Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Thursday, January 10, 2019

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): MARIE SMULA

Applicant: SHASHA WANG

Property Address/Description: 641 HURON ST

Committee of Adjustment Case File Number: 18 103629 STE 20 MV

TLAB Case File Number: **18 187808 S45 20 TLAB**

Decision Order Date: Friday, November 23, 2018

DECISION DELIVERED BY Ian James Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for review (Requests/Review Request) by the Appellant, arising from a decision of Toronto Local Appeal Body (TLAB) Member S. Gopikrishna dated November 23, 2018 (Decision). The Request is pursuant to Rule 31.1 of the TLAB Rules of Practice and Procedure.

In the Decision the Member allowed variances to recognize and maintain existing non-complying circumstances including altering an existing three-storey detached dwelling at 641 Huron Street (subject property) by enlarging the front entrance stairs, constructing rear stairs and a rear detached garage.

Objection is not taken to the specifics of the Decision but rather that the matter proceeded to be heard at all. It is the circumstance of that hearing proceeding that is at the core of the Review Request.

The Request was made December 21, 2018 by Angela Makris, a licensed paralegal, on behalf of the Appellant Marie Smula (Requestor/Appellant). It was accompanied by a seven page, 42 paragraph affidavit of the Appellant, Marie Smula, sworn the same day. No other materials, attachment or external references accompanied the Request.

A Response to the Request for Review (Response) was received by the TLAB consisting of two affidavits communicating materials exchanged between the Parties (Angela Fang, Law Clerk) and the TLAB, an attestation by Robert Graham Partner, an owner of the subject property, on aspects of the Request and a responding factum of 15 pages and 50 paragraphs by the owner's counsel, Raj Kehar. Mr. Kehar also supplied a Book of Authorities (Authorities).

There was no Reply to the Response.

The Requestor asserts two separate grounds under the Rule for the Review:

a). The TLAB acted outside its jurisdiction in failing to consider the factors relevant to an adjournment of the Hearing set in the Notice of Hearing for November 1, 2018; and

b). The TLAB, by proceeding in the absence of the appellant or her representative denied her procedural fairness and natural justice.

There are ancillary elements to the grounds asserted also considered.

The Response requests a dismissal of the Request, with ancillary relief as well.

The Decision addresses the determination to proceed with the Hearing as a conscious consideration of the materials and representations made to the Member by counsel for the owner.

BACKGROUND

The materials referenced by the Requestor and those provided by the Response attest primarily to the pre-hearing phase of the TLAB file. As neither the Requestor nor her representative participated in the Hearing, the Request is essentially a challenge to the procedures available and engaged to provide a proper foundation for the Hearing, and the Member's ruling to proceed.

None of the materials challenge the content of the Hearing, the correctness or otherwise of the Member's recitation of the evidence, the reasons or the Decision. In effect, the essence of the relief sought is that the Hearing should not have convened and, once convened, should not have proceeded.

The affidavit of Ms. Smula is well prepared in terms of the expression of events leading up to the TLAB Hearing and her appreciation of their import. By paragraph reference, I summarize that content, albeit not in the detail originally expressed:

1. Prior to, at and subsequent to the Committee of Adjustment (COA) decision approving the variances requested for the subject property, the affiant recites settlement negotiations occurred which she states she accepted and confirmed (paragraph 9). Despite this, in the absence of any written agreement, the Requestor appealed the COA decision and, continuing to the TLAB Hearing date and throughout the exchange dates detailed in the TLAB Notice of Hearing, engaged in further discussions with the owner and counsel (paragraphs 26, 25-27).
2. As a result of prior arrangements, the Requestor was out of the country for a two month period during which the TLAB Rules required document exchange and Witness Statements to be produced, and the Appellant met none of the filing obligations (paragraph 17).
3. Realizing the challenge of ongoing settlement discussions, the pre-arranged absence and the pending Hearing appointment, an email was said to be sent to the TLAB on July 23, 2018 (well in advance of the November 1, 2018 scheduled Hearing), advising of the absence and that an adjournment "would be requested once the election period was completed" (paragraph 18). Parenthetically, I note that the 'election period' is a date set in the Notice of Hearing for persons of interest to declare their status as a Party or Participant to the appeal. The reference demonstrates a close working knowledge of the TLAB Rules.
4. A second email was said to be sent September 12, 2018 to the TLAB , copied to Mr. Kehar, "formally requesting an adjournment" (paragraph 19). Neither communication referenced in affidavit paragraphs 18,19 was provided with the affidavit; however, the affiant relates that the TLAB made two dates available for a Motion (September 27; October 10, 2018), neither of which was the Appellant able to meet the filing deadlines (paragraph 22).
5. On the belief settlement discussions were ongoing, the Requestor/Appellant did not attend the scheduled Hearing, November 1, 2018, relying on the success of Ms. Makris, her representative, to achieve an adjournment (paragraph 27).
6. Neither the Appellant nor the representative, Ms. Makris, was able to attend the November sitting (the latter "on a personal health-related matter"). The events of that day are summarized in paragraphs 27-30, including the statement: "An email was subsequently delivered by Ms Makris to Mr. Kehar regarding her absence; TLAB was copied on said email." While the email was not supplied, it is contained as Attachment 'J' to the affidavit of Ms. Fang. It was received at 10.02 am the morning of the Hearing, the sitting of which had commenced at 9:00 am and stood down for ½ hour to allow late attendance.
   The email reads as follows:

