Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, March 19, 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): EHSAN VALI

Applicant: GLENN RUBINOFF

Property Address/Description: 46 BANFF RD

Committee of Adjustment Case File: 17 278786 STE 22 MV

TLAB Case File Number: 18 180855 S45 22 TLAB

Decision Order Date: Tuesday, January 29, 2019

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 Ehsan and Azita Vali, a Party and owner of 46 Banff Road (subject property) (Requestor) represented by Jennifer J. Meader, solicitor.

The Request consists of an 'affidavit' (Form 10) sworn by the solicitor, Jennifer J. Meader, retained by the Requestor, sworn February 27, 2019. The affidavit is somewhat unusual as the executed Form 10 notes an "affidavit, attached'. In fact, the attachments consist of the following:

> Exhibit A. Unsigned letter dated February 28, 2019 (a day later) apparently from Ms. Meader, addressed to the Chair of the TLAB, consisting of submissions and representations housing the essence of the Request, arguably in numbered sections but not paragraphs or attachment references, as directed by Form 10.

The swearing of the affidavit hardly constitutes the swearing of the unsigned correspondence.

Exhibit B. The TLAB Decision issued January 29, 2019, signed by Member Yao (Decision).

TAB C. The TLAB Decision and Order issued April 18, 2018, in respect of 401 Balliol Street by Member Lord.

TAB D. Memorandum, dated October 9, 2018, from Member Yao requesting the Parties address his Decision respecting 585-7 Millwood Road.

TAB E. The TLAB Review Request Orders issued June 4, 2018, in respect of 491 Parkside Drive, and August 3, 2018, in respect of 9 Thirty Eighth Street, both also by this Member (Lord).

It is doubtful whether this form of the Request would survive either the administrative or adjudicative screening envisaged by the recent revisions to Rule 31. However, those revisions are not yet in effect. Had it not been for the fact that the Affidavit was sworn by a solicitor, the Request might have been rejected out-of-hand.

I am prepared to accept it, despite the obvious shortcomings; the City of Toronto (City) response did not raise the deficiencies.

The Request relates to the above noted TLAB Decision by Member T. Yao issued January 29, 2019. The Request was served on the City and submissions were made thereafter dated March 8, 2019, by Ms. Sara Amini, solicitor. There were no other communications received by the TLAB.

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 and posting on the TLAB website, 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 current Rules of the TLAB, at the original Hearing.

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

BACKGROUND

The Requestor sought variances to permit the erection of a replacement single detached dwelling with an integral garage. After a three-day Hearing, the Member declined to issue a Decision and Order on the variances but found that the integral garage component could not be supported. The Request puts the conclusion this way:

> "Ultimately, the Decision makes a finding, "that considering all aspects of the proposal, the integral garage design does not meet the test of general intent of the Davisville Amendment". While the Decision goes on to say that the Panel Member is not making a formal order, the Decision directs the Applicants to come forward with a non-integral garage design and a parking space variance. The Decision further advises that the participants would be at liberty to object to the new proposal and any other variances either fresh or previously sought." (Affidavit, Exhibit A, second unpaginated page)

For his part, the Member put the disposition this way:

> "In order to retain jurisdiction and be more efficient, I am not making a formal order. I would suggest the Valis to come forward with a non-integral garage design and have it checked by the plan examiner. The new proposal will need a parking space variance and participants are at liberty to object to it and any other variance either fresh or previously sought, if that is their position. It will require some attention to the curb cuts and protection of a City-owned tree so those comments should also be obtained. Perhaps Ms. Amini (the City lawyer) can expedite those comments. Although I have not found in favour of the integral garage variance, I do find that the Valis have proceeded in good faith and already made some reasonable changes. I hope that this matter can be expeditiously resolved, so I will convene a conference call to settle the next steps and I would ask the parties to arrange a date with the TLAB supervisor, within, say six weeks. This will allow a new design to be circulated informally to the other parties along with the examiner's notice. If there is difficulty, would the parties please email me via the TLAB." (Affidavit, Exhibit B, Decision, page 15)

In summary, of the 13-15 variances before the Committee of Adjustments (COA), two of them (Variance 2 under By–law 569-2003 and Variance 5, By-law 1425- 2017) were dealt with by the Member in the Decision; effectively, the balance was deferred. There is some commentary on the proposed rear yard deck and its suggested inordinate height above grade.

