Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Monday, June 17, 2019

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): ROBERT THOMPSON

Applicant: AMBIENT DESIGN LTD

Property Address/Description: 10 LAKE PROMENADE

Committee of Adjustment Case File: 17 169514 WET 06 CO, 17 169522 WET 06 MV, 17 169523 WET 06 MV

TLAB Case File Number: 18 120054 S53 06 TLAB, 18 120065 S45 06 TLAB, 18 120066 S45 06 TLAB

Motion Decision Order Date: Tuesday, April 23, 2019

DECISION DELIVERED BY D. LOMBARDI

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request/Request for Review) under Rule 31 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB) made on behalf of Robert Thompson (Requestor/Appellant), a Party and the owner of 10 Lake Promenade (subject property).

The Request consists of an affidavit (Form 10) sworn by Eliott Cheeseman, a Student-at-Law with Russell Cheeseman, Barrister and Solicitor, retained by the Requestor, sworn May 17, 2019. The Affidavit consists of the following attachments:

- Exhibit A – 10 Lake Promenade Development Application;
- TLAB Decision issued by Member Makuch dated April 23, 2019 re OPA 320 and Long Branch Guidelines;
- Exhibit C- Form for Audio Transcript File of Oral Motion (Day 3 – January 17, 2019);

- Exhibit D – '*Clergy Properties Ltd. v. City of Mississauga*, 1996 CarswellOnt 5704;
- Exhibit E – *Sun Life Assurance Company of Canada v. City of Burlington*, 2007 OMB PL060707;
- Exhibit F – *Pine Lake Group v. Toronto (City),* 2019 CanLII 11858 (Ont 6221);
- Exhibit G – *James Dick Construction v Town of Caledon,* 2003 CarswellOnt 6221.

The Request relates to the above noted Interlocutory TLAB Decision and Order by Member S. Makuch issued April 23, 2019, with respect to the oral Motion brought by the Appellant's representative, Mr. Cheeseman, at the end of the presentation of the Appellant's evidence on January 17, 2019 (Exhibit B). The Motion requested a finding that evidence regarding Official Plan Amendment 320 (OPA 320) and The Long Branch Neighbourhood Character Guidelines (Guidelines) should not be admitted into evidence at the Hearing.

The Request was served on the City (Sara Amini) and the Long Branch Neighbourhood Association (Christine Mercado) by way of email on May 17, 2019. There were no other communications received by the TLAB.

The TLAB recently (May 6, 2019) adopted revised TLAB Rules of Practice and Procedure (New Rules). The New Rules were crafted and perfected following a lengthy public process, and those Rules now apply to all proceedings brought before the TLAB after May 6th. As the subject application and the related motion(s) were commenced prior to this May 6th date, this Review Request is being conducted under the regulations of the previous iteration of the Rules (Old Rules) that were in place at the time that the original appeal application was submitted to the TLAB by the Appellant.

Service is a condition precedent to a validly constituted Request, but only on Parties as outlined in 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 approval of consent and associated minor variances to sever the existing lot at 10 Lake Promenade (subject property) into two new building lots and to construct two new detached residential dwellings, one each on the newly created lots.

The matter under appeal was commenced by an application to the Committee of Adjustment (COA) on April 20, 2017 and appealed to the TLAB on February 20, 2018.

The first day of the Hearing was September 17, 2018, and the Hearing then continued on January 15, 2019. Additional Hearing dates were confirmed as follows: Day 3 – January 17, 2019. Subsequently, the following supplementary Hearing dates were scheduled to accommodate the proceedings: Day 4 – April 26, 2019; Day – 5 September 3, 2019; Day 6 – September 4, 2019; Day 7 – September 5, 2019; and Day 8 – September 12, 2019.

On January 17, 2019, the third day of the Hearing, an oral Motion was brought by the Requestor's solicitor, Mr. Cheeseman at the end of the presentation of the Appellant's evidence, without formal motion. The oral Motion was for a determination on the admissibility of OPA 320 and the Guidelines into evidence for the present case.

OPA 320 relates to the *Neighbourhoods* designation in the City's OP and provides more specific guidance as to how the designation should be applied in determining the physical character of a neighbourhood in the City.

The Guidelines, adopted by City Council, provide criteria by which to evaluate new development in the Long Branch Neighbourhood. The OPA was finally approved by the Local Planning Appeal Tribunal (LPAT) on December 7, 2018 and the Guidelines were adopted by Council in January of that same year.

