Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Monday, April 08, 2019

PROCEEDING COMMENCED UNDER section 53, subsection 53(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): HOMAYOUN NABAVI

Applicant: TJ CIECIURA

Property Address/Description: 36 CLISSOLD RD

Committee of Adjustment Case File Number: 18 130490 WET 05 CO, 18 130498 WET 05 MV, 18 130499 WET 05 MV

TLAB Case File Number: **18 214914 S53 05 TLAB**

Motion Decision Order Date: Wednesday, January 09, 2019

DECISION DELIVERED BY G. BURTON

INTRODUCTION AND BACKGROUND

This was a Request made on January 30, 2019 for a Review of a Decision on a Motion. The Decision was issued on January 9, 2019 by the Chair of the Toronto Local Appeal Body (TLAB), Mr. Ian James Lord. I append the text (only) of that Decision in Attachment 1, as it sets out in detail the necessary facts and reasons for which the Chair allowed the City of Toronto's Motion of January 4, 2019.

The City's Motion sought to adjourn the hearing of the owner's consent appeal from February 11, 2019 for an indefinite period ("…until such a time that the Appellant has brought new Minor Variance Applications associated with the Consent Application."). During this period, the appellant/owner would have the opportunity to reapply to the Committee of Adjustment (COA) for the variances needed for the proposal.

The reason for this essential delay is that the COA decisions on the variances had not been appealed to TLAB along with the consent. The appellant, Mr. Nabavi, tried very

hard to appeal the variance decisions but had been too late. Thus, the COA decisions refusing the variances stand, and cannot be revived by any means. There must be a COA decision on a new application in order for there to be another appeal. After the three-month period mentioned in the Chair's decision, there would be a teleconference to assess where the matter stands.

REVIEW REQUEST AND RULE COMPLIANCE

A preliminary question that must be determined is whether the Chair's January 9, 2019 Decision, the subject of this Review Request, can be formally reviewed at all. Under TLAB Rules, a Party who disagrees with a Decision of the TLAB may (under certain circumstances) ask that the Decision be reviewed. Current Rule 31 provides most of the authorization and procedures for a Review. It now reads:

"31.1 A Party may request a review of a Final Decision or order of the Local Appeal Body."

This section is somewhat ambiguous. It can be read as saying that only a final decision, and not a decision made in the middle of an appeal, (an "interlocutory" one) can be reviewed. As applied to the present fact situation, this appears to be clear. The "Decision and Order" in this matter was made in the middle of the proceedings, since a hearing on the consent appeal may still occur. Therefore, it would fall within the "interlocutory" category. If so, it could not usually be reviewed.

If, on the other hand, there is a Review Request for a "final" decision or order – one that effectively finalizes a matter, or the rights of one of the Parties – it can be subject to review, given the words of present Rule 31.1. There is some doubt about the phrase "Final Decision or order", however. The so-called "Decision and Order" of the Chair on January 9 here might be considered to be an Order. Any such order could be reviewed, since the word "final" in the Rule may not modify "order" as it does "Decision". This Rule may soon be clarified, however, so I will give the doubt to the Mover of the Review Request. Given the ambiguity in the phrase "Final Decision or order", I will accept the Request for Review at this time even though the Chair's Decision and Order is probably an interlocutory one in this case.

JURISDICTION

These 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

If the TLAB could approve the consent, would it assist the applicant?

I find no error here as set out in Rule 31.7. There could not be a different decision from the one made by the Chair. These are the reasons.

As the Chair mentioned, the City's Motion included the following facts and arguments:

"5. To permit the lot sizes and construction of the detached dwellings, as a result of the proposed severance, the Appellant requested relief from the City of Toronto Zoning By-

law No. 569-2013 and the former City of Etobicoke Zoning Code, as outlined in the Minor Variance Applications that were filed. The Minor Variance Applications requested a total of 16 minor variances, which included permission for:

i. Substandard lot frontage;
ii. Substandard lot area;
iii. Increased gross floor area;
iv. Reduced side yard setbacks;
v. Increased first floor height;
vi. Increased soffit height;
vii. Increased front exterior main walls height; and
viii. Increased building height.