I am prepared to consider the Member's Decision, with respect to the integral garage, to be final – a necessary ingredient in a Rule 31 application. To the extent necessary, I am also prepared to and do suspend the time period in the above quoted paragraph, from expiry, in order to consider the Request.

The Member heard from one professional planner, several residents, a settlement with one of the abutting neighbours, and from Mr. Al Kivi, a representative of the South Eglinton Residents Association (SERRA), having a specific interest in the by-laws that prohibit integral garages in a discrete area of the City (Davisville Zoning By-laws). The City attended and participated but offered no evidence.

In concluding a refusal of an integral garage, the Requestor raises and discusses 10 alleged 'grounds and reasons', falling under Rule 31.7 b) and c), below referenced. The Request asks that a new hearing be ordered.

The grounds and reasons raised are:

> "1. The Decision erred by misapplying important and recent precedential jurisprudence established through the TLAB Decision dated April 18, 2018, in respect of 401 Balliol Street.
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> 2. The Decision erred by misapplying criteria established by the City for the purposes of assessing proposals for integral garages.
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> 3. The Decision erred by unilaterally creating alternative criteria for assessing proposals for integral garages.
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> 4. The Decision erred by giving critical weight to the fact that the Applicants did not appeal the Davisville Village Zoning Amendments.
>
> 5. The Decision erred by permitting participants to make closing submissions.
>
> 6. The Decision erred by misinterpreting a statement in the Staff Report for the Davisville Village Zoning Amendments about integral garages being part of the prevailing character.
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> 7. The Decision erred by misunderstanding the City's failure to call evidence.
>
> 8. The Decision erred by comparing the application to the outcome in the TLAB appeal for 585-7 Millwood Road.
>
> 9. The Decision erred by comparing the subject application to dwelling at 57 Banff Road.
>
> 10. The Decision erred by not recounting the areas of expertise in which Mr. Riley was qualified.

It is necessary to consider each of these in turn and I do so, below. Some are interrelated, some may be shortly disposed of and all warrant combined consideration.

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

The 'grounds and reasons' above listed are expanded upon in the communication letter attached as Exhibit A to the Affidavit. Ms. Amini addresses them in a similar order in the City Response. I agree with her paragraph 6 that 'there are no allegations on the grounds outlined under Rule 31.7 a), d), or e).

To consider each:

1. The Decision erred by misapplying important and recent precedential jurisprudence established through the TLAB Decision dated April 18, 2018 in respect of 401 Balliol Street.

The Parties agree that neither the Member nor the Decision is in any way bound to follow the precedent set by another TLAB decision, even under identical jurisdiction and proximate in time and location, vis-à-vis the Davisville Zoning By-laws.

That said, the Requestor points out the many similarities of my Decision and Order in the *410 Balloil Street* appeal to the TLAB. I have read carefully the Member's explanation as to his consideration of the *Balloil Street* Decision and Order and find it lacks substance. Both TLAB decisions, *Balloil* and the subject, under their *de novo* jurisdiction deal with a request for variance to the Davisville Zoning By-law prohibition on integral garages.

While the failure to follow a Decision and Order, submitted by a Party as relevant, is entirely the prerogative of the Member, a courtesy explanation is usually provided to the Party. As I wrote in the *116 Briar Hill Avenue* Review Request Order, there is some obligation on the tribunal to be consistent or distinguish the reasons for departure:

> "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". (page 7)

It is accepted law that even a prohibition in a zoning by-law regulation can be varied upon a minor variance application, where policy and the four statutory tests are satisfactorily addressed. While the Member acknowledges that entitlement, the Decision dwells perhaps unusually on the 'general' intent and purpose of the Davisville Zoning By-law amendment, and its prohibition of integral garages. The prohibition is clearly a relevant consideration; its rationale for relaxation must surely focus on and follow any guides provided, as to the 'key' ingredients to consider relief of this "key variance"

(Decision, page 3).That relaxation is also subject to the other policy and statutory tests, that include but are not exclusive to the Davisville Zoning By-law Amendment.