On April 23, 2019, presiding Panel Member Makuch issued a Decision allowing the admission of both OPA 320 and the Guidelines into evidence in the proceeding. In making that determination, the Member gave the documents the following recognition, as outlined on Page 5 of that Decision:

> *"The Guidelines are evidence of criteria of good planning in the evaluation of the variances and the consent. The OPA is an amendment to the City's Official Plan, which must be applied in accordance with sections 45 and 51 of the Planning Act."*

In the 'Matters in Issue' section of the Decision, Member Makuch specifically addressed two issues of import in determining whether the documents should be admitted into evidence: 1) whether the OPA and Guidelines are relevant; and 2) should they be applied and, if so, how. In arguing against the admission of these documents, the Appellant raised the well-established *"Clergy Principle"* which generally holds that planning policies adopted or coming into force after an application is commenced should not be applied by an appeal body, such as the TLAB, to evaluate the application.

In his analysis, Member Makuch stated the following:

> *"TLAB, under its Rules of Practice and Procedure, can determine what evidence is admissible and how its hearings shall be conducted." (Page 3 of the Decision)*

Citing case law, he continued:

> "More importantly, the Divisional Court in Greater Toronto Airport Authority v Clergy Properties (O.C.J. File 3/97,p.3), held that the OMB (and thus TLAB) "has

> exclusive jurisdiction to determine the scope of the issues before it, the procedures to be followed, and the appropriate policy choices to be made and applied in order to arrive at sound policy decisions." The "Clergy Principle" then traditionally relies on the opinion of the decision maker that "it would be contrary to natural justice to allow the rules to change after the original application is submitted." (Beer v. Halton Land Division Committee 25 O.M.B.505 at 506) This means that TLAB members have the jurisdiction to determine what evidence should be permitted and if and how the "Clergy Principle" should be applied based on their determination of the fairness of the situation.

He concluded by noting that there was no dispute as to the evidence noting that the applications for the minor variances and consent, which are the subject of the current appeal, were commenced "long before the OPA was approved by the LPAT and came into force, and long before the Guidelines were approved by Council." (Page 3 of the Decision)

He also stated that it was undisputed that "the Guidelines are not part of the Official Plan or other document and thus have no formal status or legal impact under the *Act*. They are, as stated above, an implementation tool approved by Council for the evaluation of development applications." (Page 4 of the Decision)

He further refined his rationale for making such a determination based on an analysis of three specific issues: relevance; natural justice and procedural fairness; and public notice.

With respect to the issue of relevance, he noted that OPA 320 relates, in general, to how neighbourhood character is evaluated, including the Long Branch Neighbourhood, and the Guidelines establish development criteria for this neighborhood.

He found that it was not unfair or contrary to natural justice to consider those documents even though they were approved after the application was made, and in the case of OPA 320, "well after the appeal was commenced (his words)." In addition, he further stated (on Page 4 of the Decision) that "I find that the traditional rationale for the application of the "Clergy Principle" is not compelling in this case."

In providing context to this finding, Member Makuch wrote:

> *"Neither document was directed at these particular applications or in any way sought to impair these particular variances or consent. To prohibit the application of a bona fide public policy simply because the policy was approved after an application was made is to unduly limit the ability of municipalities to prepare and apply relevant public policy. I find that procedural fairness applies to decisions which adversely affect the ability to have a fair hearing. Such fairness includes such rights as; the right to counsel, the right to cross examination, the right to a hearing itself. It also includes, in my view, the right to know the case one must meet. It would be unfair to change a policy and apply a new policy in a hearing without notice and an opportunity for a party adversely affected to address the new policy. Such was not the case here. There was disclosure that both*

documents would be at issue in the hearing: the Guidelines on June 25, 2018, and OPA 320 on January 15, 2019 at the recommencement of the hearing, and an opportunity for the appellant to address them."

Finally, he noted in his Decision that there was public notice of the status and relevance of both documents and that those involved in the proceedings had a clear opportunity to keep abreast of where these documents were in the approval process. He stated, at the top of Page 5 of the Decision, that "there was no last-minute attempt or secretive endeavour by the City or any other body to adversely impact the rights of this appellant."