> "Raj, thank you for your email. I am dealing with a personal emergency. Could you PLEASE request an adjournment and speak on my behalf?? My cell is 416-697-9070. Leave a message if I do not answer I will call you back."

7. Subsequent discussions on incorporating settlement terms in an exchange of draft order wording ensued without a successful resolution and the Decision issued (paragraphs 30-38).
8. The Request asserts that the ongoing discussions, the adjournment topic, the unforeseen inability of the representative to attend and request an adjournment, and counsels alleged intransigence in co-operating all merit a reconsideration of the Decision under Rule 31.7, above (paragraph 40).
9. Since the Member failed to take these considerations into account and provide her an adjournment and an opportunity to argue the merits of her appeal, the Requestor asserts that the Member acted outside his jurisdiction and failed to exercise own initiative under the Rules. Despite an awareness that the legal representative could not physically attend, the Member "proceeded and made findings *in absentia"* (paragraph 41(a)). This action, she asserts, was acting outside the Member's jurisdiction by failing to grant the adjournment by virtue of failing to apply Rule 2.11 and the Rules on adjournment considerations, thereby denying "me my right to procedural fairness and natural justice" (paragraph 41 (d)).
10. Finally, the Requestor asserts that the failure of the owner or Mr. Kehar , or both, to disclose details of the prior settlement discussions "or the requested adjournment" can constitute "conduct misleading or misrepresentation to the Committee by omission " (paragraph 41 (f), underlining mine)

In the Response, a detailed record of the communications between the Parties is assembled by Ms. Fang and reproduced. Curiously absent is any aspect of the supposed exchange respecting the settling of language of a component of the draft order with the Member, or the significance, if any, of the September email exchange, referenced in paragraph 4 above, concerning potential adjournment Motion dates.

The attachments do detail the efforts by Mr. Kehar, counsel for the owner, on several fronts:

a) To request from the Appellant the filings due and incumbent under the Rules to the conduct of a Hearing and noting own compliance (paragraphs 5-8);
b) To establish terms for the non-disclosure as the Hearing Date neared (paragraph 10, 11); and
c) To provide a written record, in addition to the language of the Decision, as to the events and exchanges that occurred on November 1, 2018, the Hearing Date (paragraphs 12-14).

The affidavit of Mr. Partner, an owner, categorically asserts that "no settlement was ever reached" (paragraph 5).

The Response includes the submissions of counsel. It asserts the following topics:

1. Litigation or settlement privilege over discussions held with the Appellant throughout, together with the fact that no settlement was ever reached, or documented;

2. Factual errors largely engaged in supplementing the record of communications as between the Parties (supplied by Ms. Fang) and confirming that "no materials or motion for adjournment were ever received by the Applicant" (paragraph 21).
3. Provides a categorical denial on the withholding of information from the Member and that submissions were made (which would be on the Digital Audio Recording) as to the history of participation, non-productions by the Appellant and the failure to bring a Motion on the record for any adjournment, despite it being raised again in the email received during the Hearing (paragraph 29-30).
4. Submissions on the Request itself, including the tests for its acceptance and the allegations of jurisdiction error and breach of procedural fairness and natural justice. These are well set out in paragraphs 35-43 of the 'Factum'; they assert that Member Gopikrishna was 'alive' to the issues, wrestled with the equities of proceeding and applied the appropriate considerations in continuing to hear the matter. It presents, in paragraph 43, seven reasons why it would not be fair in the circumstances to order a rehearing.
5. The response reveals that the Applicant had filed a Motion for Costs on December 21, 2018. This is the same date that the Request was filed with the TLAB. Neither Party provided anything to connect the two events.