In both the *Balloil Street* example and the subject property, uncontradicted professional opinion assessment evidence in support of an exemption was heard. It is said in the Request that that evidence addressed not only the provincial policy and statutory 'four tests' under the *Planning Act,* but also the more informal planning criteria for relaxing the prohibition on integral garages recited in the City Staff Report, supportive of the Davisville Zoning By-laws. This planning evidence occurred in both cases, but it is there the decisions appear to depart. One deals with those criteria and the other tests; the Decision largely does not.

Contrary to *Balloil*, the Decision does not address the City Official Plan, or the statutory 'four tests' as they apply to the Davisville Zoning By-laws variance. Rather, the Decision appears to weigh heavily three elements:

a) The use of the world 'prevalent' in one of the criteria of the Staff Report on the Davisville Zoning By-laws;
b) The application of previous design considerations in an earlier decision of the Member in respect of *585-7 Millwood Road*, a TLAB decision that did not consider a variance to the Davisville Zoning By-law; and,
c) The comparisons that were before the COA in the *Balliol Street* matter, the *Millwood* matter and the subject application and the TLAB that were different and held different implications for the TLAB proceeding.

I am not comfortable with the Member's elevation of the word 'prevalent' in the Staff Report on the Davisville Zoning By-laws criteria to be a policy guide, particularly in the absence of any related discussion of the Official Plan, section 4.1.5, or the (then) pending OPA 320 enhancements. These instruments are the relevant policy considerations, the latter being of lesser import as OPA 320 was not in effect on the date of the Application. The Staff Report commentary was not policy and while it might rightly be attributed the mantle of relevant considerations as matters of generally accepted planning principles, and instructive, it still needed to be considered in light of the evidence addressed on it. Those principles for relaxation are arguably also a component of the general intent and purpose of the Davisville Zoning By-laws deserving of being applied and considered on the evidence and within the larger statutory context.

I am not comfortable with the employment of the *Millwood* Decision and Order, in many respects. While it responded to the Davisville Zoning By-laws in a design sense, the actual appeal to the TLAB did not appear to engage the Davisville Zoning By-laws prohibition on integral garages. Design is an important, loosely mandated consideration in the City OP; however, design appreciation is nowhere a governing discretion vested in a Member who is otherwise obliged to apply directed considerations. To draw massing comparisons, heights and cornice lines between actual building proposals from different locations without the establishment or reference to identical grades, measurements, streetscapes or the comparability of 'the existing physical character of

the area', to use OP policy direction, appears based on potentially arbitrary and evidentiary assumptions not present.

I am not comfortable that the Member focused on the subject appeal in a manner that permitted exclusion of speculation or the relevance of what was or was not before the COA on the *Balliol*, *Millwood* or the Banff Road appeals. The Decision does not follow the customary application of variance assessment practice individually and cumulatively. It chooses comparisons in one instance and avoids their consideration in the other. It does not appear to apply to the requested relief of the integral garage variances, the four tests. Nowhere does it evaluate these, preferring to centre on the 'intent and purpose of the zoning by-law', in this case limited to the Davisville Zoning By-laws prohibition on integral garages. Even that focus cannot start and stop with the fact of the Applications requesting relief from the prohibition. To do so would eliminate the right to apply for such a variance, a legislated entitlement. The Member makes the following conclusion statement:

> "I have made a montage of 585-7 Millwood, first with integral garage and then with no garage, along with the 46 Banff front elevation. The two storey-above-integral garage "look" (first and third elevations) and the corresponding measurements are similar. **I find that considering all aspects of the proposal, the integral garage design does not meet the test of general intent of the Davisville Amendment.** (bolding original)

I do not see that conclusion framed by any other considerations of that zoning test or the other three; indeed, it appears to spring from a subjective design ('look') comparison of differing circumstances, however well intentioned. Nowhere is there a consideration of the cumulative impact of the proposal, if any, or any of the other requested variances. Nor is there a rationale given for concluding an unsatisfactory result on one aspect of one test warrants exclusion of all the others. The Member does, elsewhere, acknowledge several design improvements as revisions applied by the Applicants, but not in the sense of any applied cumulative assessment.