Consequently, Member Makuch found that, based on the decision of the Divisional Court in the *Greater Toronto Airport Authority* case, he had the authority to determine whether OPA 320 and the Guidelines should be admitted into evidence and the weight they should be given. As a result, he allowed both documents to be admitted into evidence.

However, Member Makuch also noted that if the Appellant was of the belief that there should be an alteration in the hearing process itself to provide a fairer process (for example an adjournment to prepare evidence or an opportunity to bring reply evidence), the appellant could seek such relief. He concluded that it would not be unfair to admit the two documents into evidence and that *"procedural fairness does not include freezing all new public policy."*

As to the use of the policy, he found that the Guidelines could be used as evidence of good planning criteria to evaluate the subject development because they were prepared by planners retained by the City, in consultation with area residents. They were subsequently approved by Council, after public consultation, and represented "a clear indication of the City's view of good planning." (Page 5 of the Decision)

With respect to OPA 320, he gave this policy document more weight since, as he noted in his Decision, it is an approved part of the City's Official Plan. He submitted that under section 45 of the Planning Act, the variances being sought must comply with the general intent of the OP as amended by OPA 320 and that regard must be had as to whether the severance also conforms. In this regard, the Member concluded that there was no basis to alter these statutory requirements once OPA 320 is admitted.

On April 30, 2019, the TLAB issued a second decision by the same presiding Panel Member related to this matter. That Decision was a response to a formal Motion submitted on behalf of the Appellant requesting the following: first, an abridgement of time for serving the Notice of Motion; and, second, an adjournment of the next two Hearing dates of the matter scheduled for April 26 and April 29, 2019 to September 3, 4 and 5, 2019. It was also in response to an oral Motion brought at the hearing of the formal Motion for an order to allow the Appellant to reopen his case so that evidence could be presented respecting OPA 320 and the Guidelines.

In that Decision, the Member noted that all Parties in the matter had agreed that the Appellant should be given an opportunity to reopen their case and he agreed that procedural fairness required that the Appellant be given the opportunity to address both

OPA 320 and the Guidelines and that the terms agreed to by the Parties set out in the Decision were appropriate to enable a full and fair hearing of this matter.

As a result, the following Motion was granted:

"The Hearing is adjourned to September 3, 4, 5, and 12. The appellant may reopen his case and present evidence respecting the Guidelines and the OPA at the recommencement of the hearing on September 3.

There will be no hearing on April 29, 2019.

The appellant is to file any expert witness statements regarding the Guidelines and the OPA on or before July 12, 2019.

The other parties and participants are to file expert witness statements in reply on or before August 6, 2019.

The appellant will have a standard right of reply and the representative of LBNA may give evidence."

The Review Request

In the Affidavit filed with the TLAB on May 17, 2019, the Affiant, Mr. Cheeseman, outlines in great detail the facts of the Oral Motion and highlights the areas in which, in his opinion, the presiding Panel Member made errors of law, providing arguments as to why a review of the Decision is merited. He states that the Requestor is seeking a review in respect of the Decision, pursuant to Section 35 of the Local Planning Appeal Tribunal Act, 2017, and TLAB Rule 31, and requesting a finding by the Chair that OPA 320 and the Guidelines should not be entered into evidence as they are not relevant to the matters before the Tribunal. Alternatively, the Appellant is requesting a rehearing of the Motion before a different Member of the Tribunal.

In brief, the grounds for this review request can be summarized as follows:

1. The Decision of the Member issued April 23, 2019 makes OPA 320 determinative of the issue of Official Plan conformity. The Affiant claims that if the Decision stands, then the Decision effectively brings the Hearing to a close. It is further suggested that the Appellant's applications, then, cannot meet the tests imposed by that policy change to the Official Plan and the Decision, therefore, is *de facto* a final Decision of the TLAB in this matter; and

2. It is the Appellant's position that the Decision violates the rules of natural justice and procedural fairness, and that the Member made an error of law in arriving at his Decision to admit OPA 320 and the Guidelines, and that they are being used in determining the merits of the subject applications before the TLAB.

It is necessary to consider these in turn and I do so, below. They are somewhat interrelated and as such warrant combined consideration which is done through a

detailed examination of the facts of the Oral Motion as suggested in the Affidavit filed in this matter and identified as Exhibit B attached to the Affidavit. The Affiant also makes numerous references to the audio recording (hereinafter the "Audio File") of January 17, 2019, the third day of the Hearing, obtained through the Transcript Form (attached as Exhibit C to the Affidavit), which I have reviewed.