6. The proposed undersized lots cannot be created through solely a Consent Application, as the related Minor Variances for lot frontage and lot area have not been granted and the decisions of the Committee of Adjustment, refusing the Minor Variance Applications, are final and binding. (emphasis added).

7. Considering the Consent Application without considering the Minor Variance Applications is premature under 51(24) of the Planning Act as the Minor Variances, listed in paragraph five (5) are required to permit the proposed dwellings on the proposed undersized lots. However, the Committee's Minor Variance Decisions were not appealed and are not before the TLAB to be considered, and as a result the TLAB does not have the authority to grant the necessary variances." (Notice of Motion, filed Dec. 17, 2019).

Mr. Nabavi continued to make the following submission in his review request, much of which was disposed of by the Chair in his Decision. The appellant said that the City is wrong to argue that his application for consent is premature (because he was not granted the variances he requires, and could not appeal the COA refusals of them). He reiterates that:

"The appeal for decision on Consent application is mature on its own merit, which includes the variances required for land severance such as frontage and area without further requirement of appeal for Minor Variance applications. At this stage I seek the consent of land severance without further delay and additional cost, once consent is given, then I will file Minor Variances application for the buildings based on old or new design and drawings suitable for the severed lands.
Also confirmed by TLAB's office, there has been many Consent applications without Minor Variance application appealed to OMB and TLAB in the past, so my application is one among many."

Decision on whether approval of the consent would be possible, without related variance appeals

It seems that there are a few misunderstandings here. There are two reasons why the Chair's decision is correct and must be upheld.

First, I think that the City's reference to prematurity in subsection 51(24) is apt; this is indeed a factor when evaluating consents. However, "prematurity" is just one pillar that supports the real reason that the Chair accepted the Motion for an adjournment in this

fact situation. Essentially, the appeal cannot be granted as it now stands. It is premature because it is incomplete. The Chair was willing to allow the appeal to be completed, as is set out below.

I have read carefully the appellant's Witness Statement prepared for the hearing of the consent appeal. It is very impressive. However, the bottom line is that there are no existing appeals of the variance refusals, and such appeals are necessary for the consent to be approved by TLAB. Mr. Nabavi's attempts were unfortunately out of time, and the TLAB has no power, as the Chair found, to extend a time limit in a statute, no matter how much it might desire to do so.

Second, and this more important point should also be understood: Mr. Nabavi states again that, because he appealed the consent, he should have the right to draw up new plans AFTER the TLAB approves the severance (if it should do so). This is not possible, for the reasons the City gives above in the highlighted paragraph 6, and that the Chair accepted.

The Chair was correct. On an application for a consent to sever, it is almost inevitable that variances are needed as well, as the new lot sizes would probably not meet the By-law standards. This is true whether or not new structures are proposed for the severed lots. This application illustrates this point. The severed lots would not meet the frontage or area sizes required in the zoning By-law. Therefore, an approval authority cannot proceed to consider a consent without variance applications as well. If a lot is divided into two lots that are narrower than the By-law requires for the frontage measurement, there must be a variance for a reduced lot frontage, and (usually) reduced lot area as well. There may be severances where the lots exceed the frontage requirements, but these are rare as other variances for structures are usually required.

One cannot just "decide" to create narrower lots that contravene the zoning by-law requirements for lot frontage and area. In other words, associated variances are needed first. The appellant would have the TLAB do the impossible here. These are the reasons:

1) In this case, the consent would not meet the requirement in subsection 51(24)(c) of the *Planning Act* that it conform to the Official Plan (OP). There is an OP policy stating that zoning by-laws will govern in the *Neighbourhoods* designations. Policy 4.1.8 states:

> 'Zoning by-laws will contain numerical site standards for matters such as building type and height, density, **lot sizes**, lot depths**, lot frontages**, parking, building setbacks from lot lines, landscaped open space and any other performance standards to ensure that new development will be compatible with the physical character of established residential *Neighbourhoods."* (emphasis added).

