Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, January 08, 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): YASSER PHILOBES

Applicant: ARMANDO BARBINI PLANNING & PERMIT SERVICES

Property Address/Description: 116 BRIAR HILL AVE

Committee of Adjustment Case File Number: 17 118467 NNY 16 CO, 17 118476 NNY 16 MV, 17 118478 NNY 16 MV, 17 273928 000 00 OA, 17 273944 000 00 OA, 17 273952 000 00 OA

TLAB Case File Number: **17 274122 S53 16 TLAB, 17 274139 S45 16 TLAB, 17 274147 S45 16 TLAB**

Decision Order Date: Wednesday, October 31, 2018

DECISION DELIVERED BY Ian James Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request/ Request for Review) under Rule 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB) made by David Adam Goluboff, a Party to the above noted matter (Requestor) who was represented in the Hearing by Jennifer Meader, solicitor. The Request was supplemented by an Affidavit (Form 10) of the Requestor, sworn November 28, 2018. There is no indication as to whether Ms. Meader played any role in the Request.

The Request relates to the decision of the TLAB by Member G. Burton issued October 31, 2018 (Decision). Staff of the Toronto Local Appeal Body (TLAB) confirmed service of the Request on the Parties of record. The lands are known municipally as 116

Briar Hill Avenue (subject property) and were the subject of a severance and minor variance applications (Applications).

A Response was received December 21, 2018 from Ms. A. Stewart, counsel on behalf of the Applicants/ Appellants in the matter. The Response was in the form of a Notice of Response to Motion (Form 8) and was served on the Requestor and the Parties to the Decision.

No other contributions concerning the Request were received.

Service is a condition precedent to a validly constituted Request, but only on the 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. Nevertheless, 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 TLAB, at the original Hearing.

I have reviewed the material supplied in the Request and concluded, for the reasons set out below, that the relief requested of the cancellation of the Decision or, in the alternative, of ordering a new Hearing is not warranted. I am, however, prepared to stay the Decision from the date hereof pending receipt of the matters addressed herein.

The Requestor did propose that the effect of the Decision be stayed *"pending the outcome of this review".* No support rationale was given for that request. The Response did not address the matter of a stay.

In my view, while the TLAB Rules contemplate by a Party a request to stay the import of a Decision, such action requires a foundation for the request that is not to be presumed. A general stay has the effect of suspending any rights accruing under a Decision, can have cost and material consequences to the party affected, and ought not to be either presumed or granted without justifiable grounds being advanced and a right of response. On the general request, neither has occurred in this circumstance.

That said, in considering the matters put in issue in the request, there appears to this Member good reason to employ the relief grounds and remedies available to the TLAB to ensure the advancement of proper principles of community planning – all as set out herein.

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

BACKGROUND

This matter was heard over a four day period: May 14, August 27 and 28 and September 28, 2018. It involved a request to sever the subject property to form two

building lots and allow, with respect to each, four variances requested and refused by the Committee of Adjustment (COA):

a. Lot frontage of 6.87 m, vs. 7.5 m required;

b. Variance to permit an integral garage on a lot less than 7.6 m;

c. Floor space index of 0.70 x the lot area, vs. a maximum of 0.60 x;

d. Building length of 16.74 m, vs. a maximum of 14.0 m.

These variances had been revised and reduced from those that were before the COA. The changes had been disclosed in accord with the Rules of the TLAB. There was no objection taken to any procedural matter antecedent to the Member hearing the matter.

The Decision consists of 32 pages of text and was issued October 31, 2018. It allowed the Appeal and granted the severance and variances, subject to defined conditions applicable to the consent approval of lot creation and in respect of the variance approvals applicable to By-laws 438-86 and 569-2013.

The plans attached to the Decision indicate nearly identical built form frontages.

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 of 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

The Request is articulate and well presented, albeit having some overlapping aspects. The issues raised are expressed from a perspective of deep appreciation and affection for the neighbourhood in which the subject property is located, and for its continued preservation.

These are laudable sentiments and essential ingredients to City neighbourhoods and the quality of life that the citizens of the City respect, and aspects of which the Official Plan seeks to reinforce.

