TORONTO

Toronto Local Appeal Body

40 Orchard View Blvd, Suite 253
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

REVIEW REQUEST ORDER

Review Issue Date: Thursday, December 20, 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): ROBERT DIETRICH

Applicant: ARCICA INC

Property Address/Description: 30 WESTRIDGE DRIVE

Committee of Adjustment Case File Number: 18 12757 WET 04 MV

TLAB Case File Number: **18 176310 S45 04 TLAB**

Decision Order Date: Tuesday, October 30, 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 on behalf of Shahab Khoshsohbat, a Party and owner to the above noted matter (Requestor) represented by Martin Mazierski, solicitor. The Request was supplemented by an affidavit (Form 10) of T.J. Cieciura, a Registered Professional Planner retained by the Requestor, sworn November 28, 2018.

The Request relates to the decision of the TLAB by Member T. Yao issued October 30, 2018 (Decision).

The Request was apparently served on the Appellant, Robert Dietrich and on Anne Anderson, a Participant on November 28, 2018.

No submissions were made thereafter by either of the latter two individuals.

Service is a condition precedent to a validly constituted Request, but only on Parties (Rule 31.3)

There is no obligation on a Party or Participant to respond to a Review. However, by service, all Parties and Participants are on Notice that the Decision has been challenged. The Rules do not prohibit the right to contribute to that consideration. However, it is to be noted that, because of the initial election made, a Participant cannot initiate a Review as a Participant enjoys only prescribed and limited privileges within the Rules of the Toronto Local Appeal Body (TLAB), at the original Hearing.

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

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

BACKGROUND

This matter was heard October 10, 2018. It involved a single variance request granted by the COA applicable to 30 Westridge Road (subject property). The requested variance is to the height of an as-built detached dwelling on the subject property. The zoning maximum height permission is 9.5 m above established grade (on the adjacent property) while the maximum now sought was to 10.35 m. In 2016, the Applicant/Requestor had achieved, among other matters, a height variance of .49 m, to 9.99 m, without an appeal. A further height exceedance by some 8 inches (0.203 m) occurred during construction and a Building Inspectors 'Notice to Comply' led to a second Committee of Adjustment (COA) application to, in effect, recognize and maintain the 'as-built' height. The COA approval was appealed by the abutting owner, Mr. Dietrich, at 45 Edgevalley Drive.

Member Yao expressed the obvious question this way:

> "To recap, the August 2016 variance was for an exceedance of .49 m (1.6 ft) over what was permitted. The second variance (this appeal), May 2018, is for an exceedance of .36 m (1.18 ft). It was not explained why the exceedance was not 9.99 m + 0.203 m = 10.19 m."

Nonetheless, the COA decision under appeal was to permit 10.35 m. For information, it appears that the difference between what was 'needed', at 10.19 m and what the COA approved, at 10.35 m, is 0.16 m (6.3 inches). The information on the Order to Comply issued February 2, 2018 did indicate that the 8 inch exceedance was subject to being surveyed.

The Decision issued October 30, 2018; it allowed the Appeal and refused the variance.

Member Yao summarized the evidence heard as follows"

> "Theodore Cieciura testified for Mr. Khoshsohbat. He was qualified as a witness able to give opinion evidence in the area of land use planning. Robert Dietrich, 45 Edgevalley Dr, testified for himself and other neighbours who appeared at the earlier 2018 Committee of Adjustment hearing. Anne Anderson, president of the Humber Valley Village Residents' Association, testified on its behalf."

The COA Minutes reveal that only Mr. Dietrich appeared and spoke in opposition to the Application for the additional height variance. Additional letters of opposition were before the COA. Ms. Anderson did not speak to the COA.

The Applicant had not requested relief from any other of the specific performance standards under zoning beyond those approved in 2016.

Member Yao expressed the requested relief to permit a height of 10.35 m this way:

> "Thus, the starting point was a building with the permissions as given in the August 4, 2016 decision, notably a maximum building height of 9.99 m."

In this regard, having acknowledged he was dealing with an 'as-built situation', and as a prelude to the above statement of purpose and intent, he quoted the following (Decision, page 3):

> "11 When structures are built without a permit, the Board must not make a decision based solely on the fact that construction is illegal. On the other hand, it should not be motivated by its wish to spare the owner the expense of removing the construction. Our approach must be to pretend that the structure is not there, and to imagine what would be the planning consequences if the Turners were proposing to build these structures for the first time. Turner v. Vaughan, 1994 CarswellOnt 5488, November 25, 1994.

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.

In this circumstance, the Request took the form of a 'Factum' supported by a 'factual' Affidavit of Mr. Cieciura, made on own investigations or on 'information and belief' to be true. The Factum is described as adding the legal arguments grounded in the facts supplied by the Affidavit.

The Factum and Affidavit refer to and access references to Exhibits 1-3 filed at the Hearing that led to the Decision.

The Request raises two of the Rule 31.7 grounds: a) related to jurisdiction, and c) related to "error of law or fact which would likely have resulted in a different order and decision". (emphasis added)

The Rule requires the Requestor to demonstrate 'if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show' the selected considerations are met. (emphasis added)

It is not the purpose of engaging a review to 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.

