Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, December 04, 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): DAVID MATOC

Applicant: MARK DAVIDSON

Property Address/Description: 70 LABURNHAM AVE

Committee of Adjustment Case File Number: 18 158568 WET 06 MV

TLAB Case File Number: **18 205231 S45 06 TLAB**

Decision Order Date: Tuesday, October 09, 2018

DECISION DELIVERED BY Ian James 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 David Matoc, the Appellant and a Party to the above noted matter (Requestor). The Request was made by affidavit (Form 10) sworn November 7, 2018 (Affidavit).

The Request relates to the decision on an oral hearing of a Motion to Dismiss of the TLAB by Member L. McPherson (Member) issued October 9, 2018 (Decision). The Request asks that the Decision, which allowed the Motion and dismissed the appeal, be overturned and that a full hearing be held on the merits, at a date to be determined.

The Request was apparently served on the Owner's Representative, Marisa Keating by email dated November 7, 2018. However, no response was received from Ms. Keating nor was there a response to the Request from Rob Thompson, a Participant in the Hearing Notice.

Service is a condition precedent to a validly constituted Request.

There is no obligation on a Party to respond to a Review. However, by service all Parties are on Notice that the Decision has been challenged and a right exists under the Rules to contribute to that consideration.

I have reviewed the material supplied in the Request and concluded, for the reasons set out below, that there is insufficient merit to warrant relief.

The framework grounds for relief and the available remedies under Rule 31.6, are below recited under 'Jurisdiction'.

BACKGROUND

The Decision provides a concise history of this matter. In brief, an application was made by Mark Davidson to the Etobicoke-York Panel of the City of Toronto (City) Committee of Adjustment (COA) for five (5) minor variances to construct a two-storey rear addition, a two-storey west side yard addition, a carport and the creation of a secondary suite (Application).

The Application was in respect of 70 Laburnham Avenue (subject property) in the former Long Branch community of the City. The COA approved the Application, with conditions, by a decision mailed July 26, 2018. The Requestor appealed the COA decision and a Notice of Hearing was issued by the Toronto Local Appeal Body (TLAB) for December 12, 2018.

Before Witness Statements were due (on October 05, 2018) under the TLAB Rules, the owner's/Applicant's Representative brought a Motion to dismiss the appeal without holding a Hearing , as recited by the Member, "on the basis that the appeal is vexatious and commenced in bad faith pursuant to Rule 9.1(b) of the TLAB Rules…"

Ms. Keating argued the oral Motion and Mr. Matoc responded.

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

Rule 31.7, above, lists five (5) grounds upon which a request can be founded. The Request raises three of these: b), c), and d). It appears that no grounds have been advanced that raise the issue of whether the Member acted outside her jurisdiction. 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 or the presence of new evidence requires the owner/Appellant to provide reasons and evidence that are compelling and demonstrate that the error would likely have resulted in a different decision.

It is not the purpose of engaging a review under the Rules to simply permit the re-argument of the matter that was the subject of a TLAB Hearing except in accordance with the eligible grounds of a Review.

I deal with each assertion, below as set out in the Review Request. The Request is divided into two parts:

a) Reasons (12 paragraphs)
b) The Assertion 'The Appeal was Advanced in Good Faith'.

The latter component takes the 'Member Statements' found in the 'Analysis, Findings and Reasons' component of the Decision and suggests areas of error, by way of his commentary termed rebuttal. The Member had presented a descriptive list of considerations upon which she was "not convinced that the Appellant is acting in good faith…". I return to this, below.

To a degree, these matters, a) and b) above, are intermixed.

I agree with the Requestor that the Decision, in dismissing the appeal, fundamentally undercuts the Appellant's right to a hearing on the merits of the Appeal. Further, that this is a challenging jurisdiction which must be accompanied by every safeguard available to ensure that appeal is not prematurely dismissed.

A Motion to Dismiss in planning law has a lengthy and clear lineage which, while perhaps not known to the lay person, is readily discernible through any number of source references. It is precisely because the remedy on such a motion is so extreme, that the body of jurisprudence around the subject is voluminous and largely consistent for at least the past two decades.

The Member acknowledged that the Motion to dismiss has its origins in the statutory right of a person to challenge the validity of an appeal. The Planning Act provides near identical wording respecting challenges to various planning instruments: official plan amendments; zoning by-laws; minor variances; and consents.

The Member put it this way: "The Motion requests an Order pursuant to Rule 9.1(b), the basis of which is set out in Section 45(17) of the Planning (Act) …".

I do not place the slightest weight on the reference to Rule 9.1(b) in respect of the essence or authority for the Motion. The Motion was clearly received, treated, argued and decided upon as a Motion to Dismiss the Appellants appeal, full stop.

The reference to Rule 9.1 is clearly understandable due to the similarity of language and relief used. A person less familiar with the TLAB Rules might well have associated the Rule with Section 45(17) of the Planning Act. However, the association is somewhat misplaced but the distinction, I find, is one that is without a difference.