While there are additional considerations advanced by both Parties, I believe the above summaries adequately encapsulate the divide that separates the positions of each.

Again, the issue does not appear to be anything the Member heard or did in respect of the merits of the Hearing but whether it should have advanced at all.

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

To begin, the TLAB ascribes to the expectation that a right to a hearing on a valid appeal is an important and pervasive entitlement.

On a review request under Rule 31, the task is not to sit in judgement of the appeal of first instance, or, in this instance, in the merits analysis of the Decision. Rather, the issue here is more narrowly defined, as above expressed, as to whether the merits analysis should have proceeded at all, and if so, was it in error to not have the benefit of the Appellant's evidence, whatever that might have been.

In reviewing the Request, the Response and its materials and the Decision, I am content that the issues raised and materials supplied are sufficiently complete and clearly articulated that a further inquiry into them through requesting written submissions is unnecessary. Clearly, both Parties have made a conscientious effort to advance their positions and have done so with frankness and candour, i.e., 'put their best foot forward'.

This review is conducted on the material provided and as above identified.

I begin with the framework of a TLAB appeal.

It is the Applicant for relief that bears the initial burden on demonstrating to the TLAB, in a Hearing setting, that the merits of the application survives or meets the policy and statutory tests concerning its application and evaluation, to the satisfaction of the Hearing officer.

It is for the Appellant, if different from the Applicant, to raise and demonstrate the reasons why a particular application or element thereof fails to meet those policy and statutory tests, again, to the satisfaction of the Hearing officer.

In the course of the endeavours of those interests, and those in support or opposed, the procedural Rules of the TLAB give direction as to the exposure of the issues, the nature of the evidence and the relief sought. Some of the Rules are directory, some are mandatory and some are left to the Parties to seek to be engaged.

In all cases, the Rules are clear that their intent is to avoid 'trial by ambush', to have the Parties and interests 'put their cards on the table', such that informed decisions can be taken throughout the process to result in a consensual, mediated or contested final decision, should a formal hearing prove necessary.

The Rules are there to establish the parameters of the obligations, expectations and to facilitate discussion, settlement, mediation or other form of dispute resolution. They are not present to be avoided, observed in the abstract, agreed by the Parties unilaterally to be set aside or postponed or to be applied on the basis of individual discretion or own definition of fulfillment.

They are present to take the mystique and uncertainty out of the trial process, to cast a revealing light on the differences between citizens, agencies and each other. They are present for the larger purpose of encouraging dispute resolution in a forthright and transparent manner.

I am reminded in this circumstance of two quotes from years past. I recall it was J. Meade Falkner in *Moonfleet* who expressed the following proposition:

> "As in life, so too as in a game of hazard, skill can make something of the worst of throws".

I find that both the Appellant and the Applicant, in presenting their written positions on the Request, have demonstrated great skills commensurate with their callings and their advisors.

I am also reminded of a saying attributed to Robert Glenn Ingersoll, called to mind because of the TLAB obligations under its Rules to move the dispute resolution process to a conclusion, namely, as in TLAB so to:

> "In nature there are neither rewards nor punishments – there are consequences".

I find that the TLAB Rules are a roadmap to guide the Parties and that there is an obligation to stay on that road to achieve the ultimate disposition, dispute resolution. This is not to say that the road is absolute, unalterable, fixed and governed by gravity. The Rules clearly provide avenues, manner and means for relief and the materials (Staff, Forms, etc.) to access its availability.

I have closely examined the language of the Request and the Response and find little or no distinction between the Parties in their knowledge of the Rules or their ability to read and apply them in this circumstance.

I therefore approach consideration of the Request to include consideration of the Rules and the 'consequences' if not followed. This is not a matter of reward or punishment or any finding in respect of either.

The Request speaks to efforts made by the Requestor to engage the owner in settlement discussions throughout the pre-hearing process. It is not disputed that these discussions occurred, albeit with different views as to the degree of commitment in their progress. The Response claims 'settlement privilege' to these discussions and requests that respect be given, as a matter of public policy, to such discussions. It requests that specific paragraph references suggested as a breach be excised from the Request. Case Authorities are provided in support of this claim and its attendant remedy.

I am not entirely convinced that 'settlement privilege' has been breached by the Requestor or that a finding can or should be made on this ground. I have not found it necessary to examine the challenged paragraphs of the Requestor's affidavit to reach a definitive conclusion.