JURISDICTION

Below are the TLAB Rules applicable to a request for review:

> "**31.1** A Party may request a review of a Final Decision or order of the Local Appeal Body.
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> **31.2** A request for a review shall not operate as a stay, unless the Local Appeal Body orders otherwise.
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> **31.4** A Party requesting a review shall do so in writing by way an Affidavit which provides:
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> a) the reasons for the request;
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> 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;
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> 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 foregoing Rules restrict the scope of inquiry afforded a Review; the public interest sought to be addressed by the Rule is to permit the TLAB to have a sober second look at a Decision in light of the defined criteria on the types of errors that, if they occurred, might be afforded relief through the expedient remedies available to the reconsideration.

Rule 31.7 b) and c), above, have several clearly defined components which, if met, permit consideration by the TLAB of the remedies afforded by Rule 31.6, also recited above.

A Review is not an open invitation to simply challenge a decision with which one disagrees. Rather, there must appear a demonstrable error in the categories identified that warrants relief of the variety provided by the Rule.

In the subject Review for Request, Rule 31.1 becomes the first regulation of import that I believe must be addressed; the elemental question of what constitutes a "Final Decision or Order' becomes fundamentally important to the Appellant's basis for this Request. As the Affiant states in Paragraph 5 of the Affidavit (Page 2):

> *"If the Decision (issued April 23, 2019) stands, then the Decision effectively brings the Hearing to a close. Mr. Thompson's (Requestor/Appellant) application cannot meet the tests imposed by that policy change to the Official Plan. Ergo, the Decision is de facto a final Decision of the TLAB in this matter."*

TLAB Rule 31.1 states that "A Party may request a review of a ***Final Decision or Order*** of the Local Appeal Body." It is the TLAB's position that a 'Final Decision and/or Order' is not to be considered an Interlocutory or Interim Decision or Order but, rather, one that has been determined after all of the administrative remedies available to the Party or Parties have been exhausted and pending completion of all matters under appeal. In this matter, the Appellant's solicitor is suggesting that the April 23, 2019 Decision issued by Member Makuch is, in fact, a 'Final Decision' based on the assumption that if OPA

320 and the Guidelines are admitted into evidence then his client's application cannot meet the policy changes these documents would initiate to the Official Plan.

I disagree with this proposition for the following reasons. Firstly, the Affiant fails to note in the Affidavit that Member Makuch issued a second Decision and Order in this matter with respect to a formal Motion on behalf of the Requestor on April 30, 2019. That Decision acknowledged the appropriateness of allowing the Requestor an opportunity to reopen his case so that evidence could be presented respecting OPA 320 and the Guidelines. As outlined in that Decisions the Requestor will be allowed to file expert witness statements to challenge the OPA and the Guidelines. As well, the Decision allows the Parties to submit reply witness statements and a corresponding standard right of reply. The Decision also permits a representative of the Long Branch Neighbourhood Association (LBNA) to give evidence in the matter.

In this regard, I believe that the Member has not abrogated the Appellant's rights in regard to procedural fairness but has provided an opportunity to address those documents in a formal hearing setting within the parameters of the TLAB Rules without prejudice ability to include and pursue the same issue as may be determined appropriate, at the end.

Regarding the Affiant's contention and conclusion that the Appellant's applications cannot meet the test imposed by OPA 320 and the Guidelines and, therefore, the Decision represents a *'de facto'* Final Decision of the TLAB," I, respectfully, disagree with this assertion. I believe it is the presiding TLAB Chair's responsibility to hear the full extent of the evidence from all Parties, weigh that evidence and apply the appropriate statutory tests to arrive at a just, expeditious and cost-effective determination of the proceeding on its merits pursuant to the TLAB Rules.

I am of the opinion that this has not yet happened in this matter and that it is not open to *a priori* to make that determination either by the Requestor or upon a Review Request. I believe that the proceedings should be allowed to continue to its ultimate conclusion, that is, a final decision by the presiding Member. At that point, the Requestor may, pursuant to the TLAB Rules, request of the Chair a Review of a Final Decision, permitted by Rule 31, which may result in the TLAB "confirming, varying, suspending or cancelling" a decision, or another available remedy.