Rule 9.1 of the TLAB is an internal Rule that contemplates consideration by a Member of the essence of an appeal, where the Administrative Review process has failed to clear the substance of an appeal through to the stage of issuing a Notice of Hearing. The TLAB, in a form of Adjudicative screening can examine the appeal of its

own volition, or upon a Motion by a Party, as to its qualifications to be eligible for a Hearing.

The Member correctly notes the similarity of language. The Moving Party was not in error in referring to Rule 9.1; however, once the Notice of Hearing has issued, effectively the period of Adjudicative Review has ended and the matter is specific and in train for a Hearing. After that point, the authority for a Party to challenge the appeal is the statutory right under Section 45(17) of the Planning Act, which provides, in its entirety, as follows:

> **Dismissal without hearing**
> (17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,
>
> (a) it is of the opinion that,
>
> (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,
>
> (ii) the appeal is not made in good faith or is frivolous or vexatious,
>
> (iii) the appeal is made only for the purpose of delay, or
>
> (iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process;
>
> (b) the appellant has not provided written reasons for the appeal;
>
> (c) the appellant has not paid the fee charged under the *Local Planning Appeal Tribunal Act, 2017*; or
>
> (d) the appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal. 2017, c. 23, Sched. 5, s. 98 (5).

It cannot be overstated that the statutory right to challenge an appeal on all or some of the grounds listed puts the Appellant on notice that it must defend its appeal. The risk, to the Appellant and all those that shelter under the appeal, is that their right to

a Hearing on the merits can be dissolved by a pre-emptive Motion that succeeds on one or more of the listed grounds.

The case law before planning tribunals on the standard applicable on Motions to Dismiss under this power is quite clear. I cite but one relatively recent example (*Jackman v. Ottawa (City) 86 OMBR 260),* wherein the member of the (then) Ontario Municipal Board (now Local Planning Appeal Tribunal) states as follows (para. 64):

> "The seminal decision of the Board with respect to motions to dismiss appeals pursuant to s.17(45)(a)(i) and s.34(25)(a)(i) of the Act is *Toronto (City) v. East Beach Community Assn.* [1996] O.M.B.D. No. 1890, 1996 CarswellOnt5740 (O.M.B.), where the Board found that these provisions allow the Board to examine whether there has been disclosure of planning grounds that warrant a hearing.
>
> The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case. This does not allow the Board to make a hasty conclusion as to the merit of an issue. Nor does it mean that every appellant should draft the appeal with punctilious care and arm itself with iron-cast reason for fear of being struck down. What these particular provisions allow the Board to do is seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudicative process."

I adopt, as apparently did the Member, this line of jurisprudence. While the TLAB is not bound by the decisions of another equal and parallel tribunal, it is open to adopting the line of reasoning and interpretation it finds to be sensible, compelling and tending to consistency of approach and decision making when dealing with identical powers and responsibilities found in the same 'home' statute vesting jurisdiction.

Here, the Member embarked upon such an inquiry and the Appellant had full notice and entitlement to establish that the appeal grounds were genuine, legitimate and authentic.

The jurisprudence is also clear that mere intention to advance such grounds is not enough. It is not enough to say I intend to call evidence in identified fields, as mere representations are not the essence of the foundations of triable issues. There must be something more, frequently characterized in the affidavits of witnesses, properly qualified, that demonstrate clear differences of opinion between the parties on matters relevant to determining the land use dispute between them.

Moreover, mouthing platitudes having the semblance of planning jargon, repeating the statutory tests or reciting the variances, or even reciting generally accepted planning principles are not alone sufficient to pass the bar, once the challenge of a Motion to Dismiss is served. There must be supporting evidence to suggest a valid land use planning dispute exists, to warrant the matter being sent to a hearing on the merits, with the private and public exposure and expense that that entails.

Here, the member found that the planning language deployed and the concerns raised, individually and collectively, were not such that these tests were met. As in past cases under this jurisdiction, and as found here, it is not good enough in respect of certain issues – forestry, storm water management – to simply raise apprehensions; and to say that further experts' studies or evidence may be forthcoming, under summons or otherwise, to constitute apparent planning grounds with the hope that once the hearing is convened, more real issues could be introduced for adjudication or that the evidence in support thereof will then be available.

Here, the Member found the Appellant to be reactive, issuing summons only after the Motion to Dismiss had been served and without the inclusion of any affidavit attestations.

On the authorities, some cited by the Member, it is incumbent on the Appellant to demonstrate that the issues raised in the notice of Appeal and as further articulated in the Motion merit a full adjudication by the TLAB at a hearing. The Member found that this burden had not been met.

It is not the purpose of a review under Rule 31 to permit a rehearing unless a compelling case is made out on one or more of the listed grounds in the Rule. The Member found they had not; I must now examine whether there was any eligible error in her findings on that basis.

The Requestor asserts: "The motion was specifically filed under rule 9.2 of the TLAB Rules of Practice and Procedure and made claim that the appeal was vexatious and in bad faith."

I have dealt, above, with the foundations of the Motion and find that it was properly based in Section 45(17) of the Planning Act.