What is patently clear on the subject matter of settlement is that none was ever reached, or at the very least no settlement was ever crystallized or put in documented form. As such, I can put no weight on the inference of a breach of a settlement term or any suggestion that *male fides* or improper conduct can be applied to either party on this subject.

I cannot accept that settlement discussions, ongoing or otherwise, constitute a ground to unilaterally not fulfill the obligations of the Rules which are directed at participation in a clear and forthright manner. There are many instances before the TLAB where alterations and pauses to the march of the Rules are requested to be made, with or without the consent of other Parties, formally and in accordance with the Rules, seeking the tribunal's consent. This did not occur in the matter before the Member and I am not prepared on the evidence presented to address the inference that there was any sharp practice, mis-direction or failure on the part of either Party in the representation of their respective clients.

I find that the fact of discussions between the Parties and the actions or inactions taken by its existence or otherwise is not a substantive ground that falls within the categories of matters upon which relief can be granted. If it does, I find that there is not a compelling demonstration that it should override the obligations on a Party to comply with the Rules, or amount to an applicable ground for relief.

I find that the issue of 'settlement privilege' is not needed to be addressed, from the perspective of either Party, as a consideration determinative or even a substantive ground relevant to determine allegations of jurisdictional or procedural error or a failure to afford natural justice, in the circumstances.

I also find that the history of the matter and references to the COA are not germane to the Request in the manner in which they are raised. The COA decision and its materials are a consideration for the Member to consider in the merits Hearing; however, no challenge is made to that aspect.

The Notice of Hearing in this matter was issued on or about July 11, 2018 (Ms. Fang, Exhibit "A"). I find it understandable that the Appellant had a previously determined absence for an extended period, apparently from that date to September 15, 2018. That absence makes participation more difficult, but not impossible. There is no indication that the Appellant was unaware of the Notice of Hearing or of the responsibilities it prescribed. Indeed, I find she was timely in identifying her inability to meet deadlines and took steps, in the retainer of Ms. Makris, to address those issues.

However, I also find that despite some evidence of intention to seek an adjournment and some discussion of that prospect, no positive step was made that bore any semblance of relevance to the requirements of the Rules respecting adjournments that was pursued. I am not disposed to a finding that an email, or even several email exchanges on the topic in September, 2018, constitutes a Motion for an Adjournment. The TLAB facilitates adjournment requests, whether or not consented to, on consent without a hearing or by the possible device of a written Motion.

I find that no Motion for adjournment was sought. Certainly, none was ever properly instituted or represented by the Applicant as accepted or left uncontested. The matter of an adjournment was never crystallized; as such, it cannot form the basis of a denial of natural justice, procedural error or jurisdictional oversight.

I come to this finding even including the late arrival of a further email from Ms. Makris during the conduct of the November 1, 2018 Hearing. In that email, above recited, Ms. Makris responded to a timely inquiry by Mr. Kehar as to the reasons for her absence, the Hearing having been recessed to afford time for late arrivals.

The Appellant's email asks the Applicant to request an adjournment of the Hearing on the basis of a personal emergency, not further described. It was copied to the TLAB and a Staff member brought it forward during the recommencement.

I find that nothing arises in the manner that the email came to the attention of the Member. Its lateness, brevity, and indirectness, however, do not constitute a proper Motion of and in itself, even if the Member were to consider entertaining an adjournment Motion at such a late stage along the procedural road.

Those same issues pervade the submissions on how to deal with the request, to the Applicant's counsel, to seek an adjournment.

The request raises a professional courtesy between court officers, normally worthy of conscientious consideration. In this circumstance, the Hearing Date had been

set for nearly four months, the Appellant had provided no filings nor complied with the Rules and had brought no originating Motion. The Applicant on the other hand had complied with the disclosure and filings under the Rules, was present with counsel and a witness and was intending to proceed. While the request to counsel by Ms. Makris must have been wrenching, the duty of Mr. Kehar was to his client and the Tribunal. I find nothing untoward in the conduct, representations or consideration of his submissions in that regard and indeed find them to be entirely appropriate, even in the unfortunate circumstance of Ms. Makris' responding advice that she could not be present on account of a 'personal emergency'.

Ms. Smula's reason for not being present to support her representative holds no substance; her non-attendance arguably was neither prudent nor protective of her interests, independent of the unfortunate circumstance that befell Ms. Makris.