I performed a site visit to better understand the descriptive position of the Parties on the attributes of neighbourhood character and nuances attendant the site itself. This attendance was both out of Council's request of TLAB Members that site visits are expected but also to better appreciate the representations and descriptions employed by the Member and the Parties. Nothing in that site attendance is alone a determinative of the matters considered herein.

The Request for Review is encapsulated, on page 2, in an explanation of the reasons for the request. At the forefront of that rationale is the allegation that the Member, in her Decision, made "numerous errors and inconsistencies", both 'factual' and 'legal', that benefited the Applicant. It is asserted "that absent the cumulative effect

of these errors, there would have been a different outcome". From this premise, the Requestor asserts that the directional favouritism demonstrated "that the rules of natural justice and procedural fairness were violated."

These reasons asserted require that the reviewer examine the instances of alleged errors, assess their directional impact, if possible, consider their 'manner' and 'quantum' and assess whether they independently or cumulatively can demonstrate a bias amounting to a natural justice challenge or consequent breach. It is trite to say that allegations of a reasonable apprehension of bias require a foundation beyond mere apprehension, innuendo, suspicion, mere inference, supposition or assertion.

Independent of that aspect, as above recited, "an error of law or fact which would likely have resulted in a different order or decision" if demonstrated is an independent ground for review and remedy.

No other aspect of natural justice denial is alleged in the Request and none is to be presumed.

The 'Reasons' assert as well that there was a dereliction of responsibility in the Member, allowing the Hearing to exhaust four days of sittings. Even if this were the case it is not an allowable ground upon which relief can be granted, in the absence of something further. In this case, two able counsels and two professional planners of significant seniority represented clients adverse in interest. It is not uncommon that an appeal involving land division, multiple variances and a significant number of concerned citizens with their representatives, can consume four days of trial. Indeed, while not desirable, there are many instances in the hearings conducted by the TLAB where four or more days have elapsed.

Members are strained to afford natural justice to all persons wishing an audience while maintaining control over procedure. Cross examination is the prerogative of a party; absent undue repetition or an absence of relevance to the issues at hand, it is not to be constrained on the basis of time or expediency for such can be at the expense of evidence exposition or an undue interference with counsel's right.

I can put no weight on the duration of the Hearing, per se. To the extent that the Member commented on the evidence, its contribution, the passage of time and the attribution of responsibility in the Decision, I find that to be fair comment having allowed each and every witness full license to express themselves. If the comments were unjustifiably harsh, unduly descriptive or vindictive in attitude or appearance, that might be a different matter. I have examined the Member's observations on the conduct of the Hearing and find none to be in the latter category.

Grounds for the Request for Review

The Request needs to be examined based on the two alleged grounds: errors of fact or law that, if established, could result in a different decision; whether natural justice principles have been violated.

I follow below the general order and sequence of the Review Request.

In referencing the **testimony of Lawrence Olivo**, the Requestor asserts errors in the following references:

a) An attribution that he stated 92-94 Briar Hill was severed into 'undersized lots' which 'lend support for a severance of the property'.
b) The attribute that 103 Albertus, the Olivo residence, was 'directly behind the Property.
c) The Member's recitation of the admission agreed to on cross examination that although Mr. Olivo "could see 112 Briar Hill (the Requestor's property!), he was not directly affected".

The Decision does not define which characteristic contributes to the description of 'undersized lots'. While it is clear that the frontage is by-law compliant, it is possible that lot area minimums were not met. No evidence is provided on whether the Member's description is in error let alone how it factored into the Decision. I find that this alleged 'error' is neither established nor compelling.

The location description of the Olivo residence does appear to be an error in relation to the subject property. However, the admission that occurred in cross-examination is not refuted by transcript reference or by any filing by Mr. Olivo. I find the locational reference to be *de minimus* and see no disrespect for the evidence of the witness or a compelling basis to conclude the reference could have led to a different disposition. I find the submission as to the validity of Mr. Olivo's testimony to be an effort to re-argue the import of the evidence.

A Request for Review is not the proper forum to re-argue evidence in the hope that the reviewer may lean to a different conclusion. To do so would disrespect the discretion afforded the hearing officer of first instance and, applied here, would do so in the absence of a qualifying ground that is compelling.