It is necessary to consider each assertion. I address these in the order set out in the Factum. The Factum is extensive (148 paragraphs), involves some overlap with the Affidavit (98 paragraphs), and is structured, principally on the 'four tests' of the variance appeal direction, and as follows (Grounds):

1. GROUNDS FOR REVIEW – MAINTAINING THE GENERAL INTENT OF THE OFFICIAL PLAN
    a. COA Decision Research
    b. Elevation Change on the Subject Property
    c. Stable and Gradual Under the Official Plan
    d. Study Area
    e. Address the Street / Prominence to the Corner
2. GROUNDS FOR REVIEW – MAINTAINING THE GENERAL INTENT OF THE ZONING BYLAW
    a. Two Storeys Over the Garage
        i. Not the Subject of this Appeal
        ii. Grounded in Speculation
        iii. Non-Variances and Articulated Facades
3. GROUNDS FOR REVIEW – MINOR IN NATURE
    a. Obiter Dictum
4. GROUNDS FOR REVIEW – DESIRABLE FOR THE APPROPRIATE DEVELOPMENT OR USE OF THE LAND, BUILDING, OR STRUCTURE
    a. Discretion under Section 45(1)
    b. Public Interest
    c. Hypotheticals vs Factual Evidence
    d. Section 1(d) of the Planning Act
        i. Jurisdiction to Enforce Conditions
        ii. Limiting the Number of Applications
        iii. Substantially in Compliance

Some general observations on the conduct of a Review, beyond those above articulated, may help. It is trite to say that the issue that is challenged has been the subject of two prior decisions. The first, that of the COA, I am directed by statute (Planning Act, section 2.1) to have regard to, including the materials that were before the COA. The second, the Decision, followed a *de novo* hearing by an experienced Member who had full access to not only the record of the COA, but also the filings under

the Rules, *viva voce* evidence and the time to conclude a written decision of some 12 manuscript pages.

In these circumstances, it is incumbent on the reviewing authority to give consideration to the direction that the grounds employed in the review be and are 'compelling', not merely convenient or a re-argument of evidence already considered, in the hope that it will motivate a re-direction. Mere disagreement with the Decision, even with an evidentiary base of contrary opinion exhibited in a Review Request, may or may not suffice to challenge the deliberative assessment process engaged in by the Member in reaching a determination on the merits, following a Hearing.

Second, under the Rule as currently drafted, the exercise of the full entitlement of disallowance of the Decision, where requested as here, should be approached gingerly, deliberatively and with an abundance of caution, not so as to create a barrier to the granting of relief, but so as to respect and support the integrity of the processes which the Parties and Participants have engaged in and experienced to date.

Third, where the case for relief has been made out to the satisfaction of the reviewing authority, the reviewer should not hesitate to apply the remedies prescribed as available in the Rule in the public interest. The authority given by statute to empower reviews is a trust not to be exercised carelessly, casually or with wanton abandon based on exigencies, personal preferences or as personalities might dictate. Rather, the approach must be one that is inquisitive, principled, purposive, transparent and present a rationale anchored in evidence with due regard to the principles of good community planning and the larger considerations of administrative policy. These are words borrowed from past considerations of courts and tribunals which serve to frame and communicate the value of a tempered philosophy of respect for both private and public interests within the ambit of the Rule of Law.

In Ground 1 a. the Request asserts that the Member failed to 'acknowledge' and 'understand the limitations' of the Planners' COA decisions and area character assessment evidence, its limitations to 10 years of data, the existence of additional examples of 'actual deviations from the by-law standard' for heights within the 300 unit property study area and the 'incomplete snapshot' that adherence to that data might generate. A previously available but not produced decision respecting 96 Edenbridge Drive is tendered as an example.

The assertion concludes at paragraph 32 (my emphasis in bold):

> "32. **If** Member Yao properly understands the evidence as a potentially incomplete snapshot of how applications had been treated over the last 10 years as opposed to a full accounting of the conditions in the study area, **and realizes the high probability of there being other homes (most likely but necessarily older than 10 years old)** exceeding 9.5 metres in height within the study area, **it likely results** in a different finding with respect to the Proposal maintaining the general intent of the official plan, and in turn contributes to a different order and decision.

I find that the Member was alert to the description of the data presented. He is an experienced Member and is intimately familiar with data access and sorting procedures and the role of study areas in helping to define discrete elements of area character. At page 6 of the Decision he acknowledged Mr. Cieciura's own reticence about the data: "…the data needed constant checking and double checking from other data sources".

More important, the Member employed the data presented by the Applicant's planner, including considerations both within and outside of that data, set to conclude on page 7 of the Decision:

> "The existing character of the 300 properties in the study area is thus overwhelmingly a height of 9.5 m or lower with a few widely scattered higher buildings in the range mentioned by Mr. Cieciura, mostly on Edgehill and Valecrest. A height variance of 10.35 m does not respect and reinforce the existing physical pattern."

I cannot find that the Member either closed his mind to relevant considerations, misunderstood the nature of the data or misdirected himself in any manner in focusing on the test of the intent and purpose of the Official Plan, respecting the physical character of the area on the issue of building height. There is no basis in the Affidavit or otherwise that the potential of additional information (available at the time) constituted a 'high probability' of a different finding. It is no answer that if examples of relevant height exceedances were of relevance to the Applicant, that the cost or effort of their identification resulted in presenting an 'incomplete snapshot'. There is no assertion of 'new evidence', only speculation on the presence of other examples and desirability of a different result.

I do not find this 'probability' either established or compelling as a ground for intervention.

In Ground 1 b. the Request asserts that despite extensive evidence germane to the subject property and other properties, there was a failure by the Member to address elevation change and the measurement of height from established grade.

The assertion concludes, at paragraph 40 (my emphasis in bold):

> "40. Member's Yao **failure to give written reasons for discounting key evidence** about the elevation change on the Subject Property raises issues of jurisdiction, while the **failure to effectively weight the factual evidence is an error of fact** that **likely contributes** to Member Yao making a different determination about consistency with the official plan than is made if the error is not committed."

The Affidavit attests to the fact that the Member "was given a comprehensive and detailed explanation of how established grade is determined". (Affidavit, paragraph 38)

The Member, on page 3 of the Decision, recites an awareness of the evidence of the planner as to the incidence of the measurement of height from "established grade". In the same paragraph, he goes on to state:

> "While I should not reopen the 2016 case I will explain I should consider the massing considerations and not just consider the new height in isolation."

He also recites that section 4.1.5 c. of the Official Plan directs a consideration of:

> "Heights, massing, scale…of nearby residential properties".