Because there are by-laws that govern development applications in *Neighbourhoods*, **variances are required for lot sizes that do not comply with such by-law requirements.** Therefore, it would indeed be "premature" as the City argued and the Chair accepted, to think that a consent **could** be approved where there are no complementary and necessary reductions to the zoning by-laws for frontage and area, etc., by means of minor variance applications for the resulting lots. The TLAB could not

approve such a consent. In my view this is the inevitable interpretation of the consent criteria in subsection 51(24) of the *Act* for these types of applications. It should need no further authority to be cited in order for it to be accepted by the TLAB.

2) Another argument of Mr. Nabavi is that the consent application **should** be heard up front, even before variance applications are approved. If it is approved by TLAB, and if his subsequent applications for variances are then approved by the COA, there will be no need to appeal them to TLAB. He could just proceed to develop the project. This is not acceptable as a solution, for the reasons set out in the previous paragraphs. Variances are required in this case along with a consent, and the consent cannot be granted without associated variances as well.

It is indeed unfortunate that there are no related variance appeals for the TLAB to consider, along with the severance appeal. The two differing dates for appeal of the COA decisions may have led to confusion, as they were August 22, 2018 for the variance decisions, and August 30, 2018 for the consent decision. These meet the requirements in both cases, but they may have led to confusion for Mr. Nabavi when he was away. When trying to appeal the variance decisions, he was too late and no extensions are possible.

The Chair does mention that TLAB has accepted consent appeals in the past without accompanying variance appeals. However, he stressed, these happened only where the COA had approved the related variances, and had not refused them. Where this happened, the necessary variances did not need to be appealed and considered with the consent, as they were already in effect following the COA approvals. In other words, the consent could be considered alone, since the underlying variances needed for the development were already in place. **This is NOT the case for Mr. Nabavi's appeal of the consent.**

In my view this is the reason why the City stated that it was premature. There should now be a pause in the consent hearing, as unfortunate as this is for the owner both in time and money. He must apply once again to the COA for approvals for the requested variances. If the COA were to approve the variances in a new hearing, they would not need to be appealed, and the consent appeal could proceed. If they were refused, an appeal from these decisions could be added to the consent appeal.

I make no findings at all on the merits of the requested variances. I only note the need for decisions on them, before the severance can be considered by the TLAB, as the Chair has found.

I find also that it is to the applicant's advantage that the City appears willing to wait for any necessary variance approvals in this matter. I urge Mr. Nabavi to seek the required variances if he wishes to proceed with the application. Any negative findings concerning variances could then be joined with his valid consent appeal, should the TLAB decide to do this.

DECISION AND ORDER

The Request for Review is denied, and the Decision and Order of the TLAB dated January 9, 2019 is confirmed.

Attachment 1 – text of Decision and Order of January 9, 2019

DECISION AND ORDER

Decision Issue Date Wednesday, January 09, 2019

PROCEEDING COMMENCED UNDER section 53, subsection 53(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): HOMAYOUN NABAVI

Applicant: TJ CIECIURA

Property Address/Description: 36 CLISSOLD RD

Committee of Adjustment Case File Number: 18 130490 WET 05 CO, 18 130498 WET 05 MV, 18 130499 WET 05 MV

TLAB Case File Number: **18 214914 S53 05 TLAB**

Motion Hearing date: Friday, January 04, 2019

DECISION DELIVERED BY Ian James LORD

INTRODUCTION
This matter involves a Motion for Adjournment (Motion) brought by the City of Toronto (City), a party to the Applicant's appeal of the Etobicoke and York Panel of the Committee of Adjustment's (COA) refusal of a consent to sever 36 Clissold Road (subject property).
The Motion was directed to be heard in writing returnable January 4, 2019. The Motion was served in accordance with the Notice of Hearing timelines and supported by the requisite affidavit, sworn December 17, 2018.
A timely Response to Motion (Response), inclusive of an affidavit sworn December 27, 2018, was also received.
No Reply to the Response was forthcoming.
The Notice of Hearing of the Toronto Local Appeal Body (TLAB) set February 11, 2019 as the date for hearing this Appeal.