The Request raises an error in the stated **location of 92 and 94 Briar Hill** and references two instances where the Decision implies or states a locational reference on the south side of the street. From this it is asserted that the Member's claimed familiarity with the area is in conflict and that she may have believed these lots had reduced frontages, presumably analogous to the applications.

I have tracked the several references to 92-94 Briar Hill Avenue. I agree with the response that the references cited are minor, are elsewhere contradicted with actual locational acknowledgement and were the admitted subject matter of multiple evidentiary testimony, map filings and references. I cannot conclude that the identified locational references are themselves otherwise consistent or are in any way determinant of an error that contributes to the reasons for the Decision in a material way.

The textual omission of the word 'or' would explain away one such reference. The recent severance of these parcels is an undisputed fact in close proximity to the subject site, capable of being considered as an element of area character. The Member distinguished the difference in frontages to the Application as being minimal. Taking all

of the references as a whole, I am unable to ascribe to the putative reference errors as a compelling basis upon which a different decision could result.

In reference to his own **testimony (of Mr. David Goluboff),** the Requestor references instances in his evidence of advice from the City that actual (or MPAC) data show minor discrepancies in lot frontage measurements. From this it is asserted that if the Member actually believed that lot frontages were, to a degree, lesser than as shown colour coded, the implications of the lot studies might have been misconstrued in favour of the Applications.

This specific issue is raised on page 21 of the Decision; however, the subject matter of frontages extends through much of the evidence recited in the Decision, pages 13-21.

The Member canvasses evidence on three professional planner lot study analyses as well as the testimony of lay citizens. Nothing in her Decision is pointed to that suggests the lot frontage of the severance or the associated variances turns on the evidence of a discrepancy of .5 of a meter on an alleged colour coding analysis.

A fair reading of the Decision in its entirety confirms that the Member canvassed the 'frontage' evidence, its distinctions and their application to the physical character of the area and its relationship to the opinion evidence on the policy direction of the Official Plan. This is exactly the statutory direction afforded the Member as to the proper approach.

I cannot find that the evidence as to supposed inaccuracy in frontage measurements and the categories or groupings chosen by the planners in their respective Study Areas was so pervasive, important, clear or compelling to constitute an override to the proper perspective the Member applied to the evidence as a whole.

In this aspect, not only do I find that there is no discernible error, but I also find the subject of the complaint is not compelling given the use and componentry of lot study analyses in formulating and applying the test of 'respecting and reinforcing the physical character of the neighbourhood'. Indeed, the complaint itself is but a re-argument of evidence that was before the Member, albeit one component of the issue of area character.

On page 4 of the Review Request, the Requestor references the **15 Stanley Avenue Decision** alleging inconsistency with its tenet respecting protection of the urban forest. Also referenced is the decision in 9 Thirty Eighth Street in a similar vein. That latter decision is subject to a leave to appeal application. Both referenced decisions are mine in respect of the matters they address.

As such, I agree with the Requestor that consistency in the rationale for decision making is a worthy objective of the TLAB. Consistency in the application of policy, approach, procedures and substantive decision-making not only serves to provide predictability to decision- making but is the essential essence and purpose of policy and regulatory enforcement. Without consistency, the Tribunal falls susceptible to claims of irrelevant considerations, favouritism, bias, unreliability and undisciplined discretion. It

follows that consistency is an important but non-exclusive attitudinal ingredient in decision making. It is both relevant and appropriate for parties and participants to raise the element of consistency in circumstances of similar fact circumstances and for the Member to be open to its consideration, evaluation and application.

The Request very competently questions the treatment and resolution of the Decision insofar as it addresses the environmental considerations 'on threats to four trees on the site' (and associated implications) of the proposed development.