Later, on page 7, the Member states: "I feel massing was disregarded in the evidence'. Later still, the intent of the zoning by-law is discussed in terms of massing and it is the zoning by-law that is required to conform to and implement the Official Plan.

While I agree that the failure to consider a relevant consideration can amount to an error of jurisdiction or denial of natural justice, I cannot agree that in the Decision there is either a failure to consider height, established grade and massing or the evidence in relation thereto. The obligation on a Hearing Officer is to address the issues in relation to the statutory tests and, on the matter of height, this was done. The obligation is also to provide a road map of replicable reasons, but not to visit every stop along the way. The matter of 'height and massing' is a statutory and policy directive and relevant consideration to the statutory tests of the intent and purpose of the Official Plan and the zoning by-law. The matter of 'established grade' is not such a test. Punctilious references to every shred of evidence, even if extensive, is not required provided that replicable, logical and supported reasons are provided.

I find that the Member did, in considering the evidence, provide on at least two occasions an awareness of established grade as a measurement determinant and included that with an appreciation of massing and scale, as he was obliged to do.

It is these measures that are 'key elements': 'height, massing, scale', not the Requestor's definition of 'established grade' or its mention. I see no error going to jurisdiction or any error of fact or omission that would warrant granting this element of the review request.

In Ground 1 c. the Request asserts that the Member made an error of law in interpreting certain Official Plan policies, supportive of 'stable' residential environments and to ensure that change is 'gradual' and 'fits' with the existing physical character of the neighbourhood, to apply to the frequency of applications on a property.

The challenge is expressed as follows (my emphasis in bold):

> "46. Member Yao's determination that the Proposal offends the "gradual" and "stable" language in the official plan on the grounds that it is the second of two applications over a short period of time is an **error of law**. If the error of law is not made **it likely results** in the determination that the Proposal does meet the general intent of the official plan, and in turn **contributes to** a different decision and order.

The Affidavit makes the point (paragraph 43) that despite the number of applications "the Proposal (is) one continuous construction process and therefore one "physical change" to the neighbourhood.

The Member makes the finding at page 3, having regard to section 2.3 of the Official Plan that "A second minor variance within 18 months of the first is not "stable". Further, at page 4, he states: "A second development application in this timeframe is not "gradual"." He noted that the words 'sensitive' and 'gradual' are not modified by the word 'generally'. And the Member added at page 5:

> "But there is no entitlement for a successful applicant to return to the Committee of Adjustment and request a further incremental increase on the strength of favourable arguments already made.

I accept that the interpretation of an Official Plan is a matter of law. I also accept that the Member appears to have associated, even contrasted the Application as a succession of variance requests, as to height, using the commonly understood meanings of 'stable', 'gradual' and concluding that the timeframe in which they are addressed is short.

The foregoing reference to 'entitlement' addresses a different issue relating to evidence tendered by the planner and suggests that it is not a credible planning argument to employ a rationale or foundation for earlier relief, granted in 2016, as a basis for the Application. This is understandable as the Member had been urged by the Applicant to consider only the incremental increase in height and take as a given the earlier COA approval for the subject property, to be allowed a height variance to 9.99 m.

At issue is whether the Member's observations on multiple applications as offending the common interpretation of 'gradual' and 'stable' is inconsistent with the policy intent of the Official Plan and therefore an error of law?

I have re-read the relevant policies in section 2.3.1 of the Official Plan. I agree that Policy 1 language refers to 'physically stable areas' and that the policy objective is to 'respect and reinforce the existing physical character of buildings, streetscapes and open space patterns in these areas.'

Where I depart from the submission of the Requestor is in the rigour of statutory interpretation requested to be applied. Official Plans are policy documents and are to receive a 'large and liberal construction' consistent with their objects. I cannot conclude that the frequency of applications on a single property is an irrelevant consideration to the interpretation of a policy addressing overall physical stability and support for gradual physical changes in a designated 'Neighboourhood'. Applications that are approved result in physical changes. To draw a connection between the frequency of applications on one or more properties, in my view, may constitute a relevant consideration to the policy goals of stability and gradual change. The TLAB often wrestles with the apprehension of precedent as a temporal factor of relevant land use planning considerations, is assessing applications. It is consistent with the policy direction to be alert to issues, including multiple applications that have the capacity to change the physical character of a neighborhood.

I find it an undue parsing of the policy intent of section 2.3 to declare that a consideration of the number of applications on a single property as having ramifications

for stability and gradual change constitutes an irrelevant consideration or amounts to an error of law or loss of jurisdiction.

In Ground 1 c. the Request asserts that there are examples of higher heights of dwellings than the by-law standard in a quadrant of the study area and that the Member should explain why they are discounted and why heights and lot sizes are not more fulsomely addressed.

The challenge is expressed as follows (my emphasis in bold):

> "55. The fact that Member Yao's Decision gives certain variances in the study area **less weight** without openly questioning the study area, and/or **giving a reasonable and replicable explanation** as to why he is discounting the evidence provided to support the proposition that the properties in question (on Edgehill Rd and Valecrest Dr) belong to the same neighborhood, **raises issues of jurisdiction**,"

(The Affidavit raises in passing reference to an anomaly in paragraph 49. A Reply question to the Planner was disallowed by the Member (respecting height permission in zoning on ravine lots) at a time when the Planner was 'not in the room'.)

In my view, the Member focused on the Official Plan criteria in section 4.1.5 c. "heights, massing, scale…of nearby residential properties."(Decision, page 5, my emphasis) Moreover, he was aware of and distinguished the lots that 'back onto the Humber Tributary' and stated that "I consider them unique". (Decision, page 6) The Decision is also clear that the Member conducted a mini audit of the Planner's statistical analysis and concluded that there were "a few widely scattered higher buildings…mostly on Edgehill and Valecrest." (Decision, page 7)

I find that the Member neither ignored the evidence nor failed to address a rationale for it not factoring materially into the Decision. The fact that the Member placed a different weight on the evidence from what the Applicant now asserts is a proper assessment is little more than an attempt to reargue the merits of the Hearing that resulted in the Decision. For these, and the reasons described in Grounds 1 a. and b., I find no jurisdictional oversight. The Member accepted that the height standard in the zoning by-law applied equally to the ravine lots; there is no error in declining to hear further evidence on that aspect and it does not appear that height variance activity on ravine lots was established in the evidence at the time of the Hearing, although it would have been readily available.