BACKGROUND
The affidavits are clear to the circumstances surrounding the appeal and a related set of minor variance applications to the proposed two new lots sought to be created by the consent Application, and its appeal.

The COA refused those associated variances and confirmed in its Notices of Decision, prepared August 2, 2018 and mailed August 10, 2018, that the last date for appeal was August 22, 2018, applicable to both variance application files.
The last date for the appeal of the consent refusal was confirmed in the Notice of Decision also prepared August 2, 2018 and mailed August 10, 2018, as August 30, 2018.
The Applicant instructed and perfected a timely appeal of the consent Application, the TLAB file for which is the subject of the Motion.
The Applicant asserts the intention and submission of a timely appeal of the variance Applications. However, the COA did not accept the appeals, and no appeal file on either variance application request has been forwarded to the TLAB.

MATTERS IN ISSUE
There appear to be two issues: adjournment and jurisdiction.
The Motion requests that it be heard in writing and that the Hearing scheduled for February 11, 2019 be adjourned. The Motion asserts that the variances refused by the COA are final and binding, that considering the consent appeal in the absence of the required variances to permit construction on the lots 'is premature', and that the TLAB is without jurisdiction or authority to grant the necessary variances.
The Motion requests an adjournment "until such time as the Appellant has brought new Minor Variance Applications associated with the Consent Application."
The Response asserts all matters were appealed and, but for circumstances, the variance appeals were not received by the Secretary Treasurer of the COA within the period established for receipt of appeals. Further, it asserts that the consent appeal, which was forthcoming in a timely manner, "includes the variances required for land severance such as frontage and area without further requirement of appeal for Minor Variance applications."
The Response clarifies that once a consent is given "then I will file Minor Variance applications for the buildings based on old or new design and drawings suitable for the severed lands."

The Response says the consent appeal is mature and requests denial of the Motion.
The jurisdictional issue appears to the TLAB to be whether the variance matters were appealed and whether they are before the TLAB in any form. Ancillary to that is whether the consent appeal can proceed in all the circumstances.

JURISDICTION
As this is a Motion in writing, the Rules of Practice and Procedure of the TLAB are germane. Both parties assert the application of Rules 2.2, 2.3 and 2.11, 23.2 and 23.4.

EVIDENCE
I have read carefully the Affidavits and submissions of both parties.
The salient points of the Motion, in addition to the factual recitation under 'Background', above, include:
a) There were 16 variances applied for at the same time as the consent application; they were refused and are not before the TLAB on appeal;
b) It would be premature to proceed with the consent appeal in the absence of associated variances.

The Motion does not assert that there is no jurisdiction to proceed with the consent application; rather, it indirectly invokes the statutory test on the merits of a consent consideration (section 53 (b) of the *Planning Act*, namely "whether the proposed subdivision is premature or in the public interest". The support rationale behind that submission is not provided.
The salient points of the Response, in addition to the factual recitation under 'Background', above, include:

a) That due to special extenuating circumstances (the father's passing), the Applicant "forgot about appealing the Decisions til the last day".
b) Herculean efforts were made over long distances to tender an appeal on August 22, 2018; however, circumstances mitigated against the ability to do so: the COA would not accept credit card payment; delivery of documentation and payment could not be achieved before 4:30 pm, office closing time; delivery was confirmed by an email of 5:59 pm that the appeal material was left in a common mail depository, not that of the COA office; that physical receipt was not acknowledged before August 23, 2018 and was never accepted, entered or forwarded to the TLAB.
c) It is asserted that the consent appeal is mature and that hardship, measured both in delay and additional cost, warrants the consent Hearing to proceed to permit "my only opportunity to defend the appeal in person after four years…of constant stress…and thousands of dollars of…cost for this project so far…(and)…where justice will be served."
d) The Affidavit material attached reveals the exchanges between counsel and, earlier, the COA representative; it sets out where the Applicant makes the conscious decisions:
i. To proceed with the severance appeal (on August 23, 2018) after receiving advice that the variance appeals will not be accepted; and
ii. To proceed with the severance Hearing date despite the City exchanges identifying its position on the prematurity of proceeding with the consent appeals in the absence of the variances and the suggestion the Applicant seek an adjournment.

