

REVIEW REQUEST ORDER

Review Issue Date: Thursday, February 28, 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): CITY OF TORONTO

Applicant: ARC DESIGN GROUP

Property Address/Description: 119 HAREWOOD AVE

Committee of Adjustment Case File Number: 17 236315 ESC 36 MV, 17 236319 ESC 36 MV

TLAB Case File Number: 18 167346 S45 36 TLAB, 18 167348 S45 36 TLAB

Decision Order Date: Monday, December 24, 2018

DECISION DELIVERED BY DINO LOMBARDI

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for review (Request) made under 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB). The request is made by Ms. Amber Stewart, counsel for Muhmuda Khatun and Mamunur Rashid (Requestors), the owners of the two lots of record which are currently developed with a single dwelling known municipally by a single address: 119 Harewood Avenue (subject property).

BACKGROUND

The owners of the two lots filed two separate minor variance applications to permit the construction of a new detached dwelling on each underlying lot, which were consolidated and heard by the TLAB on September 25, 2018 and December 14, 2018.

In a Decision and Order issued on December 24, 2018, the TLAB refused the applications.

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Pursuant to TLAB Rule 31.3, "A Party shall serve on all Parties and file with the Local Appeal Body a request for review within 30 days of the decision or order, unless the Local Appeal Body directs otherwise." In this matter, the deadline for the filing of a Request for Review of the subject Decision and Order was January 23, 2019 at 4:30 pm.

On January 23, 2019, at 3:47 pm, the TLAB received an email from Ms. Amber Stewart (Amber Stewart Law) confirming the owners' intention to request a review of the Decision issued by Member Yao on December 24, 2018 for the subject property. She also advised in that email that "the balance of materials will be submitted shortly."

The email is carbon copied to Ms. Laura Bisset, solicitor for the City of Toronto, the Appellant and the only other Party in this matter.

The email included an attachment (preliminary letter) from Amber Stewart Law, also dated January 23, 2019, intended to serve as the owners' request to review the TLAB's Decision in respect of both applications, pursuant to TLAB Rule 31.

She further advised that the owners were relying principally on Rule 31.7(c) submitting that the TLAB Panel made an error of law which, had it been decided correctly, would likely have resulted in a different order or decision. In paragraph 4 on page 1 of that Letter, Ms. Stewart wrote:

"Given that the deadline expires today, we are submitting this letter to provide notice of our client's decision (confirmed this afternoon) to file the review request. Full details of the request and the accompanying Affidavit of Mr. Jonathan Benczkowski, MCIP, RPP, land use planner for the owners, will be submitted today. However, in the event that it is filed past the deadline of 4:30 p.m., we will rely on the TLAB's Rules permitting relief from strict compliance with the Rules, and providing that substantial compliance is sufficient. These Rules include Rule 2.2, 2.3, 2.9, 2.10, and 2.11."

The TLAB received neither the aforementioned Affidavit of Mr. Benczkowski nor any other requisite and supporting documents from Ms. Stewart on January 23, 2019.

On January 28, 2019, Ms. Bisset forwarded an email to the TLAB confirming her receipt of Ms. Stewart's email of January 23rd. She submitted that what Ms. Stewart had acknowledged in her Preliminary Letter was that the deadline for filing a request for review was the date of her letter and that she would be completing her clients request for review later `sometime before the end of that day, but possibly after the 4:30 p.m. deadline.

Pursuant to the TLAB Rules, Ms. Bisset noted that the owners were now 5 days past the deadline for filing a review request and, more importantly, that the City had not been provided with a copy of Ms. Stewart's Client's Request for Review and did not see one posted on the TLAB's website.

She concluded from these facts that the Request had not yet been made.

She took the position that Ms. Stewart's January 23, 2019 correspondence did not itself constitute a request for Review and that it was "now too late" (her words) to make such a Request, regardless of the flexibility afforded by the TLAB Rules.

On the morning of January 29, 2019, Ms. Stewart forwarded a further email to the TLAB with two attachments: an Affidavit (Form 10) from Mr. Benczkowski, the owners' land use planner, dated January 28, 2019, outlining the grounds for the Request for Review; and a corresponding more detailed letter, dated January 23, 2019, highlighting the areas in which the Panel Member made errors of fact and law, and arguments as to why a review of the Decision is merited.

The letter provided a more comprehensive explanation as to the reasons for the tardiness of the submissions than contained in her previous correspondence. She opined that since the deadline is not statutory, but is set out in the TLAB Rules, the Rules afford flexibility in providing relief from the procedural requirements for filing a request.

On that basis, the owners requested the following relief:

- 1) That the Decision be overturned and that the applications be approved;
- 2) In the alternative, that a rehearing be granted before a differently constituted Panel of the TLAB;
- 3) In the further alternative, that an oral motion be granted to permit the submission of detailed arguments regarding the review request.

Ms. Bisset responded the same day, by email, to both the TLAB and Ms. Stewart. Her concern with the filing was concise and unequivocal. She noted that although the letter was dated January 23, 2019, it was in fact filed on January 29th. She argued that pursuant to TLAB Rule 31, the 30 day period for the filing of Request for Review had passed and that the TLAB should not consider allowing a review request even with the explanations offered by Ms. Stewart and Mr. Benczkowski.

She asked that the Request be rejected by the TLAB on this basis.

However, she also requested that should the TLAB be inclined to entertain the owners' Request for Review, despite its tardiness, the City would appreciate an opportunity to respond to the substance of the submissions.