In the circumstance of both the 15 Stanley and 9 Thirty Eighth Street, I endeavoured to enunciate, applicable to the resolution of those circumstances, several principles that I as the decision maker felt appropriate to articulate and apply. Without reducing those principles to an absurdity of generality, they included the following elements of general application to the subject matter of the 'environment', including preservation of the urban forest:

a) Environmental preservation is a subject matter of specific policy support, statutory, provincial and local, and it is an accepted general principle of good community planning;
b) The City Official Plan has a specific policy regime respecting environmental preservation in its Natural Environment and Built Form policy chapters, including the protection and enhancement of the urban forest;
c) The City has, as a part of its Municipal Code, specific regulatory provisions respecting the treatment of applications that engage the injury or removal of public and private trees;
d) The policy directives are not replaced, overridden or pre-empted by the regulatory provisions of the Municipal Code, in the absence of express legislative or policy direction to do so of which there is none;
e) The Urban Forestry Staff of the City are not the sole protectionists of the environmental preservation ethic as it is an obligation on all professionals acting in consideration of an undertaking to apply policy and principles within their sphere of accreditation;
f) The rules of evidence, professional obligations, conduct, accountability, qualifications, expertise and the rights and privileges of the hearing process apply equally to matters relating to the environment, including tree assessment and preservation; and
g) While the 'environment' is not mandated as an overriding determinant of development applications, it is commonly accepted as a principle of good community planning that it be given first consideration in evaluation and impact assessment purposes.

These tenets and others that may be applicable in a particular circumstance suggest an approach to appeals involving an environmental consideration component. That approach has a number of facets for consideration that are responsive to common inquiries the 'trier of fact' must apply. These latter directions are well recited in the 'Jurisdiction' component of the Member's Decision.

It may be instructive to identify the elements of an environmental issues assessment:

1. Is there an environmental issue and what is its character or attribute?
2. Has it been identified and investigated?
3. Is there an adequate evidentiary foundation on creditable assessment criteria sufficient to achieve a perspective on its relevance?
4. Has the entire policy framework applicable to the feature or function been accessed, assessed and applied?
5. Are their conflicting issues that are required to be resolved?
6. Has the decision maker been afforded an evidentiary foundation adequate to encapsulate all relevant considerations?
7. Does the assessment and decision reasonably and appropriately apply administrative policy?

It follows that in order to adequately and properly address an issue with an environmental element, responsibilities rest on a number of fronts. A decision maker is not entitled to avoid an identified environmental issue simply because it has been ignored or remained unreferenced. An Applicant bears a responsibility to provide a *prima facie* assessment of implications and policy compliance. Where a public authority has identified an environmental issue of concern, all persons with an interest in the issue, including the public authority, are on notice of an evidentiary burden for its proper consideration.

The Request asserts an inconsistency between the Decision and the findings and result of the TLAB dispositions in *15 Stanley Avenue* and *9 Thirty Eighth Street.*

The Decision addresses the environmental issue of tree preservation, urban canopy protection and injury to on and off-site trees in these pages: Evidence of Mr. Goluboff (including Ms. Fox and Ms. Meader's submissions) in pages 21-23; and in the Analysis, Findings and Reasons component, page 27.

The assertions are clear:

a). The 'unequivocal' Memorandum from Urban Forestry as to tree loss with no alternative design solution, in the absence of challenge or contradictory evidence, 'should be accepted without question';

b). The Member failed in her task on this issue of assessing the severance and erred in concluding that the fate of the trees 'would be dealt with following the Decision at the permitting stage';

c). The Memorandum and lay supporting evidence opposing the Applications requires a consistent determination to the above referenced cases.

It is necessary to examine each submission individually and together as they evidence clear assertions of error that could lead to a different conclusion, if supported, that warrant a remedy, whether framed as requested or otherwise. To do so, I apply the framework above discussed.

The Memorandum from Urban Forestry is clear and formed part of the record of proceedings both before the Committee of Adjustment and the TLAB. It put the Applicant and all persons with an interest in the environmental issue of tree preservation on notice that the matter needed to be addressed.

Neither the Applicant nor any other party or participant called either a representative from Urban Forestry or an arborist to address any of the issues arising from the Memorandum. The City did not call evidence on the issue and the Memorandum was not 'proven' as a matter of evidence in the sense that it was not supported and challenged. In this regard, I agree with the submissions in the Response that the Memorandum never achieved in the Hearing the status that its direction 'should be accepted without question'.