This is not to say that the TLAB cannot identify one element or consequence of an application to be so compelling as to be a determinant of a statutory test, provided the framework for consideration is appropriately addressed.

Despite the differing interpretations and emphasis on the weight and the relevance attributable to the *Balliol Street* Decision and Order, I find the Member's Decision does not address the use, 'interest and relevance' of that decision, being in the same Davisville area, proximate in time and subject matter, dealing with the same statutory applications in a parallel sitting environment and with at least one similar witness, Mr. Kivi. I find that this also is discomforting.

I disagree with the strength of the City submission that none of the same factors are applicable but do agree that where the parameters are satisfied. they "become of interest and relevance" (paragraph 13). Regrettably, even that bar is not addressed in the Decision as it does little more than acknowledge that the *Balloil* Decision and Order exists.

I disagree with the Requestor that these concerns 'likely would have resulted in a different decision', but they might have, if more fulsomely considered and addressed. I find this ground compelling but not determinative of a specific error of fact or law.

I do agree that the Decision does not supply an apparent or even adequate basis for distinguishing the *Balloil* Decision and Order or providing adequate substantiation for the employment of the *Millwood Road* Decision and Order, based upon anything other than design preferences. I return to these considerations, below, as a potential misapplication of relevant considerations and the consideration of irrelevant consideration, as a matter of natural justice.

I cannot accept that the failure to adequately distinguish an equal and parallel tribunal decision can itself amount to a denial of natural justice or procedural fairness as the Requestor alleges. No such principle was recited or supported. Had the Applicant/Appellant been denied the right to make submissions on the relevance, then I might have reached a different view; however, here it is acknowledged that the *Balliol* Decision and Order was the subject of submissions '*ad nauseum*'.

These submissions were simply not dealt with. The City response does not deny that circumstance but rather argues the implications of evidence. However, the Member did not, in the Decision, weigh, apply or address those considerations. (Response, paragraphs 9, 13)

2. The Decision erred by misapplying criteria established by the City for the purposes of assessing proposals for integral garages.

In this element, the Requestor recites the 'criteria' for allowing integral garages, notes their coverage by the planner Riley on behalf of the Applicant/Appellant and laments the Member's recitation of the criteria and acknowledgement of the opinion evidence, but then fails to give it any further consideration.

The Request notes: "the Decision failed to give appropriate consideration to the only expert testimony provided at the Hearing in respect of the Criteria."

Had this been the only point, as expressed, I would give it little weight and hold it more in the category of a thinly veiled attempt to reargue the evidence before the Member. Certainly, it is open to a TLAB Member to not accept the evidence, or some of it, from a professional planner, or to prefer the evidence of one over another. In either circumstance, on issues of materiality, affording some explanation in that regard is an expected obligation of informing the affected Party as to the reasons upon which the Member relies.

However, the focus of the Decision is on the integral garage variance and its satisfactory justification or otherwise. Where the Applicant /Appellant addressed qualified professional evidence on that point, in my view it needs to be tracked and dealt with in a replicable, measured manner.

The 'Criteria', elicited in the City Staff Report on the Davisville Zoning By-laws for relaxing the prohibition on integral garages, appear to be considered on consent by the Applicant/Appellant, the City and the Member as relevant considerations. Their actual status is nowhere described, beyond being found in a Staff Report, but appear to be somewhere between policy and guidelines; they are not described as being enshrined in the Davisville Zoning By-law. Regardless, their acceptance, given the absence of a City witness, appears to warrant their application, assessment and disposition. This did not occur in the language of the Decision.

I agree with the Requestor that the Decision's reasons on the consideration of the Criteria alone are inadequate.