MATTERS IN ISSUE

The request raises three primary issues:

1. Is the Request eligible to be addressed under Rule 31?
2. Can TLAB Rule 2 be applied to determine whether the Request for Review submitted in this matter can be considered a perfected Request?
3. If eligible, what is the appropriate approach to a remedy under Rule 31?

JURISDICTION

Rule 2 ‘**Application of these Rules**’, and Rule 31 ‘**Review Requests**’ are set out in full on the TLAB website: www.toronto.ca/tlab.

EVIDENCE

The only material supplied on the Request is that contained in the Affidavit (Form 10) in support of the request to review the Decision, and the two letters from Amber Stewart Law, both dated January 23, 2019.

In addition, the TLAB has a record of correspondence, above referenced.

ANALYSIS, FINDING, REASONS

Rule 31, and specifically Rule 31.7(c), is referenced by Ms. Stewart on several matters for making the request, relevant tests, and review grounds. As previously recited, the owners have submitted that the TLAB Panel made an error of fact and law which, had it decided correctly, would likely have resulted in a different decision.

I note that the owners fully engaged in an appeal and Hearing wherein the Notice of Hearing had, at the outset, identified that the TLAB conducted its affairs under a strict regimen. There is no issue of the lack of awareness of the TLAB Rules of Practice and procedure.

Rule 31.3 requires that a Request be made within 30 days of the Decision and that there be service on the Parties to the Hearing. Rule 31.4 outlines the contents to be submitted to the TLAB in 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.”

The TLAB can afford relief on suitable grounds.

The facts suggest that neither Rule was respected.

Although Ms. Stewart forwarded an email to the TLAB on the last day for a Request for Review and attached a solicitor’s letter providing formal notice of the owners’ review request, there was no affidavit included, as required by Rule 31.4. Although she notes in the letter that an affidavit from Mr. Benczkowski would be submitted in short order the same day, she specifically includes a caveat referencing additional TLAB Rules in the event that the affidavit is not filed in time.

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In this regard, Ms. Stewart acknowledges in her letter that January 23, 2019 is the last day for a review request in this matter and requests relief from the Rules regarding timeline for delivery of the submission. She further notes that the TLAB Rules permit relief from strict compliance with the Rules, providing that substantial compliance is sufficient.

In support of this request, she argued that the City was provided with notice of the owners' intention to file a review request within the time limit. She raised the timing of the release of the Decision, and the intervening holiday period, as rational for the tardiness of the Request filing, noting that she received instructions from the owners to file the Request on January 23rd, the last day for filing.

Additionally, Mr. Benczkowski in his Affidavit suggested that following discussions with owners, they had difficulty deciding whether to seek a review of the Decision due to the cost associated with such a review. (para. 3)

I must deal with the requests as outlined in the Matters in Issue.

With respect to whether the Request is eligible to be addressed under Rule 31, I am directed to consider whether the Request was submitted within the 30 day time period (as per Rule 31.3), and whether the Requestor(s) provided the requisite contents as outline in Rule 31.4.

As to the issue of timing, Ms. Stewart submitted a primary letter on January 23, 2019, which was intended to serve as notice of a Request for Review. While I acknowledge that it was received by TLAB staff and the other Party, I agree with the City that the correspondence does not itself constitute a 'perfected review request'; in fact, I view it as incomplete and unperfected.

The owners failed to provide an affidavit outlining the reasons and grounds for the request, any new evidence, and any applicable Rules or law supporting the request in a timely manner, and service of this complete filing was not provided to the City for consideration until January 29th.

In my opinion, it served simply as a 'place card' in a sense, in order to file a form of notification prior to the expiry of the deadline. The Letter referenced additional documentation containing full details of the request and an affidavit to be submitted contemporaneously the same day as required by the Rules. However, this did not occur.

Instead, it took six days for the owners to submit a review request that included the requisite documentation in Rule 31.4. I find this to be unacceptable, as is the explanation for the tardiness provided both by Ms. Stewart and Mr. Benczkowski. While I am sympathetic to issues of cost, I note that there is no fee to file a Request for Review with the TLAB, and I find it difficult to accept that any additional cost in this regard should be considered surprising.

I also find it difficult to accept that it would require 30 days to determine and understand the costs required to undertake a review and then make a decision to proceed.

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I also do not accept that the timing of the release of the Decision, and the intervening holiday period, was of any meaningful consequence in the owners' assessment of whether a review request should be filed. In fact, conversely, I agree with Ms. Bisset's position that the intervention of the holiday period would have afforded the owners more, rather than less, time to decide on filing a request, given the associated reduction in business and work demands in this period.

With respect to the issue of whether the filing is in substantial compliance with the requirements of the TLAB Rules, I do not believe that an unperfected Request that is largely one week overdue for reasons that are not compelling and persuasive can be considered to be in 'substantial compliance' with the Rules.

Rather, I am of the opinion that this Request is an attempt by the owners to relitigate the matters that were canvassed, and decided by Member Yao, and I agree with Ms. Bisset that there must be a measure of finality to the TLAB's decisions. Moreover, I believe the integrity of the TLAB decision making process is impinged if Requests for Review are allowed without respect for the time frame and obligations of Rule 31.

Finally, I find that a request for an oral motion to permit the submission of detailed arguments regarding the review request has not been justified. I do not believe the Requestors have provided appropriate justification to warrant a rehearing of this matter and I am of the opinion that the TLAB has performed its function of addressing the variances requested.

DECISION AND ORDER

The request for Review is dismissed; the Decision of the TLAB dated December 24, 2018 is confirmed.



Dino Lombardi
Panel Chair, Toronto Local Appeal Body