There was evidence at the Hearing addressing issues raised in the Memorandum. Ms. Fox and others attested to the environmental benefits of the City tree in the front yard and the potential for impact and injury to rear yard and neighbouring property trees.

The Applicant called evidence from Mr. Romano, a qualified land use planner (but holding no expertise as an arborist) who opined, apparently unchallenged on the consequences of the discrete issue of proposed building locations and access, as they related to the environment.

The Member recites Mr. Romano's evidence at page 9 of 32 as follows:

> "City Tree: Urban Forestry's **earlier report** had stated that the design would require the destruction of one healthy city-owned tree, to permit driveway access for Lot 1 to the west. It stated that the tree would not survive the injury resulting from the proposed or any other access configuration, and removal would be required. **Therefore the design was amended. The westerly driveway was shifted to the right side of its lot in order to wrap around the tree.** In any event, even if approved, the proposal could not proceed without the required permit for the City tree. He is satisfied that the proposed condition respecting a permit will meet the concern for tree preservation. (my emphasis)

The Member again refers to this evidence in the Analysis section of her reasons, quoted by Mr. Goluboff at page 4 of the Request:

> "There was a minute examination of the trees on the present site. Both Ms. Stewart and Mr. Romano emphasized that even if the proposal were approved, *Urban Forestry and the Community Council had ultimate control over whether removal or injury permits are granted*. Nothing in the development process completely prohibits tree removal. The Built Form policies only speak of tree retention "wherever possible". Ms. Meader finds support from the very recent (September 14, 2018) TLAB decision refusing a severance (without variances), based on threats to four trees on the site. I distinguish this case on the facts, as there is no evidence in this Briar Hill matter from a qualified arborist as to the ultimate disposition of

> the one boulevard tree, or the others to the rear. *The Urban Forestry memos do provide a note of caution, but are not the ultimate word on the disposition of the tree*. **Design changes within the by-law requirements may still be made, if necessary, to satisfy Urban Forestry.** The TLAB Chair Mr. Lord's decision balanced the environmental policies in the OP with the almost certain destruction of several trees on the lots in question, and he had the evidence of the Chief Arborist for the City and no contrary professional evidence**. I do agree that the ultimate disposition of the boulevard tree here is not certain**. *This is why the Urban Forestry department, and ultimately the Community Council, has the power to consider the required qualified arborist's report, and make the final determination.* No development on the subject site could proceed without these permits. *In my experience the permit process is not dealt with until after the planning issues have been determined, as Mr. Romano stated*. This application is not then premature. The decision on the other planning issues can proceed. I also agree that the neighbours' fears for their backyard tree from the rear deck construction are not merited. *Thus I do not find that the policy goal of retention of urban canopy trees, if possible, is contravened with this proposed development*. (my emphasis).

I find that on the first aspect, a). above, that the evidence (in **bold**, above) as recited and accepted by the Member satisfactorily answers the question of weight that should be afforded the Urban Forestry Memorandum. Clearly, the issue of the clarity of evidence on tree removal was disputed in the circumstance of the City tree.

The second question, as to whether the Member erred in failing to address on the severance the issue of policy compliance in favour of deferring that assessment to the regulatory process conducted under the City's Municipal Code regarding tree injury or removal, is even more astute.

It is this matter that arose in the *9 Thirty Eighth Street* circumstances and may be one of the matters to be further addressed on the leave application, if granted.

In this Member's view, on an appeal engaging an environmental issue, the TLAB Member has an independent duty to examine general and 'intent and purpose' conformity of the (severance and minor variance, respectively) applications on appeal.

This is a duty arising by statutory direction, cited in the Decision, that cannot be avoided or deferred to a subsequent assessment or process, including that provided by the City's Municipal Code. In addressing that responsibility, the evidentiary burden considerations above recited are in effect.

I have considered carefully the evidence as recited in the Decision, the arguments and assertions of the Requestor and the import of the *italicized* language by the Member in the above lengthy extract.

I would agree with the Requestor that if the import of the italicized language was intended by the Member to permit the abandonment on the appeal of the duty to consider the environmental policy regime of the province and the City Official Plan, in

favour of the Municipal Code decision making process, I would not hesitate to grant a Review and order a new Hearing.