In those circumstances, the Member made a determination to proceed with the Hearing on the merits in full consideration of the relevant matters. In this regard the Decision states:

> "At the hearing held on 1 November, 2018, the Respondents, Party Partner, were represented by Mr. Raj Kehar and Mr. Sean Galbraith, as stated earlier. Ms. Angela Makris was not present, nor did the TLAB hear from her about her being unable to appear prior to the hearing, to represent her client at the hearing. After ascertaining that Ms. Makris wasn't present, I decided to postpone the hearing by half an hour to give Ms. Makris an opportunity to attend, in case she was late. When we reconvened after the half an hour break, Mr. Kehar informed me that he had both called and emailed Ms. Makris, to see if she would be attending, but had not been able to contact her. As we were discussing to do what next, we were alerted by the TLAB staff that an email had been sent by Ms. Makris to Mr. Kehar with a copy to the TLAB, where she stated that she couldn't attend because of a "personal emergency", and asked Mr. Kehar to seek an adjournment. Mr. Kehar expressed his frustration at the lack of engagement from Ms. Makris, and the request for adjournment. Mr. Kehar stated that such behavior would prejudice his client's case through inexplicable delays. There was, consequently, no Motion for adjournment, and I said that I would proceed to hear the case immediately. The reasons for this are explained in the "Analysis, Findings and Reasons" section"… (at page 3)

It then continues, at page 10, under **Analysis:**

> "It is important to commence with a discussion of my reasoning to proceed to a full hearing on 1 November, 2018, despite the absence of the Appellant. The lack of any submissions by the Appellants to the TLAB, when combined with what comes across as indifference to the concerns expressed by the Applicant around the lack of submissions, suggested to me that the process was not a high priority for the Appellants, notwithstanding that the process had been initiated at their behest. Given that their Appeal had set into motion, a time consuming and resource intensive sequence of steps culminating in the oral hearing for the Applicant and the TLAB, the lack of engagement is a disservice to the process. Even if I accept that the Agent for the Appellant couldn't attend the hearing

because of a “personal emergency”, there is no stated reason, to date, about the lack of engagement throughout the process, including timely submissions.”

I find that there was no failure to consider a relevant consideration in determining to proceed with the Hearing. The Member was ‘alive’ to the issue in not having the Appellant present and the reasons therefore. There was nothing requiring the Member to take an initiative beyond that demonstrated in reviewing the participation record of the Appellant. I have found that the presence of settlement discussions, unfulfilled, would not have been relevant or a ground for an adjournment in the absence of the willingness of the Applicant.

The Member weighed the equities and made a determination, a procedural determination, to continue on the road of disposing of the appeal. There is evidence in that Decision consideration that the Applicant and its professional planning advisor addressed the known concerns of the immediate neighbours, including revisions and opinion evidence thereon in support of the Application. There is nothing in the Request to suggest that this evidence is disputed, in error or even that it would have been the subject of questions.

In that respect, the concerns of the Appellant were heard and addressed.

The Appellant in the Request asserts that the ongoing discussions, the adjournment topic, the unforeseen inability of the representative to attend and request an adjournment, and counsels alleged intransigence in co-operating all merit a reconsideration of the Decision under Rule 31.7.

For the reasons described above, I do not agree. While Ms. Makris’ absence was indeed unfortunate, it could have been ameliorated if the Appellant herself had backstopped the Hearing attendance with the knowledge and concerns she held, but had never formalized.

I find that the Member committed no apparent jurisdictional error. The decision to proceed ‘*in absentia’* was founded on all known facts. I can find no procedural error worthy of exploration or denial of natural justice in the decision to proceed with a Hearing that had been convened fully in accordance with the TLAB Rules and in the absence of any Motion for Adjournment.

Even if as asserted by the Appellant to have occurred at the TLAB Hearing (which is unclear and unsubstantiated), I find no misrepresentation by or on behalf of the Applicant that warrants consideration.

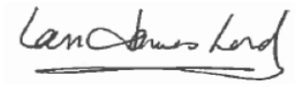
In no other respect can I find a compelling argument by the Appellant that requires consideration of the relief requested.

I am appreciative of the Authorities presented. The lack of reference to them does not indicate either application or disagreement with their import. They are morally persuasive but not determinative of the reasons herein.

As a consequence, the Request for Relief is not warranted.

DECISION AND ORDER

The Request is denied and the Decision and Order dated November 23, 2018 on TLAB Case File Number 18 187808 S45 20 TLAB is confirmed.

X 

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