On the question of vexatious, previously the Requestor had stated: "5. The member disregarded and denied the Applicant's submission that the appeal was vexatious." I confess I am at a loss as to the Requestor's position on this issue. I do not discern in the Analysis, Findings and Reasons by the Member any discussion or finding that the appeal was 'vexatious', as a reason for allowing the Motion. As such, it is not a valid or compelling ground to exercise any remedy attendant or available upon the Review.

On the question of 'good faith' v. 'bad faith' and the sufficiency of the argument that there is a difference in definition between the two vis-à-vis the relief requested, I am not inclined to engage in legal research (none presented) or the potential for nuances between the two, as definitions having relevance at common law.

The statute, Section 45(17)(a)(ii) employs the terminology 'good faith'. The Member, in her opening paragraph of the Analysis, Findings and Reasons section uses the term 'good faith' and assembles, to her, indicia that cumulatively were accepted as evidentiary that the test of genuine, legitimate and authentic planning reasons had not been met. In my view, the Member confined herself to the correct language and applied the relevant test; the conclusion she reached in the Decision and from the challenge

presented in the Request was within the zone or realm of reasonableness. I can find no basis on this ground to interfere or cause a further review of that conclusion.

The finding of not being convinced that the appeal was in good faith is the standard set for consideration by statute; no Rule can cast that process of consideration in doubt.

The Requestor raises the examples of COA decisions and City appeal letters that provide little or no further descriptive identification of the planning issues in the decision or the dispute relevant to the statutory tests than those espoused by the Appellant on the appeal and the Requestor on the Motion before the Member. The argument is that if these grounds or reasons or statements are "widely accepted" elsewhere, how can they be rejected as a proper basis for an appeal in defence of a Motion to Dismiss?

Respectfully, that is not the test. The TLAB is not disposed to comment on the reasons or lack thereof of any COA decision. Nor are letters from City Legal instituting and listing appeal grounds evidentiary of the standard necessary to defend a Motion to Dismiss under Section 45(17) of the Act. At risk is the entitlement to a Hearing. Hearings serving no proper purpose are to be avoided as a matter of the public interest.

As earlier described, a higher bar is raised when a moving party challenges the authenticity of an appeal; the response must rise to and be commensurate with the challenge, and provide valid land use planning grounds or risk dismissal. It is clear from the Request that the Requestor did not understand that responsibility. It likely was also clear to the Member, whose reasons adopt the bar and concluded it was not met.

I can give no weight to the allegations of the Requestor that the owner's representative "thwarted, delayed and ignored attempts…after the motion hearing" to engage in settlement discussions. Such conduct is not relevant to the Review, occurring after the fact of the Decision for which the Review is sought. The TLAB uses every effort to encourage meaningful discussion and would not support conduct as described if indeed it occurred at any stage of a TLAB proceeding.

Here, the Parties, via the Motion, had argued their respective positions; it is not beyond the pale of reason to avoid incurring added expense during the hiatus prior to the release of the Motion Decision.

Again, the Requestor argues that such 'slow walking' and the activities of case management, including bringing the Motion before the exchange date for Witness Statements based on legal advice, places the public at a severe disadvantage such as to dissuade the public from engaging in meaningful involvement. It is easy to appreciate that knowledgeable counsel can be helpful in case management, that is a type of commercial service offering available that is undifferentiated from a host of other types of professional advisors. The TLAB can give every assurance that Parties and Participants before it will receive fair and equal treatment; however, it cannot curtail the legitimate exercise of statutory rights on some subjective appreciation as to how things might have been different had different circumstances been present.

This is a subject matter, 'levelling the playing field', of a much larger dimension and one that this Review cannot resolve nor appropriately consider. Efforts are underway both through the Province and the TLAB to help level the playing field, as the saying goes. These are not relevant to the disposition of this Review.

The Requestor, finally, presents a series of "specific responses and rebuttals to the reasons provided by the member".

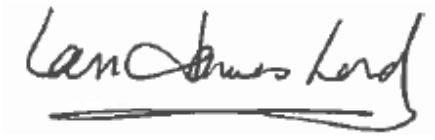
The proper place to establish the parameters of the rebuttal was in the Motion in response to the submissions of the moving Party and to provide the requisite genuine, legitimate and authentic planning reasons. It is not appropriate, in the absence of a demonstrable ground for review, to reargue the Motion in support of a rehearing.

Where these 'rebuttals' have addressed eligible grounds, I have considered them, above.

It is also, as the Member stated when asked to address this in the Decision, also not a proper basis for a review nor a defence to raise a new issue. In this case, the subject matter of a deck or decks was raised that was not the subject matter of any variance, sought or decided upon. If a variance was missed, it remains at the peril of the owner who would be denied a building permit for a non-compliant deck.

DECISION AND ORDER

For the above reasons, the Request is denied and the Decision and Order issued October 09, 2018 for the subject property is confirmed.

X 

Ian Lord
Panel Chair, Toronto Local Appeal Body