In my view, such a delegation of decision making responsibility would be contrary to the anti-delegation rule, a declining of jurisdiction and a failure to consider relevant considerations. These are all relevant grounds that could warrant the relief valves available on a Request for Review.

Again, in my view, a TLAB Member, in the absence of proper direction otherwise, must make an independent land use planning decision on the appeals extant and not defer a proper determination element to a subsequent process, no matter how elaborate or thorough that process may appear to be.

In the Decision, the Member recites that she had considered the Memorandum, the evidence (planning and lay), the degree of certitude on canopy injury (both absolute and incremental) and the Official Plan policy regime applicable to tree preservation. By specific reference to the Built Form policies of the Official Plan, she demonstrated that attention had been paid to this relevant consideration. While there appears no specific reference to the environmental policies *per se*, I agree with the Response that it is not necessary in reaching a conclusion that every policy reference or consideration need be visited along the way, provided that the essential roadmap is clear to reaching a conclusion.

I find that in this instance the Member did not lose jurisdiction by leaving the issue of tree assessment exclusively to the Municipal Code assessment. I find her references to 'ultimate control' and 'final decision' to be accurate but only IF the land use planning decision permits the Applications to proceed. While no arborists' evidence was tendered, an essential impact allegation of the Memorandum and the lay citizen concerns were answered by direct evidence, and that evidence survived challenge.

I find on the second aspect, b). that it was open to the Member to conclude, as she did on this issue, that neither the severance nor the variances should be denied because of or arising from conflicting cogent evidence on environmental policy or impact respecting tree loss or retention. In doing so, I find that her conclusion, *italicized* in the last sentence extract, above, properly recites and acknowledges that the City Official Plan was considered and applied, sufficient to warrant the matter to proceed to a detailed implementation assessment.

I find in the Decision that the Member did not decline the *Planning Act* jurisdiction and duty to consider whether the Applications should be approved or rejected having regard to their environmental implications.

I have considered whether the absence of a professional assessment by a qualified arborist is required to properly adjudicate the issues of the impact of the Applications on tree preservation and enhancement. While such evidence might always be advisable when such issues are raised, I decline to order a motion or rehearing on this issue in this circumstance for the above reasons.

The Request, in c). above, asks for consistency. While it is trite to say that identical fact circumstances are rare, still, consistency of approach and application as above described should be a hallmark of administrative law decision making. The circumstances in *15 Stanley Avenue* and *9 Thirty Eighth Street* differed dramatically from the evidence and substantive reasons provided therein. I find that even in applying consistent evaluation criteria, different evidentiary considerations in specific fact circumstances and the thoroughness of the expression of reasons can and should be considered to affect the application of those criteria.

The Decision recites direct testimony affecting the considerations of the Memorandum and the apprehensions of lay citizens without any evidentiary support that those apprehensions would in fact materialize. I find that the *prima facia* responsibilities of the Applicant were addressed in a manner satisfactory to the Member and that no error of a qualifying nature occurred in that consideration relating to the environment.

The Request, in a section beginning on page 5 marked: **Severance,** recites, references and applies two additional decisions of the TLAB to the Applications and the Decision, ostensibly as 'new evidence', presumably as they were delivered (or discovered) subsequent to the release of the Decision on October 31, 2018.

I agree with the Response that subsequent decisions, even of the TLAB, cannot constitute 'new evidence' upon which a Review Request can grant a remedy. In the same vein that a Review Request does not operate as a forum to re-argue the evidence of a case in the hope that the reviewing agent could come to a different conclusion from the member who heard the original evidence, it is entirely inappropriate to attempt to reconsider a Decision on a Review Request premised upon a subsequent and different fact situation occurring later in time. To allow either proposition to proceed would undermine the desirable goal of finality in the administrative law decision- making process.

The mere fact, in the referenced cases, that different Members gave different weight to relevant factors presented to them in terms of 'precedent' impact or their assessment of 'the physical character of the area' (*Westbourne; Charnwood)*, from that of the Member in the Decision, is not a cogent, sufficient or compelling basis to consider relief. Area character attributes and the potential for replication of applications or their encouragement (precedent) are matters that turn entirely on the evidence of individual fact circumstances.