The City, in its Response, marries this ground with two others, which I also find appropriate for simultaneous consideration:

> **3. The Decision erred by unilaterally creating alternative criteria for assessing proposals for integral garages.**
>
> **6. The Decision erred by misinterpreting a statement in the Staff Report for the Davisville Village Zoning Amendments about integral garages being part of the prevailing character.**

The Requestor asserts that the Member in the Decision establishes his own 'Alternative Criteria' for considering integral garages when he stated:

> "Having regard for the context I have just described; my thinking process would be to look for at least one, and preferably more than one, of the following elements:
>
> 1. If it is just one isolated home, whether the proposed integral garage was book-ended (on both sides) by two other integral garage homes;
>
> 2. Whether it was part of a strip of homes with integral garages; or
>
> 3. Whether the majority of homes on that block face (that is, one side of the street), or a goodly part of that block face, was composed of homes with integral garages."

The Member's description of these considerations as 'elements' is persuasive of that submission, but it is not determinative as to whether they (the 'Alternative Criteria') are the only considerations the Member had in mind. More important is the assertion by the Requestor that these:

> "Alternative Criteria are articulated for the first time through the Decision and consequently, the Applicants were not afforded any opportunity to address or respond to them. The establishment of the Alternative Criteria is an error of law and a clear violation of rules of procedural fairness and natural justice."

As a third component, on Ground 6, above, the Requestor points to the Member's emphasis from the Staff Report of a reference to minor variances being potentially appropriate 'where houses with front integral garages and taller building heights conform with Official Plan policies and **are part of the prevailing character, …".** The Requestor then suggests the Member mistakes the reference to 'prevailing' to be to the presence of integral garages whereas it was intended to be and should properly be attributed to all the characteristics listed comprising the existing physical character of the area.

Coupled with the failure to address the planning evidence on the application of the Staff Report 'Criteria' and the creation of the 'Alternative Criteria' above listed, there is reason to believe the Member did indeed: release consideration of Official Plan compatibility standards; inferentially draw in OPA 320 as more than a consideration element; forsake the application of the Staff Report Criteria with the conceptualization of undisclosed 'Alternative (or Additional) Criteria; and make the association that integral garages must themselves, individually and discretely, constitute a 'prevailing' element.

I am uncomfortable as well with the Member drawing a distinction in the Decision between at-grade and below-grade integral garages, in determining character. Both appear to be incursions into the main front wall of the dwelling unit.

The City focuses its defense against the critique of the Decision as improperly addressing the test of the 'intent and purpose of the Davisville Zoning By-law'.

The City states (paragraph 19):

> "The test is whether the proposed integral garage and taller building heights (1) conform with the Official Plan policies, (2) are part of the prevailing character, and (3) do not result in any adverse impacts. The criteria used to assess these are identified on Page 12 of the Decision."

Respectfully, this is not the test for either the application of or the general intent and purpose of the Davisville Zoning By-laws. As addressed above, its clear intent is the prohibition of integral garages on traditional support bases for a land use control instrument. Here, there is no Official Plan policy respecting integral garages. There is no zoning performance standard relating to prevailing character. The issue of adverse impacts from integral garages is directly relevant but left largely unexplored. I feel the City is casting too wide a net when it is considering the specific statutory test of the 'intent and purpose', in this case of the Davisville Zoning By-laws (possibly to the exclusion of By-law 569-2013).

I agree with the City position (paragraph 21) that the TLAB was not bound to accept the planner's opinion on the application of the Staff Report Criteria and could reject the evidence if not satisfied with it. The Decision does neither in relation to the planner's evidence; instead it is left unaddressed and the Decision examines other 'elements', own criteria, inapplicable 'policy', 'possible scenario's and design preferences extracted from elsewhere, including a dwelling proximate to the subject property with an integral garage of a different character, a covered parking space or carport.

The City submission suggests that these considerations are "illustrating contextual elements that can assist in understanding prevailing character" on the road to understanding "the general intent and purpose of the Official Plan and the Davisville Zoning By-law".

While I can agree that such an exercise would be appropriate, excluding the use of 'prevailing' applicable to the subject appeal, that does not appear to be the thrust of the Decision. In any event, even that argument should not obscure the exclusion of the consideration of relevant evidence left unaddressed nor protect the introduction of succinct new considerations not exposed, described or addressed in evidence.