With respect to the Requestor's submission that the Decision violates the rules of natural justice and procedural fairness, and that the Member made an error of law in arriving at the decision to admit the OPA and Guidelines and to use them in determining the merits of the applications before the TLAB, the Affiant provides a detailed rationale for this proposition in the Affidavit.

He first sets out the facts to the oral Motion on January 17, 2019, providing both the City's and LBNA's positions on the introduction of OPA 320 and the Guidelines, and quoting extensively from the Audio File attached to the Affidavit.

In short, The City's position was that the documents should be admitted into evidence as supported by the following excerpt:

> *"(City's position) that the documents are clearly relevant to this proceeding. They are planning instruments. They form part of policy narrative. There should be evidence on this and you should hear the evidence before you make a determination (of the matter)." (Audio File – January 17, 4:13:39)*

The LNBA took the same position as the City during the Motion:

> *"So, in the interest of fairness and good planning, I request these documents be admitted into evidence and weighted appropriately." (Audio File – 5:01:30)*

The Appellant took the position that OPA 320 and the Guidelines should not be admitted into evidence because they are not relevant to a material issue related to the case, based on the *'Clergy Principle'*:

> *"(The City) goes back to textbook…Information can be admitted into evidence only where it is relevant to am material issue in this case." (Audio File, 5:03:40)*

> *"In my respectful submission…you shouldn't admit the Guidelines and OPA 320 because they are not relevant." (Audio File, 5:04:27)*

The Affiant further notes that the Appellant's position is that these two documents may be admissible based on the fact that they are applicable to the geographical area in which the subject property is situated, but that should not be confused with their 'relevance' to the material facts of the case.

> *"(An Official Plan amendment could be) admissible, on its face…but is it relevant to the material here?" (Audio File, 5:05:03)*

The Affiant also noted that the City's planning witness never took the position that OPA 320 should be used to determine the current matter:

> *"The City's witness took the position that the determinative test in this matter is the former official plan. The City never said that (the development) should conform to OPA 320." (Audio File, 4:11:00)*

Furthermore, the Affiant submits that the City's witness never used the Guidelines during the development of her evidence because they did not apply at the time of the application:

> *"City witness is going to say that they did not consider (the Guidelines) because they did not apply at the time of the application." (Audio File, 4:12:29)*

As to the 'weight' the Member should apply to these documents, the Affiant noted that the City left that to the Member but felt that the *'Clergy Principle'* was not binding on the Member:

> *"'Clergy' does not bind you, if you would like to apply OPA 320, this board has the jurisdiction to do so." (Audio File, 4:15:27)*

Finally, the Affiant suggested that the City's ultimate position was that the applications would fail the tests regardless of the introduction of these documents, and that admitting them into evidence would benefit the Member in making a decision:

> *"(City Witness) With or without OPA 320, it is the City's position that this application fails. I am not taking the position that this application should conform to OPA 320." (Audio File, 4:14:40)*

In summary, the Appellant's solicitor, Mr. Cheeseman, asked that the documents be excluded from evidence because they are not relevant to a material issue in the applications. The Affiant submitted that if this evidence is, in fact, admitted, the City's position that it is 'not' determinative is hollow:

> *"If (the Member) says (OPA 320) is admissible, it's admissible, sir, so that you can use it…you are going to be asked to give it weight. And the fact that you are giving it weight makes it determinative." (Audio File, 5:05:29)*

The Affidavit addresses the application of the 'Clergy Principle' by the Member in this matter. The Affiant provides an analysis of case law with respect to *'Clergy'* on the basis of the following cases: *Clergy Properties Ltd. v. City of Mississauga* (OMB, 1996); *Sun Life v Burlington* (OMB, 2007); *Pine Lake Group v Toronto* (City) (LPAT, 2019); and *James Dick v Town of Caledon*.

The Affiant suggests that *'Clergy'* is a well-established legal principle in land development matters that stipulates that land use planning applications must be judged on the basis of provincial, regional, and municipal policies in place on the date an applicant submits their development application. Upon submission, the policies used to decide that application are those that were in place on the date of submission. The Affiant contends that the case law provided for guidance makes it clear that if the policies were to change post-application submission, it would violate the fundamental legal principles of natural justice and procedural fairness.