In the absence of 'new evidence' to that which was before the Member, it is not possible to attribute significant weight or relief to representations on analogies that may have dealt with similar issues differently because of different evidence. It is not for the review authority to substitute its own appreciation of issues in the absence of direct evidence of an error in the evidence or its application as heard by the Member.

The Request also asserts that the Member failed to appropriately deal with the severance tests, focused on the 'secondary evidence of the variances', comingled the tests and the evidence, and erred in placing undue emphasis on the provincial plans.

However, the Request fails to demonstrate any of these considerations let alone how they may have wrongfully contributed to an error in the Decision, constituted a mis-direction or were a commitment of jurisdictional error. It is not for the reviewer to search out such connections but to assess matters properly put in challenge.

I find that on a reading of the Decision in its entirety, the Member properly instructed herself on the relevant considerations of both the consent and variance jurisdictions, addressed the relevant tests to the standard set and applied provincial policy as is mandated to be done "at the time of the decision". The weight attributed to these considerations, their obvious overlap in several circumstances and the detailed discussion of each is a prerogative of the Member and her discretion, in the absence of any identified error. It is not an 'error' to prefer evidence or to cite provincial policy (*Charnwood)*.

Without a more specific identification of the alleged concern, I can give no weight to these somewhat vague challenges.

In a section of the request beginning at page 7 under the heading '**Proposed Variances**' the assertion is made that the Member erred in applying the four tests.

It is of concern that in the issues and examples cited, the Requestor appears very close to arguing for a different appreciation of the result or implications of the evidence. This would be simply re-argument, an insufficient basis upon which to seek relief by way of a Review Request.

For example, at page 7, the Member's acceptance that the limit on floor space index (FSI) as set by the by-law is simply a trigger to ensure the review of a proposal in excess, is cited as a conclusion "that the variance to FSI is acceptable, and therefore predetermined the result without correctly applying the four- part test". This is an unsubstantiated conclusion or argument. It comes with no new facts and entirely ignores those pages of the Decision reciting the evidence on the variances (pages 11-13) in support and the pages opposed (pages 15-19) or their discussion in the 'Analysis, Findings and Reasons' section (pages 24-29).

I find that the Member recited and ultimately, through express language, concluded on the application of each of the four tests to each of the variances sought. While each is not described in excruciating detail, there can be no denying that the Member had each variance in mind from the introduction where the reduced number and extent of the requests are discussed to the penultimate paragraphs where the finding of minor and desirable can be found.

The Request recites that the Decision wrongly treats the subject of integral garages. It recites, quite appropriately, the language of the *Streetscape Report* which recommends their prohibition on lots less than 7.62 m in width, such as the proposed.

Indeed, both the old and 'harmonized' by-law provide minimum frontages for dwellings with integral garages, and have done so for many years. However, I agree with the Response that the setting of a minimum lot frontage requirement for dwellings

with integral garages is a prohibition by implication only; it is not a definitive 'use' prohibition, even if zoning were capable of that type of prohibition.

The Member was faced with an application for relief from the lot width criteria to permit an integral garage in the circumstance of actual examples as an element of the physical character of the neighbourhood and Committee of Adjustment applications granting such relief. No basis is presented to suggest a Report and its text outweighs the by-law regime, the statutory right to seek a variance relief and the relevance of examples extant. I have no basis to conclude that there may be an impact of such stature that the contrast results in a compelling basis for relief that may be different. If the Member failed to appreciate wording in the *Streetscape Report* it can have no consequence or, here, jurisdiction or the evidentiary basis she recites to consider and determine that variance.

I have considered but found no basis to challenge the Decision in reference to the number of parties and participants who registered, attended at different intervals or who spoke at the proceedings, whether 6, 8 or 11 as variously described. No qualifying error is asserted in this regard.