The task of examining the multiple variances sought, including the requested permission for an integral garage is clearly complex, difficult and multi-dimensional. It is made more so by the focus on one element, the Davisville Zoning By-laws, and the failure to evaluate relevant considerations in evidence on that while, at the same time, dealing with the introduction in the Decision of potentially irrelevant considerations.

The Member appropriately signaled his interest in advance respecting the consideration of *585-7 Millwood Road*; it is regretful that the same was not done in respect of the so-called 'Alternate Criteria'.

On these three matters, I find that there is a sufficient basis to conclude not that the decision is wrong, but that there has been a denial of natural justice and procedural unfairness in the failure to consider the planner's evidence on applicable criteria and the introduction of questionably irrelevant considerations and tests for which there was no advance opportunity to address.

This is an appropriate basis for a Review Request.

4. The Decision erred by giving critical weight to the fact that the Applicants did not appeal the Davisville Village Zoning Amendments.

The Member did use the term 'critical' in connection with the Applicant/Appellants' failure to appeal the Davisville Zoning By-laws. It is a decision that was made or not made for undisclosed reasons. However, nothing more is made of it and I agree with the City in that regard. The term is unfortunate, in the absence of a definition or implication. I cannot agree that its usage in the Decision amounts to a reviewable error. The terminology implies that the Requestor had an option that was not exercised. Whether that option had reasons or not was not explored because it was not an issue in the Hearing. By the same token, it is not expressed as an issue in the determination of the Decision.

It is not for the Reviewer to parse every word or read into an expression an interpretation that does not speak for itself.

5. The Decision erred by permitting participants to make closing submissions.

Had it not been for the sequence described by the Requestor, I would have no comment in dismissing this ground. The TLAB is responsible for its own procedure and can vary the application of its Rules in appropriate circumstances, even without notice.

Here, the Applicant/Appellant appears to have been misled, likely inadvertently, by the Member announcing that final submissions would be confined to the Parties, only to change that direction on the arrival of the appointed day.

As pointed out by the City, no new evidence in the Participants' submissions appeared to be reflected in the Decision; there is no support for any alleged injury.

I find this procedural decision, despite Rule 13.8, a mixed courtesy. It does not amount to a reviewable error.

7. The Decision erred by misunderstanding the City's failure to call evidence

The Requestor asserts that the Member drew an incorrect inference in the City not calling evidence, and in attributing that fact to the relatively recent adoption of the Davisville Zoning By-laws, and a Staff Report in support.

I agree with the City position that a Party has every right to elect not to call own evidence and that there may be many reasons for that decision.

The fact that the City Staff Report appears to have been admitted into evidence on consent in the absence of its author being present is a separate issue not raised.

Once admitted, its use was open to opinion, inference and argument.

Whether there was a 'misunderstanding' as to the import of the Decision on the timing relationship between the Staff Report and the absence of a City witness is, in my view of the circumstances, inconsequential. If it is a factual error, it is not compellingly sufficient to meet the circumstance of resulting in a different decision.

It does not amount to a reviewable error.

8. The Decision erred by comparing the application to the outcome in the TLAB appeal for 585-7 Millwood Road.

Previously, I have described what I consider to be the questionable relevance of the Decision and Order for *585-7 Millwood Road*. Like the *Balliol* Decision and Order, its reference is appropriate for the application of relevant considerations. However, the attributions applied in the Decision, even with the Member's notice of intention to consider the matter, may well have exceeded the justifiable comparative bounds given the differing fact circumstance vis-à-vis the absence of relief requested under the Davisville Zoning By-laws and the seemingly heavy emphasis on design comparisons, without evidentiary support.

I find that the application of the *585-7 Millwood* Decision and Order in the Decision to be contributory to my concerns that there has been a failure of natural

justice or unfairness in the importation of considerations that may be irrelevant to the subject matter on appeal. While it may be true that dwellings can be designed without integral garages, it is equally true that there may be circumstances where integral garages can be designed and accommodated in individual circumstances.

9. The Decision erred by comparing the subject application to dwelling at 57 Banff Road.

The Requestor asserts that the Decision "errs in fact by giving more weight to subjective design preferences than to precedence in the neighbourhood established by a number of existing dwellings".