In *Sun Life v Burlington*, the Affiant specifically noted that the Board Member provided a clear explanation of the purpose of the *'Clergy Principle'* when she wrote:

> *"The Board finds that the Clergy principle is not merely a Board policy, it is an enunciation of a principle of natural justice and procedural fairness. It is well-settled law that natural justice and procedural fairness require that a party know the case it must answer and be permitted to answer that case. If, in the context of planning law, the policy regime were a moving target, natural justice would be absent." (Sun Life, p.12)*

Furthermore, the Board Member wrote:

> *"The Board finds that the Planning Act has due regard for procedural fairness and natural justice. The Act sets out notice provisions, limitation periods, and proper parties and includes comprehensive procedures for the adoption of planning instruments, including policy documents." (Sun Life, p. 12)*

The Affiant concludes that the TLAB Member in the present matter did not refer to any of the above cases or provide any legal basis for delineating from well-established 'Clergy principle' in his Decision, although they were put to him by counsel.

The Affiant also submits that Member Makuch misunderstood the *'Clergy Principle'*, the purpose it serves, and its applicability in the present matter. In support of this proposition, the Affiant highlights the Member's interpretation of *'Clergy'* as found in his Decision on Page 4:

> *"I find that, based on the decision of the Divisional Court in the Clergy case referred to above, I clearly have the authority to determine whether the OPA and Guidelines should be admitted into evidence and the weight they should be given." (emphasis added by the Affiant)*

Additionally, the Affiant suggests that the Member makes a determination of whether the documents are "relevant" to the present case writing that:

> *"I find that both documents should be admitted into evidence for the following reasons. Firstly, they are both* ***relevant*** *(emphasis added by the Affiant) to the appeal before me. The OPA relates to neighbourhood character in general…The Guidelines specifically set out development criteria for this neighbourhood."*

The Affiant expresses disagreement with this interpretation suggesting that determining the 'relevance' of the documents in the manner as prescribed by the Member is not determining relevance at all but, rather, confusing 'relevance' with 'applicability'.

He further submits that Member Makuch continued to misapply *'Clergy'* when he wrote the following in his Decision (Page 4):

> *"Secondly, I find that it is not unfair or contrary to natural justice to consider these documents even though they were approved after the application was made and, in the case of the OPA, well after the appeal was commenced. I find that the traditional rationale for the application of the 'Clergy Principle' is not compelling in this case."*

The Affiant argues that there is no basis in case law for the above statement suggesting that there is no 'traditional rationale', there is only this principle.

Nevertheless, it is interesting to note that in the same paragraph (Para. 41) in the Affidavit, he does acquiesce to the very thing he stated was not possible - an alternative rationale. The Affiant states that any alternative rationale that has been relied upon in the cases referenced by the City, such as *Pine Lake Group v Toronto (City)* and *James Dick v. Town of Caledon,* has been due to a unique set of circumstances that do not apply in the present matter.

In *Pine Lake*, as in *James Dick*, the same argument was used to allow a new set of policies to be used in determining a development application. However, the Affiant highlighted in James Dick that the OMB Member also commented on the applicability of OPAs being retroactively applied to land use matters:

> *"Where new policies are to be applied, they must not be permitted to apply if their only or main intent is to frustrate an application or throw up politically inspired roadblocks retroactively. Retroactive policies should not become part of the arsenal of those whose only interest is to protect their own backyards from any and all development."*

The Affiant then provides what I consider a rather self-serving rationale as to why the comments made by the Board Member in *James Dick*, noted above, are directly applicable to this matter. He submits that OPA 320 and the Guidelines were put in place retroactively to make applications such as the one before the TLAB in this matter, more difficult, if not impossible, to approve on a policy basis. He continues by suggesting that both the City and the LBNA are relying on the reasoning in *James Dick* to justify the application of OPA 320 to the present case, and submits that the facts of this matter are not 'analogous' to the very different facts that lead to the *James Dick* decision.

The Affiant then takes umbrage with Member Makuch's assertion that he has provided the Requestor with a re-dress opportunity to deal with these documents when he wrote in his Decision:

> *"It would be unfair to change a policy and apply a new policy in a hearing without notice and opportunity for a party adversely affected to address the new policy. Such was not the case here (Emphasis added by the Affiant). There was disclosure that both documents would be at issue in the hearing; the Guidelines on June 25, 2019, and OPA 320 on January 15, at the recommencement of the hearing, and an opportunity to address them."*

The Affiant submits that the Appellant was completely unaware that these two documents would become 'issues' in this matter until after the application was already submitted and argues that disclosure prior to the Hearing date is 'irrelevant' in determining which land use policies apply to the application. Additionally, he suggested that the Member further confused matters when he wrote on Page 5 of his Decision:

> *"Therefore, I conclude it is not unfair to allow the two documents to be admitted into evidence. Procedural fairness does not include freezing all new public policy."*

Finally, the Affiant questions the rationale used by the Member to attribute a level of 'weight' to each document. He submits that the Member was never asked by any of the Parties during the oral Motion to do so but, nevertheless, did in his Decision:

> *"With respect to their weight, I find that the Guidelines can be used as evidence of good planning criteria by which to evaluate this development…OPA 320, on the other hand, has more weight. It is an approved part of the Official Plan of the City. As stated above…the variances being sought must comply with the general intent of the Official Plan as amended by OPA 320. I see no basis to alter these statutory requirements once the OPA is admitted."*

In the '*Conclusion*' section of the Affidavit, the Affiant asserts that the Member based his Decision on alternative interpretations of the *'Clergy Principle'* in various OMB decisions

that the Affiant submits have been determined to either violate the principles of natural justice and procedural fairness, and only be applicable in very specific circumstances. He argues that the present matter is not analogous to the circumstances, such as those in *James Dick*, which would allow such delineation from this well-established *'Principle'*.

As noted at the beginning of the '*Considerations and Commentary'* section of this Review Request Decision and Order, the Requestor is asking that I find that OPA 320 and the Guidelines not be allowed to be admitted as evidence before the Tribunal or, alternatively, a rehearing of the Motion be scheduled before a different TLAB Member.

As also noted previously, I find that the Member's April 23rd Decision is not what the TLAB would consider a 'Final Decision' as contemplated by the Rules and, therefore, is not in my opinion a *'de facto'* final decision. In fact, on Page 1 of the Affidavit, the Affiant specifically identifies the Member's April 23rd Decision an *"Interlocutory Decision and Order*" which, by its very definition, is given provisionally during the course of a legal proceeding.

I disagree with the Requestor that Member Makuch's Decision, therefore, effectively brings the Hearing to a close since the Member's subsequent April 30, 2019 Decision affords the Requestor appropriate opportunity to reopen his case and present evidence respecting the OPA and Guidelines. In his Decision, Member Makuch specifically states the following: "I find the terms agreed to by the Parties as set out above are appropriate to enable a full and fair hearing of this matter." I believe the Member has in effect undertaken to consider the principles of natural justice and procedural fairness and has the Appellant with a reasonable opportunity to test the relevance and applicability of documents in question to this matter.

The Affiant's statement that the Appellant's application cannot meet the tests imposed by the policy changes of OPA 320 to the Official Plan is a premature supposition that I submit is ultimately the prerogative of the presiding Panel Member to be determined and outlined in a final disposition of the matter. At that point, and pursuant to the TLAB Rules (specifically Rule 31), the Appellant would retain the right to request a review of that Final Decision or Oder.

As a result, and for the reasons noted above, I find there is not sufficient basis provided by the Requestor to demonstrate on a compelling basis that the Member's Decision constitutes a 'Final Hearing' and that a rehearing of the motion before a different Member of the Tribunal is warranted.

As to the issue of whether the Member made an error of law in arriving at his Decision to admit OPA 320 and the Guidelines and their utility in determining merits of the applications before the TLAB, I make no finding. Parenthetically, there are multiple instances, in fact in almost every case where these issues of admissibility are raised, the TLAB has admitted the documents after stating respect for the principle and acknowledging that they are "not to be used as determinative but are subject to weight."

I am not prepared to foreclose the Requestor's right to seek a Review of the Member's interim Decision in its entirety nor am I disposed to preclude or interfere in the manner by which the Member has accorded procedural rights to the Parties. I therefore am

suspending, until there is a final determination of the matters before the Member, any decision on the Request, other than the determination that the main issue must await the Final Decision and Order.

Upon that being issued, the Requestor is free to raise the concern of admissibility as a matter for review, without prejudice, as may appear necessary in the circumstances.

With respect to the rehearing of the motion before a different Member, I do not find compelling grounds to allow that request as it relates to an interlocutory proceeding. That issue will not be open to be re-argued by the Requestor if it is raised again after the determination of the matters and after a Final Decision and Order is issued.

DECISION AND ORDER

The Request for Review is suspended, without prejudice, pending the completion of all matters under this appeal.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body