No case authority or legal argument accompanied either the Motion or the Response.

ANALYSIS, FINDINGS, REASONS
I find that the consent Appeal is mature and, but for the Motion, is scheduled to be heard February 11, 2019. I also find that it is premature and not in either the public interest or that of the Parties to proceed on that date.
The TLAB has no authority to extend a filing date for an appeal of matters heard and determined by the COA. Appeal dates are limitation periods that are set by statute and regulation and in the absence of anything further, the TLAB is without authority to second guess or sit in review of the decision of the COA Secretary Treasurer that a timely appeal was not received or that its procedures were in some way in error.
I have considered and apply the case of *Garvis v. Toronto (City) 68 O.M.B.R.238 (O.M.B)* as a non-binding precedent. In *Garvis,* a consent and minor variance were considered and refused by the Committee of Adjustment and the minor variance appeal period expired before that of the consent. The minor variance appeal was filed three days late. The Board would not proceed with the minor variance appeal as it was not filed within the statutory time frame. In that case, the consent appeal was dismissed as premature and not in the public interest.
There are parallels to the fact circumstances herein. I equate the inability to review the COA decision to not accept the Applicant's variance appeal to being "three days late". In any event, there is no variance appeal file before the TLAB.

There is, also, no request by the City at this point seeking a dismissal of the consent appeal. That is a matter to be considered and determined on its merit.
I can give no weight to the submission of the Applicant that certain variances, to lot frontage and to lot size, are *de facto* a component of the consent appeal. There is no doubt that the requisite *Planning Act* approval jurisdictions overlap on these subject areas; however, distinctly different considerations arise and are to be applied despite the similarity of subject matter.
Separating the consideration of these matters risks duplication and the potential for inconsistent findings.
It is the case that the TLAB has proceeded to hear consent appeals in the absence of associated variance applications. While none have specifically been referenced, such a

proceeding could be expected to and has occurred, where only the consent has been appealed and an approval of variances by the COA left in place.

I find that the Applicant has acknowledged the need for variances to support development on the proposed lots. It is no answer to state that, once approved, variance applications will be brought on 'old or new' drawings, to pave the way for building permits. That procedure, while perhaps compelling to the lay person or resultant from expediency in this circumstance, is simply not viable. It bifurcates overlapping decision making processes, lacks certainty, duplicates evidence, inconveniences the public in multiple engagements, and projects a total disregard for the efficiency of public agencies in decision making.

I find it somewhat excusable in the special circumstances extant in this matter that the related files were not properly conjoined. The history does not however, justify, even on alleged grounds of cost and convenience that a proper consideration not be given to the Applicant's matters in a comprehensive manner and in a single Hearing.

The City has suggested that the variance matters be reinstituted and properly brought before the TLAB, and I agree. That position could have been of a much more severe nature to the Applicant and may yet be. However, at the moment, it affords a clear path for the Applicant to follow, if it so determines. The additional cost and inconvenience to all with an interest in these matters is indeed regretful. In the circumstances, it cannot be conclusively visited on any action, conduct or individual.

The Applicant will have the opportunity of a Hearing, subject to fulfilling the matters herein and the Rules of the TLAB.

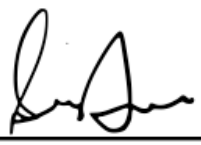
DECISION AND ORDER

The request for a written Motion is allowed.

The request for an adjournment is granted. The Hearing scheduled for February 11, 2019 is cancelled and no attendance is required.

The Supervisor is directed three (3) months from the date of issuance of this Decision to canvass the parties on the status of the matter, unless earlier in receipt of the requisite variance appeals or a notice of abandonment of the consent appeal.

In the event that the Supervisor's canvass shows no progress in the matter of scheduling a hearing, the TLAB will, on Notice, schedule a teleconference hearing to show cause why the matter of the consent appeal should not be dismissed.

X 

G. Burton

Panel Chair, Toronto Local Appeal Body