In Ground 1 d. the Request asserts that the test of maintaining the general intent and purpose of the Official Plan is not extinguished and must still be considered even if the subject property has been the subject of a previous application. It asserts no evidence was called in support of the Application based on 'corner lot' conditions argued in the previous 2016 COA decision.

The Member's statement that gave rise to this challenge is recited and discussed above, under Ground 1 c.

The challenge is expressed as follows (my emphasis in bold):

> "62. The error of law and error of fact related to the official plan consideration of the Subject Property being **a corner lot**, taken together with the other errors of fact and law made by Member Yao while addressing whether the Proposal maintains the general intent of the official plan, **likely result** in a different finding with respect to maintaining the general intent of the official plan than is made if the errors are not committed, and in turn a different order and decision.
>
> 63. Lastly, with respect to jurisdiction, the specific language employed by member Yao could lead one to conclude that he was acting outside of his jurisdiction, as he referred to the applicant's rights to make certain arguments at the COA (not at TLAB). The **choice of wording** on page 5 of the Decision implies that Member Yao was questioning the COA's procedural decision to accept such an argument (**if** it had been made), and not dealing with the rights of the applicant in the context of the de novo TLAB hearing."

I find these arguments somewhat contrived, speculative and not respectful of the Decision's actual wording. In footnote 3 on page 4, the Member extracts a reference to a 'corner site' as found in section 3.1.2 of the Official Plan, referenced by the Planner, Mr. Cieciura. The subject is not further advanced in the Decision as, apparently, it was not engaged. As a matter of fact, the plans clearly depict that the subject property is a corner lot. The Member acknowledged having the policy intent of the Official Plan respecting corner lots having been brought to his attention. Nothing in that speaks to height increments.

I find it clear in reading the Decision as a whole that the Member properly instructed himself on the applicable Official Plan and zoning tests, apparently on the insistence of counsel for the Applicant, that the 2016 Hearing evidence was not relevant either for or against the assessment of the appeal matter before the TLAB in the Decision. Rather, the Member' s statement above referenced is equally consistent with the proposition that on a *de novo* Hearing, the Applicant had the burden to justify the requested height increase to 10.35 m above the approved base of 9.99 m. Further, that the justification must rely on a current assessment of the increment, not evidence called in the prior Hearing.

I confess that I can see no factual error evident on the face of the Decision or an error of law in the interpretation and application of the Official Plan to the matters on appeal founded on this Ground. Where two inconsistent interpretations are taken from an isolated extract, I prefer the one more consistent with the expressed discipline of the Hearing is to be preferred– over the more extreme suggestion that the Member was not prepared to consider a second application on the subject property.

Moreover, this challenge does not appear or amount to the mainstream aspect of the Decision such that the second branch of the test is met: "would likely have resulted in a different order or decision". While that test is not applicable to a 'jurisdiction' challenge, I find that the Member entertained over a 12- page Decision a detailed consideration, vetting and weighing of the evidence on the tests, in a manner entirely inconsistent with a finding of declined jurisdiction.

In Ground 2 a. i. the Request asserts that the project's design of two storeys above an integral garage is within the intent of the zoning by-law and was approved by the COA in 2016. As such, that design was not before the TLAB on appeal and there would be no impact on that design resulting from the current Application on appeal. The submission is that the Member failed to recognize that there are two stories over the garage that are not caused by or the result of the requested additional 0.36 m height increase.

The challenge is expressed as follows (my emphasis in bold):

> "72. It is outside of Member Yao's jurisdiction to question the decision from the 2016 COA Hearing to approve that form of massing (two storeys above the garage) as **that decision is not the subject of this appeal**."

The Affidavit largely repeats the assertions in this ground.

Respectfully, the criticism raised is a construct not of the Decision but of an argument in search of a jurisdictional error. In my view, the proper question is as to whether the Member properly directed himself on matters in issue. In that regard, I find multiple instances where the Member accepted that the matter before him was an incremental height request above and beyond as-of-right permission. In proceeding with that analysis, he accepted the 2016 decision, again, "is not the decision before me" (Decision, page 11), eschewed its evidentiary base, set aside issues of 'motive' (Decision, page 8) and concentrated on the deliverable that would result from a further approval in the context of the evidence presented as to the physical character of the area. That context included height and massing (Decision, page 7), prevailing typology (Decision, page 9) and a finding that the intent of the zoning by-law is to control massing, a subject put in issue by the Application.

No language described points to anything but the acknowledgement and acceptance that the COA approved 'two storeys above an integral garage' and that there is "no zoning limitation on (the) number of storeys" (Decision, page 9).

The finding that zoning by-law's intent to control massing (Decision, page 9) is wholly consistent with the evidence and is far from a refusal to accept the approval of the COA in 2016. I cannot accept the strain it would take to suggest that the Member made a jurisdictional error or committed any over reach into a matter that was "Not the Subject of this Appeal." He examined the height and massing issue in the context of a number of the comparables brought to his attention in the evidence.

In Ground 2 a. ii the Request asserts that the Member's finding concerning the intent of the zoning by-law (to control massing) is an error of fact that is based upon cumulative speculation: e.g., earlier COA refusals without the absence of elevation drawings; and, that two referenced properties 'were designed together'; and, the absence of direct testimony on the design intent of the zoning by-law.