In my view, this ground enters the field of rearguing the matter heard by the Member.

I agree with the City Response that an assessment of the physical character of an area "is exactly the type of analysis that is required by the Official Plan".

While the Member may have paused and even dwelled on the design example of 57 Banff Road, he also referenced various attributes of what appears to be a dwelling of similar height and number of floors, as proposed by the Applicant/Appellant. In that character assessment, design is an element. I do not find qualitative descriptions of design attributes to be a fundamental breach of a relevant consideration.

I see no error of fact or law in the discussion or use of the 57 Banff address.

10. The Decision erred by not recounting the areas of expertise in which Mr. Riley was qualified.

The Requestor asserts that the planner called on behalf of the Applicant/Appellant was also qualified as an urban designer.

There is little to assess in the evidence referenced or in the language of the Decision to indicate that this qualification was pressed, ignored, avoided or wrongly considered.

It is true that urban design considerations pervade elements of the Decision but what is absent is any assertion that the urban design opinion evidence given was wrongfully contradicted.

The City states that Mr. Riley was not accredited specific status as an urban designer, but that he gave extensive evidence on built form that his urban design evidence was 'heard and considered'. (Response, paragraph 53)

I am unable to conclude whether specific urban design evidence was given or 'considered' from the Decision.

Consequently, I can have no finding on whether this ground has merit. Certainly, it is not a basis for my disposition of this Request.

DIRECTION

Under the jurisdiction afforded in the current Rules, a Request for Review can be dismissed or addressed under any of the relief heads listed in Rule 31.6.

In this circumstance, I am unable to find that the Member's Decision on the merits was wrong. However, I have determined that compelling grounds have been made out that there appear to have been compromises to natural justice and procedural fairness. Further, I have expressed discomfort in several areas that, coupled with the foregoing, require a remedial approach.

Consequently, and on a without prejudice basis to the position of any Party or Participant, I will not dismiss the Request but to choose from the list:

> **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.

I find that the relief requested in the Request to be the more appropriate.

Namely, to direct a rehearing of the appeal in its entirety without any terms or conditions that might be seen or construed to influence its determination. It would be a *de novo* Hearing, but with the learning curve of history. At the same time, the Member offered a different remedy being the pursuit of a redesign based on a parking pad application. While the Request arguably rejects that opportunity, I am not disposed to eliminating its consideration should circumstances warrant.

If a rehearing is to occur, it is to be before a different Member than has been engaged in respect of the subject property to date.

The Decision offered the Applicant an opportunity to consider redesign. This determination offers the Applicant an additional opportunity for a comprehensive reconsideration of the appeal.

All Parties are offered the opportunity of mediation, private or led by the TLAB, on agreement or upon a request.

It is appropriate to afford the Applicant a period of time to consider these opportunities and for all the Parties and Participants the possibility for the consideration of their positions.

I see no reason why that consideration needs more that an extension of the timeframe originally envisaged by the Member. The election and its exercise remain best left with the Applicant/Appellant and that decision is to be considered without prejudice.

Again, nothing in this determination is to be read or suggest any particular final outcome on the merits of the appeal, however pursued.

DECISION AND ORDER

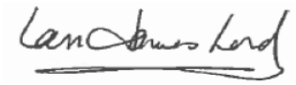
1. The Applicant/Appellant shall have a period of six (6) weeks from the date hereof to determine whether:

   a). the Decision will be pursued as written for finalization by the Member or a Member; or

   b). a rehearing will be required, by advice to that effect from the Appellant to the TLAB, with a request for the issuance of a Notice of Hearing.

2. In the event that the election in 1.b), above is chosen or upon the expiry of the time period in paragraph 1, the Request is granted, the Decision is cancelled and the TLAB, at the earliest opportunity available, shall schedule a two-day Hearing on the appeal before a different Member than engaged to date and issue and post a Notice of Hearing schedule, for exchanges.

3. If there are difficulties with the interpretation or application of this decision, the TLAB may be spoken to.

X 

Ian J. Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord