Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: **Wednesday, June 12, 2019**

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

Appellant(s): AMANULLAH DORANI

Applicant: DANILO MARASIGAN

Property Address/Description: 144 WESTBOURNE AVE

Committee of Adjustment Case File Number: 18 145916 ESC 35 CO, 18 141784 ESC 35 MV, 18 141791 ESC 35 MV

TLAB Case File Number: **18 188072 S45 35 TLAB, 18 188073 S45 35 TLAB, 18 188074 S53 35 TLAB**

Decision Order Date: Tuesday, April 30, 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 by Reka Nicholas, a Party to the above noted matter (Requestor).

The Request is in respect of the decision of Member S. Gopikrishna issued April 30, 2019 (Decision) in respect of an appeal heard November 12, 2018 related to 144 Westbourne Avenue (subject property).

The Request asks that the Decision be overturned and the decision of the Committee of Adjustment (COA) be confirmed, refusing the severance and associated variance requests.

It is appropriate that this matter be considered under the Rule as it was in effect prior to May 6, 2019 as the matters under appeal had their Notice of Hearing issued in 2018.

There were no submissions received on the Request by the TLAB either from the Appellant or from any Participant.

I am of the view that the Request was commenced in proper form accompanied by an affidavit (Form 10) sworn May 29, 2019, by R. Nicolas (Affiant).

BACKGROUND

According to the Decision, the Appellant's applications were to sever the subject property into two lots and seek variances "to build a semi-detached house on each of the lots." This description appears to be in error; the plans attached to the Decision depict two separate detached dwellings. Nothing is made of the introductory description by the Requestor.

In dealing with preliminary matters, the Member afforded Party status to the Requestor. There is no issue taken with her ability to participate fully in the Hearing of the appeals. The Decision is some 18 pages in length; it ultimately allows the consent and the variances sought, with conditions and attached plans.

The Member heard from a professional land use planner, Mr. Ryuck, and several local residents. The Member also followed up on a decision of the TLAB brought to his attention after the close of the evidentiary stage of the Hearing, by asking the Parties to comment.

At issue throughout was the request to allow the introduction of reduced frontage lots in an area of comparatively large lots, with associated narrow, tall residential buildings argued as being out of character with the physical neighbourhood.

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 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 d), above, has several clearly defined components which, if met, permits 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.

The Request for Review is based on three fundamental assertions: new evidence, false and misleading evidence (2 instances alleged) and a violation of the rules of natural justice and procedural fairness.

These headings roughly track the proper grounds identified, above, in Rule 31.7 d), e) and b) and are discussed in the order presented by the Affiant.

1. New Evidence Official Plan Amendment 320

The Affiant notes that OPA 320 was approved December 07, 2018 AFTER the appeals on the subject property were heard. It suggests the sense of the policy in OPA 320 and the manner of its approval are instructive as to how the subject appeal should be treated; namely, that the amendment dictates a stricter policy respect for the 'same block, and opposite, as well as the broader geographic neighbourhood'.

Respectfully, this policy evolution and its formal approval after the Hearing is not and cannot be made germane to an application which was not subject to it. OPA 320 was not a factor in the Decision and cannot be made so after the fact. To do so is fundamentally unfair to the Appellant, contrary to the general expression of the '*Clergy Principle'* and simply not a relevant policy consideration or determinant in the circumstances.

OPA 320 had been adopted in a form that could have been introduced for consideration; the planner could have been examined on it, subject to objections. There is no Ruling that precluded its admissibility or otherwise.

Indeed, it is curious, but not determinative, that the Requestor did not seek to call the Member's attention to either the decision of the Local Planning Appeal Tribunal (LPAT) or OPA 320 or this Member's Decision and Order respecting *157 Maybourne* in the same manner as that related the Decision of Member Yao, described on pages 10-13 of the Decision.

Such submissions after the close of the sitting are not encouraged. They engage the potential for an additional round of communications, the potential to open the Hearing to a new sitting or the possibility of inappropriate reliance.

Once the evidentiary phase of the Hearing has ended, the door for the introduction of new evidence is closed, save for the more extraordinary circumstances.

It is for this reason that Members are encouraged to deliver timely decisions; in this case, the Decision was significantly delayed - a factor which may have played heavily on the potential for additional considerations entering the mix.

Even so, tribunal policy and jurisprudence protect against the application of after acquired policy approvals not in hand when the original applications were made. The exception is the change to applicable provincial policy, but that is not relevant here.

I can give no weight in this Review to the subsequent approval of OPA 320.

2.The Local Appeal Body 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.

My decision in *157 Maybourne* followed, by two months, the Hearing applicable to the subject property.

While I can appreciate the frustration expressed by the Requestor in having applications/appeals with arguably similar attributes decided differently by different Members, there is simply no way this fact can be ascribed as 'false or misleading evidence from a Person', as required by Rule 31.7 e). It is also not 'new evidence' under the Rule definition.

I can give no weight to this ground for review.

The **Third Ground** raised falls under the same category in the Rule, as 2., above.

In this area, the Affiant describes two instances wherein the Appellant's planner, Mr. Ryuck, is asserted to have supplied 'false' evidence to the Member:

a). Describing 144 and 146 Westbourne (a recently severed property) as being 'mirror images', 'across the street ', 'opposite' one another to which the Member ascribed an 'element of symmetry', presumably supportive of the decision to consider a severance; and

b). Advising the Member that a consent/severance had been granted to create 142A and 142B Westbourne, when in fact there is no such property or address.

I have reviewed carefully the Decision in these matters.

With respect to a)., the Member on two occasions suggests that 149A and B Westbourne are "across the street" (page 12); later, the reference is more direct, albeit paraphrasing, presumably, evidence heard: "two sets of smaller lots facing each other, on opposite sides of the road." (page 16).

In the first instance, the reference is figuratively if not literally true; in the latter case, the Member is using the locational attributes of the street separation to differentiate the appeal site of the subject property, from the 'side-by-side' relationship, which appeared potentially problematic to Member Yao in the *103 Westbourne Avenue* decision.

In both cases, I cannot ascribe the references or their sources as being 'false or misleading'; opposite houses they would not be, but they are on the same street and there is close proximity in the lot pattern.

With respect to b)., there is indeed advice received, on page 6, to the effect that a severance COA decision exists for 142A and 142B Westbourne Avenue.

There was no cross examination recorded on this question and the Member makes no further mention of it.

There is nothing to indicate how the Member received this information or what he did with it. I am not prepared to ascribe weight to the information, or lack thereof, that is not evident in the reasons for the Decision.

I cannot conclude which information was false or misleading; even with the appearance of an error, assuming there is no COA decision, there is absolutely no basis to conclude a different decision, let alone its likelihood, on the appeal itself.

On the representation made and as presented, I can ascribe nothing by way of error attributable to the planner, Mr. Ryuck. If there is a misdescription, it may as well be that of the Member. In either case, no eligible ground is made out and none that is compelling.

4. The Local Appeal Body may have *violated the rules of natural justice and procedural fairness.*

It is suggested in this ground that the Member held a bias against 'lay people'. The Request draws upon two phrases used by the Member to assert bias: first, a reference to "personal inconvenience" in addressing areas of citizen participation devoted to retaining attributes of neighbourhood character. Second, an inferred belittling of area residents by accepting the "uncontroverted evidence from the expert witness" as being "unchallenged."

At best, I find these quotes potentially insensitive albeit without meaning to be so.

The accusation that tribunals, including the TLAB, prefer expert testimony over lay citizen input is a common one. It was heard many times in public deputations over the Rules revision process embarked upon by the TLAB in 2017-18.

The criticism has its origins in the respect the English common law attributes to professional who, through academic programs or enterprises garnering experience, are held entitled to express informed opinions deserving of weight, related to their qualifications.

In the same vein, the criticism that a professional planner retained by a Party can never be independent of the clients interest belies the professional obligation in the Code of Conduct: that it is incumbent on a Registered Professional Planner to place the primacy of the public interest above all else. It also demeans the oath and affirmation made to the Tribunal in swearing the Form (Form 6) attesting to professional detachment. To accept an allegation of 'complete bias' over these credentials, on a mere submission would be unsupportable. Witness credibility is an important safeguard of the Hearing process; here, it was apparently left unaddressed, except by the inferential submissions.

For the TLAB, it has never been meant that lay citizen advice is unappreciated or that it cannot be equally as compelling in different fact circumstances. There is nothing, in this instance, in the reported concern of the Affiant or in the language of expression by the Member,that suggests or demonstrates a personal bias, antipathy, or inattentiveness of the Member in the reception and consideration of the evidence.

There is nothing presented in support, beyond the submission that: "The case was decided based on the legal prowess of the applicant's representatives instead of a conscientious examination of the true question, which is whether the application is beneficial for the long-term health of the neighbourhood."

While I might think that the restatement of Official Plan policy is essentially accurate, the Requestor has presented no compelling evidence or instances that this is not exactly the test, among others, that the Member had in mind in concluding as he did.

5. Failure to carry out basic due diligence for the decision

On this aspect of a failure of natural justice and procedural fairness, the Requestor asserts that the Decision does not advise of a site investigation or reviewing the data presented in the Participant Statements supportive of the concern for 'destabilization' caused by excessive lot severances.

Site visits are an expectation of Council and the review of filings is an obligation incumbent on all Members.

As is the determination to provide timely decisions. Long intervals of intervening circumstances may serve to undermine the authenticity of the decision-making process.

That said, the primary drivers of a TLAB decision are the evidence presented at the Hearing, the statutory directions and 'tests' and any overriding considerations of administrative law and policy.

It is the role of the Parties to call forward the evidence, challenge that not agreed with and argue its relevance within the framework of the perspective within which the statute, the *Planning Act*, operates.

In this case, silence as to the conduct of an actual site visit is not a criterion deserving of a remedy. The failure to address evidence can be an error; however, the Decision is not brief, and the issue of destabilization is not ignored. More would be required to raise issues that were pressed in evidence and not addressed but seminal to the decision-making process. A simple reference to 'data' would not suffice.

It is the case that the concluding issues of precedent and intensification(via the Golden Mile Secondary Plan) were raised and considered. I find that the path to the Decision is adequately 'lit' by the reasons expressed on the challenges made.

In the absence of an eligible ground being established in a compelling way, there is no basis to afford the relief requested.

I have no doubt that the concern expressed for the well-being of preserving area character is well founded and that the Decision is troubling in that regard, particularly given subsequent events which might suggest inconsistencies.

It is not for the reviewer to speculate as to how the evidence presented or now available might have been weighed if presented before a different Member, especially in

the absence of a compelling basis establishing a ground for review; the Request opportunity is not one to simply re-argue a disposition that is not accepted or supported. The task for the Requestor is to demonstrate an eligible ground that has been breached, with sufficient particulars to warrant the reviewer to interfere.

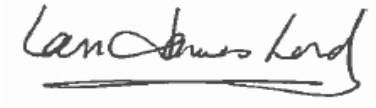
Professional opinion evidence is but one input to the decision-making process in land use planning. It is not an error to follow that advice provided all relevant considerations have been heard and considered and irrelevant ones discarded.

There are not sufficient instances raised by the Requestor, in the Decision, to demonstrate on a compelling basis under the Rule that the Member failed to perform his duty based on the evidence placed before him.

A different Member, with more information, might differ, but that is not a basis for consideration distinct from those listed in Rule 31.

DECISION AND ORDER

The Request for Review is dismissed; the Decision is confirmed.

X 

Ian Lord
Panel Chair, Toronto Local Appeal Body
Signed by: ilord