The Affidavit and the Request, paragraph 81, itself speculates, after the event, that 'if Mr. Cieciura had been asked whether the intent of the by-law was to control the number of storeys above the garage, he would have answered in the negative.'

The challenge is expressed as follows (my emphasis in bold):

> "82. Member Yao's reliance on **multiple unsubstantiated facts**, especially his speculation about the massing of refused proposal, to arrive at his conclusion about the intent of the bylaw **is an error of fact** that likely contributes to Member Yao making a different determination about consistency with the intent of the zoning bylaw than is made if the error is not committed."

On this challenge, a close reading of the Decision reveals a traceable route of findings leading to the Member's conclusion that the Application did not meet the intent and purpose of the zoning by-law to control massing as a product of height and built form:

a) Height is important and height and massing have to be considered together (Decision, page 7)
b) The zoning standard accommodates a common approach to established grade, 'off property' (Decision, page 9)
c) The prevailing typology is the one storey solution;
d) Flat roofs add bulk and these are penalized in the by-law by imposing a height limit of 7.2 m and a limit of two storeys (Decision, page 9)
e) The Planner acknowledged that 'two floors over an integral garage was **not** the prevalent typology in the neighbourhood (Decision, page 10)
f) Two neighbouring houses approved and constructed within a year of each other would have the benefit of being 'considered together' (Decision, page 11)
g) A comparative photographic analysis occupies pages 10, 11 and 12 of the Decision

As a consequence, I find that the Member focused on the test and the issue before him relevant to the Application. Observation is an important element of information gathering, unless demonstrably in error. The Review does not substantiate the comparative descriptions are in error.

Having expressed reasons for his conclusion that an intent of the zoning By-law is not maintained, it is not for a Review to challenge that conclusion unless those reasons are laced with error, are spurious, incongruous or unintelligible. I find none of these elements are present and none are alleged; nor is the replicable chain based on speculation or unsubstantiated facts, as alleged. It is not sufficient to parse one paragraph or point and exclaim: "That's it. A clear error." There must be a context, perspective and dimension by which the claim, cumulative or large, can be allowed because it represents a cogent, glaring element that cries out to be corrected. That is not the case here.

Neither the challenge to the Member's finding of a failure 'to meet the intent and purpose of the Official Plan or the zoning by-law' to this point have been successfully challenged.

It is trite to say that each variance must pass all four tests and that the failure to pass one, is fatal.

That said, the Request needs to be addressed in its entirety for any cause that may vitiate the entire proceeding, independent of any individual finding.

In Ground 2 a. iii the Request asserts that the failure to address and weigh direct evidence is an 'error of fact that also raises jurisdictional issues'. The principles of administrative law would suggest that the failure to consider relevant considerations is a matter of natural justice and an error of law. These terms are not applied and indeed were expressly chosen not to be pursued by the Requestor. The distinction may or may not be esoteric but will not be dwelt upon further in favour of a liberal approach to the challenges offered to the Decision, other than to inquire and insist upon whether there were such omissions proven and their relevance.

This challenge as to the weight of the evidence is advanced primarily on acknowledgements of the Member's understanding of the evidence by his use of regulations pertaining to flat roofs, to glean the intent of the by-law. The Request acknowledges that the evidence did not dwell on all the provisions of the by-law (Request, paragraph 87) but suggests that compliance with all the other applicable regulations (to the subject property) should be weighed (reconciled) with that compliance and the articulated façade of the proposal, "designed to mitigate the appearance of height" (Request, paragraph 92).

The challenge is expressed as follows (my emphasis in bold):

> "92. Member Yao's **failure to properly weight** the evidence is an error of fact that likely contributes to Member Yao making a different determination about consistency with the intent of the zoning bylaw than is made if the error is not committed, while **a complete failure to give written reason** for why he rejects or discounts the evidence goes to jurisdiction."

The Affidavit does not contradict the Member's assessment that massing is addressed by the zoning by-law; it does ascribe a lack of relationship between the references to flat roof buildings and the subject Application.

There is no assertion that there was direct evidence contrary to the conclusion that massing is a component of the intent and purpose of the zoning regulations or that height is a factor in massing. As such, I am at a loss to find the direct evidence that was not dealt with that would place the Member's reasons in peril. He clearly identified the differing approaches, in number and frequency, to non-flat roof designs as a comparative element of area character.

Weighing the importance of the evidence is the direct prerogative and duty of the Member – to consider all relevant considerations and discard irrelevant considerations.

While I can see no discussion in the Decision that references articulation in the particular façade and its mitigation of the appearance of height, and wonder why not, I cannot conclude that this was an essential stop on the road that needed expression in

all the circumstances. Again, every detail, nuance, reference or point of emphasis in the evidence of the witnesses need not be addressed in the reasons.

To call the matter of design mitigation a 'complete failure' to address relevant evidence and to be considered in a Motion Hearing or new Hearing would be to undermine the integrity of the Hearing process which was constituted as an inquiry into whether all of the four tests have been appropriately met. To consider the import of the omission, I am mindful that design configuration, while a relevant elemental consideration, is not expressed as one of the four statutory tests with which the Member was charged. The Member had the design plans in evidence before him in Exhibit 1 and elsewhere. Silence does not imply either consent or disapproval. It can be taken to conclude this aspect, design mitigation, was not a seminal ingredient of the decision weighing process; certainly, it is not raised to that level in either the Affidavit or the Request submissions.

It is therefore not a compelling basis to direct relief let alone a matter upon which a different conclusion might reasonably be inferred.

I see no reason to address Ground 3 as it is described as '*obiter dictum*', not forming a part of the reasons behind any component of the Decision.

In Ground 4 a. the Request asserts the Member inappropriately exercised the discretion granted in section 45 (1), in a manner outside of jurisdiction and committed an error of law.

The challenge is based on statutory interpretation and the *DeGasperis v. Toronto (City) Committee of Adjustment* decision (2005 CarswellOnt 2913) which is said to hold that the discretion lies outside of the four statutory tests.

The inappropriateness alleged is a lack of connectivity between the Decision and the spirit and intent of the Panning Act. Namely, that the Member erred in tying his decision to earlier COA decisions on the frequency of variance requests or the ability to request variances to COA conditions, or both. The specific excess alleged is the use of section 2.1 of the Planning Act as a ground to favour one COA decision over another, later one.

The challenge is expressed as follows (my emphasis in bold):

> "111. It should also be noted that Member Yao's Decision **seemingly** relied on the discretion granted to the tribunal **as part of** his evaluation of the desirability of the minor variance, a misuse of the principle laid out in *DeGasperis*, which treats the discretion as something to be exercised independently of the four-part test.

I am not prepared to accept either part of this submission. The issue of whether there are restrictions on how frequently one may make a succession of minor variance applications on the same property is addressed, in part, in respect of Ground 1 d., above. The doctrines of *res judicata,* issue estoppel and abuse of process may also come into play on such an analysis. This is not the issue in the Application and I find

there is no basis to suggest it is an issue in the Decision let alone a basis to assert it is a discretion exercised improperly.

While it is agreed that tribunal decisions made pursuant to a statutory power vested by the Planning Act must fall within the letter and spirit (perspective) of that statute, nothing is raised in the Affidavit or the Request submission that specifies an abuse of this principle. There is no power, decision, condition, subject matter, protected *Charter Right* or other statutory right that is alleged offended. Rather, the vague notion is that the Member's finding (that the relief requested is not 'desirable') is founded on the interpretation that the discretion to so find must occur outside of the four tests reasons, or it constitutes a 'misuse of the principle'.

The Affidavit points, in paragraph 81, to the Member's language, at page 12 of the Decision that;

> "…part of that discretion should be exercised in favouring the upholding of the conditions to the decision already reached by the Committee of Adjustment".

The statement is made in the context of the statutory power and the representations of a party and a Participant that the original decision (*inter alia*, setting a height limit of 9.99 m with conditions), should be maintained.

Had the Member stopped there, there could be no quarrel that one of the purposes of the administrative dispute resolution system is to avoid prolix litigation or incremental applications that might be seen to negate earlier processes.

It is, in my view, entirely appropriate to reflect on the importance of certainty to the planning process and to support earlier decisions on the same subject matter engaging the same players on the same property.

The Member however, had disciplined himself not to engage in an analysis of the previous decision or decisions; the most recent COA decision had approved the very application on appeal.

It is not, by the same token, beyond a reasonable expectation that area residents not be called forth a second time to address the issue of height and the plans asserted in support, to not harken back to the earlier event and demand consistency.

In having to address this aspect of the opposition evidence, the Member accepted the principle or at least observed that:

> "…in creating a uniform and enforceable system of planning permissions…Enforcement of conditions (site plan and elevation drawings) are a "must" to make the whole system work…..It is not timely or efficient (sic: Planning Act, section 1.1(d)) for the community or the Committee of Adjustment to plan in two steps what should be done in one."

Did the Member engage in the consideration of an irrelevant consideration?

Did the Member commit an error by stating a principle that planning decisions should be complete and enduring, not piecemeal and incremental?

Did the Member breach the undertaking to disregard the evidence and support base for the 2016 decision in order to consider the present Application solely on its own and distinct merit?

I find that the answer to each of these three questions, and also the answer to the more general assertion on the limits of the scope of discretion afforded the "desirable' test, is no.

The overall integrity of the planning process is an essential hallmark of the statutory and common law direction that decision making be both fair and relatively final.

I find that the integrity of the decision- making process is a relevant consideration. I do not find that it is a determinative component of the entirety of the Decision but acknowledge that the Member made it a significant component of his findings on this test of 'desirability'.

I find that the Member did not overstate the principle so as to make it a peremptory consideration. The use of the word 'must' is a recognition of the systemic requirement that laws and approvals need to have accountability and sanctions for their enforcement. Unfortunately, this is a recognition of a need to address a simple fact of human nature.

Finally, I do not see the reference to the acceptance of the principle to be a direct violation of the undertaking to examine the Application on its own merits. Part of that examination is the evidentiary justification of the changes requested, both to the approved plans and, in this case, the one variance.

One cannot maintain the integrity of the system that put the earlier (2016) approvals in place, unless one examines the rationale in support of their change. That rationale for increased height was found wanting on two of the three minor variance tests, independent of what happened in 2016.

It does not appear obtuse, irrelevant or an excess of jurisdiction to require that the third test, desirability, also address the reasons for the requested height change. This is not a retrenchment in an undertaking; rather, it is holding accountable adherence to a principle, systemic integrity, and a principle that the Applicant failed to address satisfactorily or, in some aspects, at all.

In this regard, the Member appropriately brought the test back to the relevant considerations of his mandate related to the Application on appeal and its compliance with the statutory tests:

> "…that the result and the process followed is appropriate and in accord with the purposes of the Planning Act". (Decision, page 13)

I find that this reasoning does not offend the scope of the test to determine whether the Application is 'desirable'.

In Ground 4. b. the Request asserts a challenge to the definition of the 'public interest' the Member employed as a component of the 'desirable' test. Again, with reference to the *DeGasperis* authority, the Request asserts that the public interest that is of relevance is the 'development or use' of the subject property and whether the proposal is "desirable for the appropriate development or use of the land, building or structure" (underlining added by the Requestor, Factum, paragraph 115)

The assertion is that the public interest is in the physical relationship of the proposal to the site and surrounding lands.

The challenge is expressed as follows (my emphasis in bold):

> "117. The **error of law** committed by Member Yao **when dealing with the 'public interest' likely contributes** to Member Yao making a different determination as to the desirability of the proposal than is made if the error is not committed."

There is a difficulty with the submission that the public interest, in the test of whether a variance is desirable, is confined to the physical implications of the request. Any definition of the term desirable is not confined to physical ramifications. Even if the *DeGasperis* decision suggests the term relates to the 'development or use', that terminology fails to define a limit to the eligible considerations of what goes into the development or use. More important, variances themselves do not always address the development or use solely from the perspective of physical ramifications.

The TLAB hears arguments almost on a daily basis on such values as privacy, sunlight, views, area character, the natural environment, heritage preservation, protection of natural resources and perceptions of 'legitimate expectations'. While these and others may have a physical attribute pointed to as a cause for concern, the public interest aspects of their evaluation are not always or entirely physical.

Curiously, the Affidavit adds nothing to this issue.

I do note that the opposition mounted in this case, including by the neighbour, is to the imposing height and attendant mass of the structure.

There is only one perceptible direct reference to the 'public interest' in the decision and it is attributable to Ms. Anderson. The Member's general agreement with her submissions cannot be touted as an express finding that the scope of a relevant public interest definition has either been defined, agreed to or, especially, transgressed contrary to the common law – for failing to be confined to physical impacts.

I find this ground to be without definition, support or substance sufficient to cause further inquiry. To that I would add the discussion, above and in the foregoing Ground 4 a.

In Ground 4 c. the Request asserts that the Member erred in fact by agreeing with Ms. Anderson's speculation that there is no way of knowing whether the COA would have accepted, in 2016, a height variance to 10.35 m. It asserts that it is unreasonable to give weight to the factor of an unknown decision in 2016 when the

COA in 2018 in fact approved the 10.35 height variance. Further, that the failure to give any consideration to the 2018 COA decision is contrary to the statutory direction in section 2.1 of the Planning Act and contrary to the need to address the direct evidence of the COA decision on a 10.35 m height variance.

The challenge is expressed as follows (my emphasis in bold):

> "127. Member Yao's failure to have regard for the 2018 COA Hearing approval and **to weight it** against the hypothetical statements put forward by Ms. Anderson amounts to **an error of fact that likely contributes** to Member Yao making a different determination as to the desirability of the proposal than is made if the error is not committed.

The Affidavit asserts that the Decision 'completely disregards the COA's consequent decision to approve 10.35 m at the 2018 COA Hearing.

I agree and can find no overt commentary reference in the decision to the 2018 COA decision beyond its acknowledgement on page 2 of the Decision that the COA granted the Applicant's request on May 24, 2018. Certainly this was not an unknown factor; I find that the failure to cite or describe it as a factor of relevance, or not, does not, in itself, amount to a reviewable error. The statute, section 2.1, does not require written reasons as to its consideration.

In the above discussion on discretion and the public interest, I have concluded that there is no merit to the accusations that suggest there was any failure to adhere to the jurisdiction and relevant considerations remitted to the TLAB on appeal.

In this circumstance, the complaint centres on the Member's alleged failure to properly weight the COA decision against an earlier ('we don't know') hypothetical raised by a Participant, which was agreed to by the Member as a statement of the obvious.

I commend counsel for creativity, but in my view this alleged Ground is too remote from the relevant considerations on a Review request. The 'weighing' of evidence and arguments is the prerogative of the Member. It is not for the Requestor to raise an argument in a Review that could have been made in the Hearing setting. It is even less a basis for a Review request to suggest that a proper ground for review, is to substitute such allegations for the weighing function of the tribunal who heard the evidence and conducted the Hearing. Had there been credible evidence that was unanswered, conflicting opinion evidence resulting in findings not rooted in relevant considerations or some other deficiency that was tangible, substantive, determinative or wrong, the relevance might be different.

I cannot find the Applicant's assertion that a substitute weighing of evidence 'likely' might have yielded a different decision is either an error of fact or law or is in any sense a compelling submission warranting further consideration.

In Ground 4. d. i. the Request asserts that the Member exceeded the TLAB's jurisdiction and committed an error of law when he described the necessity of

enforcement of tribunal decisions as an integral component "to make the whole system work". (Decision, page 13)

It is asserted this is a misreading of section 1.1 (d) of the Planning Act which references only the 'planning process', not enforcement.

The challenge is expressed as follows (my emphasis in bold):

> "135. Member Yao is acting outside of his jurisdiction by taking it **upon himself** to decide that the condition attached at the 2016 COA Hearing **has not been adhered to** and **by basing his finding with respect to desirability on a non-existing authority to enforce** that COA condition."

The Affidavit adds, in paragraph 91, that it is the role of the Buildings Department to determine whether minor variance conditions have been adhered to. I note in passing that it is the work of the Buildings Department that discovered the height exceedance and non-adherence to the approved plans and variance from 2016 that led to the current Application.

The substance of this challenge aspect is also discussed under Ground 4 a. above.

In addition, if the Member made a conscious determination that the prior condition – of construction substantially in accordance with identified plans – had been breached, that is a finding of fact on the evidence. I have reviewed the elevation plans referenced in the 2016 Condition; the north elevation plan very clearly identifies a height of 9.99 m. The Notice to Comply found in Exhibit 1 to the Hearing identifies that that height had been exceeded, on construction, for undisclosed reasons.

I find that this finding of fact, on the evidence is unassailable.

To proceed from that point and draw the observation or conclusion that the current application changes the prior Condition is neither a leap of logic nor a mis-description of the process before the Member. The mere fact that the Application process amounts to a request to change an earlier Condition is neither an issue of enforcement nor a pre-determination of the merits of the requested change. In my view, it is nothing more nor less than an observation that part of the earlier 2016 decision is re-engaged in two ways: the plans; and the variance to height itself.

The Member's observation that the request should be acknowledged to be a change to an earlier deliberative process is entirely consistent with the public policy objective of respect for the integrity of the land use planning decision making and dispute resolution system, and nothing more.

I am not prepared to read into the Decision the Requestor's submission that the Member has assumed an enforcement role in a manner that overrode his fulsome consideration of the merits of the Application.

I accept that his comment:

> "It is not timely or efficient for the community or the Committee of Adjustment to plan in two steps what should be done in one." (Decision, page 13)

as an observation, that in this circumstance the Application is a process that was engaged on a subject matter, height/plans, that is engaging the system twice. From that, he concludes his appreciation of the 'desirability' of the Application.

I agree that that the Member's conclusion, as a component of the desirability test , subsumes or can rightly be seen to include the element that the duplication of the process, to rectify the non-observance of the earlier decision and its Conditions, is not itself a desirable attribute:

> "In conclusion, I find that the variance sought is not desirable for the appropriate development of the land at 30 Westridge." (Decision, page 13)

Even if the duplication of the process is the only substantive element of the Member's conclusion, I do not accept for the reasons stated in this Ground that it is an irrelevant consideration to the TLAB's role in dispute resolution.

For these reasons and those expressed earlier in this series of Grounds, I do not find a compelling basis to interfere with the Decision.

In Ground 4.d.ii. the Request asserts an error of law in the language used by the Member to justify a limitation on the number of COA applications that can be made in respect of a property or zoning attribute.

The Affidavit does not raise this issue.

The challenge is expressed as follows (my emphasis in bold):

> "139. By reading **a limitation** on the number of applications into Section 1.1(d) of the Planning Act Member Yao **is acting outside his jurisdiction** and committing an error of law that **likely contributes to Member Yao making a different determination** as to the desirability of the proposal than is made if the error is not committed."

As recited above, the closest the Member came to doing what is the essence of the complaint is to write as follows:

> "It is not timely or efficient for the community or the Committee of Adjustment to plan in two steps what should be done in one." (Decision, page 13)"

I do not construe this statement as any limitation on the number of applications, either generally or specifically. As above discussed, it is a component of the TLAB function to maintain the integrity of the appeal system including the role of a gatekeeper on matters and persons coming before it. This is an integral component of its function.

I have found that the Member did not make a determination of the Application on its merits based on the revisions to a previous 2016 application. Rather, he excluded the previous application in assessing the merits of the current Application in respect of the separate tests of Official Plan and zoning by-law intent and purpose. He found it undesirable and unnecessary that the earlier approval needed to be revisited because construction had resulted in non-compliance. I have found this to be a relevant consideration and not an error of law or a jurisdictional error. I think it is going too far to suggest that the Member has expressed a limitation on applications.

Consequently, I do not accept that this is a compelling ground that is raised or one that would alter the findings that the Member has independently made in the Decision or on any of the respective statutory tests.

In Ground 4.d.iii the Request asserts that the dwelling on the subject property was built in 'substantial compliance' with the plans approved in the 2016 decision and the Member was factually in error in finding non-compliance. It is submitted that but for this factual error, the Member's opinion on the 'desirability' of the proposal could change. An ancillary aspect, raised in the Factum as a matter of jurisdiction, is the Member's failure to address the evidence of Mr. Cieciura that the earlier 2016 condition was met.

The challenge is expressed as follows (my emphasis in bold):

> "148. Member Yao's **failure to explain** why he does not accept, or discounts, the ample evidence that contradictions the conclusion about compliance with the June 24, 2106 plans in his written Decision raises issues over jurisdiction. Furthermore, **if member Yao had the jurisdiction to decide whether the condition was breached (which he does not) he would be committing an error of fact by failing to properly weigh the one-sided evidence before him**."

The Affidavit acknowledges that the Order to Comply "raises the fact that the height has deviated from the building permit plans". (Affidavit, paragraph 94)

It asserts that this is a distinctly different issue than construction substantially in compliance with the COA plans. It states that it was the Planner's evidence that construction was substantially in compliance and that the purpose of the COA Condition is 'often to manage the appearance of the building façade'. Mr. Cieciura also notes that his testimony is not mentioned and that the additional 0.36 m height request does not appear in the 2016 plans and it follows that the current variance for the 0.36 m height addition is not prohibited by the 2016 condition.

I dealt with the 2016 COA plans above and found as a matter of fact that the elevation drawings prescribed a height of 9.99 m. This is reinforced by the variance permission, in 2016, to build to 9.99 m in height. While Mr. Cieciura may hold the opinion that the building was constructed in 'substantial compliance' with the 2016 COA plans, that general evidence is not germane to the specifics of the matter before the

Member. It is similar to the issue of the usefulness of 'ranges' of heights over a broad neighbourhood; the individual circumstance needs to be considered.

The Member had before him an admission of non-compliance, as earlier stated, in the form of an Order to Comply on the specific permit and his available COA elevation drawings. These were facts than no generalization could address, especially for the purpose of overlooking the basis of the need for the current Application.

It is not necessary, again as earlier stated, to address all and every opinion tendered. This is particularly true where a Planner's opinion, as expressed in the Factum, fails to address the issue at hand, height compliance, or acts to disguise its relevance in asserting an alleged factual error. I find no fault with the Member failing to address the Planner's opinion evidence on substantial compliance, where that evidence is general and not on point to the assessment of the desirability of the current Application, focused on a requested height increase.

I find that there is no evidence of a factual error on the part of the Member even if non-compliance with the Condition on construction is found to exist in the Decision. As a consequence, in the absence of an error, there is no reason to suggest its consideration as a component of the 'desirable' test would change. I find that there is no reason to 'properly weigh the one-sided evidence before him'. Weighing a factual observation against a general opinion submission is an exercise that an experienced Member can readily identify and decide to avoid the absurdity of its consideration.

DIRECTION (IF APPLICABLE)

The Review jurisdiction provides, subject to its determinations, a variety of options listed in Rule 31.6, above recited (under 'Jurisdiction'), from which to choose.

In the result here, I have not found substance in the multiple challenges to the Decision. As such, there is but one option of choice.

DECISION AND ORDER

The Decision of Member Yao dated October 30, 2018 is confirmed. The request for review is dismissed.

X

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