Similarly, I am unable to ascribe significance to the nuance in description as to what was before the panel for consideration as a characterization of the Applications. In the Attachments to the Decision, the Member clearly focused on the approval of two single detached dwellings side by side, albeit on 'undersized lots' - at least from the measure of lot frontage. There is nothing to indicate that their description in a generalized use of terminology, even if an inaccurate reflection, constitutes an ignorance of either the proposal or the built form. Indeed, the perspectives appear to contemplate two identical dwellings, side by side, on lot frontages slightly below the by-law standard.

Finally, the Review cites evidentiary propositions by two witnesses**, Mr. Barry Applebee and Ms. Sue–Anne Fox.** Both relate to supposed 'mis-understandings' of the evidence, in relation to settlement discussions on balconies and the use of Municipal Property Assessment Corporation data, respectively. In neither circumstance is it brought home to this reviewer as to how that mis-understanding or the evidence, even if mis-interpreted, contributed to an error of fact or law that in a compelling way might have resulted in a different decision.

As such, I can ascribe no relief to either of these latter matters.

Finally, the Requestor raises the somewhat hypothetical or rhetorical question of why a condition was not imposed prohibiting the drainage of water onto the Requestor's abutting property when in a similar fact concern, such a condition was imposed in respect of a matter concerning 122 Briar Hill.

There is nothing in the materials or the Decision that assists me in dealing with this issue. Indeed, an expressed request occurs only by implication. The Response does not repudiate the suggestion and it is a common circumstance of new construction adjacent pre-existing buildings.

In summary, I cannot confirm any substantive errors of law or fact or denial of natural justice, individually or cumulatively, that are apparent in the Decision.

DIRECTION (IF APPLICABLE)

The Request asks for a finding "that there is a well-founded reason to cancel the Decision…in the alternative…a new hearing be ordered."

Despite a concise and well-prepared Review Request, I have not been able to agree that either relief has been supported to a satisfactory standard. The grounds cited are simply not compelling.

That said, there are two aspects of the Decision that warrant further consideration. The first is the issue of the above noted condition; I see no harm in its imposition. The Response has no objection to a modification to include a similar condition.

The second is premised upon a prevailing sense of the community expressed by many of the participants who contributed to the initial COA and TLAB consideration. Their demonstrated commitment to their neighbourhood and its appearance is palpable and commendable – one that is to be commended in a City that seeks to pride itself in appearance, community spirit and standard of maintenance in property appearance and identity. Indeed, both planners acknowledged particular attributes of the streetscape as recited by the Member as elements of 'context' in physical character.

This description was confirmed by my own observation of a prestigious house within the environment of well-established, presentable and distinguishable homes.

Two identical new homes ('usual townhouse high towers') on the lots approved by the Member fail to contribute to that sense of distinction, appearance and contribution in a meaningful way. Although admittedly not raised directly in the Review Request, I cannot but expect that the Applicant can do better, on the criteria of façade appearance, than to replicate two identical dwelling units within a neighbourhood that prides itself for its distinction and its physical attributes.

I therefore will suspend and alter the Decision to provide an opportunity, should the wish be to do so, to address these two additional elements.

DECISION AND ORDER

The Review is allowed, in part, as follows:

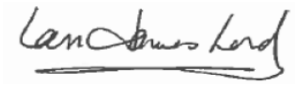
1. The Decision is suspended until such time as the following conditions are fulfilled:

a. A supplementary condition is supplied satisfactory to the TLAB that provides that no stormwater drainage or run-off from the severed properties will be directed or visited upon the lands identified as 112 Briar Hill Avenue;
b. The Front Elevation in Attachment 4 to the Decision and identified as Drawings A6 and A16 is altered by the Applicant using best efforts to reflect and ensure differentiated street façade treatments as between the two units, premised upon materials or design elements in common use on Briar Hill Avenue in proximity to the subject property.

Upon receipt of these materials, the TLAB will vary the Decision herein to so incorporate their content, release the suspension and issue the Decision and Order herein in final form.

2. In all other respects, the Request for Review is dismissed.
3. The Supervisor is directed to bring this disposition forward three (3) months from the date of issuance in the event of non-compliance with the directions herein.

If difficulties arise in the implementation of this Decision and Order, the TLAB may be spoken to.

X 

Ian James Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord