of

the parties to present a full case. Justice Martin said at page 231:

> Where the interventions have made it **really impossible for counsel for the defence to do his or her duty** in presenting the defence, for example, where the interruptions of the trial judge during cross-examination divert counsel from the line of (sic.) topic of his questions or break the sequence of questions and answer and thereby prevent counsel from properly testing the evidence of the witness (citations omitted) (my bold)

In that case, the trial judge disparaged the quality of defence counsel's education and told her "I don't believe you have gone about it in the right way" (cross examination on a prior inconsistent statement reduced to writing). Notwithstanding the interventions, Justice Martin found defence counsel's conduct "entirely appropriate" and yet those interventions did not exceed "impermissible limits", that is, were not sufficient to order a retrial. The standards for a criminal trial are more exacting than for a regulatory tribunal.

The highest level that these allegations reach, is that interventions were "numerous". Ms. Quildon does not even allege that the interventions made it "really impossible" for the Mr. Bhuyan's counsel to do her duty. Had she so alleged, she still would have been obliged to produce evidence. In *Valley*, defence counsel itemized every impugned intervention. Mr. Bhuyan has not done so and thus the alleged violation of the rules of natural justice is not demonstrated.

Conclusion

None of the grounds are compelling and demonstrated. Where there are errors of law or fact, the Requester Mr. Bhuyan must demonstrate that these would likely have led to a different result and he has not done so. Both are a necessary part of the test for Review.

DECISION AND ORDER

The Review Request of October 18, 2018 is rejected, and the Final decision of the TLAB of September 20, 2018 is confirmed.

Ted Yao

X

T. Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao