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): JANUSZ MARCINKOWSKI

Applicant: VICTOR GUITBERG

Property Address/Description: 74 MARKHAM ST

Committee of Adjustment Case File Number: 18 126222 STE 19 CO, 18 126248 STE 19 MV, 18 126259 STE 19 MV

TLAB Case File Number: 18 227553 S53 19 TLAB, 18 227570 S45 19 TLAB, 18 227574 S45 19 TLAB

Decision Order Date: Monday, April 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 by or on behalf of Janusz Marcinkowski, Appellant and Party, in respect of 74 Markham Street (subject property), in the City of Toronto (City).

The Request is supported by an Affidavit sworn by Jonathon Benczkowski (Affiant) dated May 29, 2019. The Affiant is a Registered Professional Planner who acted for the Appellant and provided land use planning opinion evidence at the Hearing of the appeal.

A well prepared 'factum' of some 60 paragraphs accompanied the Request (Submissions).

The Applicant, Victor Guitberg, had sought severance of the subject property and associated variances to permit the erection of two semi-detached dwelling units on the original lot.

Following a Hearing on February 8, 2019, by Decision and Order issued April 29, 2019 (Decision), TLAB Member S. Gopikrishna (Member) refused the consent to sever and the associated variances and confirmed the decision of the Committee of Adjustment (COA).

There were no other Parties or persons heard on the appeal; consequently, there were no respondents to the Request for Review. According to the Submissions and the Decision, the Affiant was the only person who gave evidence at the Hearing of the appeal. The Affidavit of the Affiant and the Submissions, with attachments, are the materials submitted in support of the Request. The Submissions binder included referenced authorities, a full transcript, the variances requested and the affidavit.

This Request is considered under Rule 31 as it existed prior to May 6, 2019 as the matter itself originated before that date with a Notice of Hearing issued October 15, 2018.

BACKGROUND

In addition to the Decision, to which no factual objection is taken, the Affiant described, in a 29 paragraph of the affidavit, the subject property as consisting of two municipal addresses and two dwellings located at the front and rear. A concise description of the evidence presented at the Hearing is provided by the Affiant with particular emphasis being placed on the testimony and filed exhibits presented to the Member respecting study area, lot study, lot patterns, lot structure and the distribution and variety of dwelling types (paragraphs 3-10).

The Submissions identify, in paragraph 5, Rule references likely related to Rule 31 as amended and in effect after May 6, 2019. Nothing turns on the Rule references themselves as the substantive relief available (Rule 31.6) and the eligible grounds for review (Rule 31.7) remain the same in the post May 6, 2019 revisions.

The grounds raised are:

A) A denial of natural justice and procedural fairness related to the tests applied by failing to give notice of those considerations;

B) Errors of fact and law, likely to result in a different decision;

C) Deprivation of 'new evidence' not available at the time of the Hearing, likely to result in a different decision.

The bulk of the affidavit supports the essential nature of the Review Request:

1. **Precedent** (paragraphs 11-15). In this recitation, the Affiant describes the nature of his evidence and opinion, presented to the Member as to why, in the Affiant's assessment, precedent was not an issue of concern resulting from the applications on appeal.

While the issue of 'precedent' was said to have been raised by the Member and addressed, the Affiant attests:

"The Chair did not indicate that he had follow up questions after the initial precedent question as the Chair seemed satisfied with the answer. If the Chair had expressed further interest in the question of precedent, I could have and would have undertaken a more detailed review of each "suspected candidate" lot based on the lot data supplied by the City." (paragraph 14 and 15)

2. **New Evidence Subsequent to the Hearing** (paragraphs 16-21). In these paragraphs, the Affiant performs, in response to the Decision, "an in depth analysis" of the potential candidate lots, within his study area, of the 44 lots (4%) having a comparable frontage to the subject property. He attests he did not do this for the Hearing given his view at the time, since confirmed, that there was no demonstrable concern for precedent. He concludes only one lot (Submissions, possibly two) had potential for the same type of applications as the subject property and he provides his reasons for that conclusion: "I am more of the opinion that precedent is not a concern …that could lead to destabilization." (paragraph 21)

3. **Analysis of the Immediate Block** (paragraphs 22-27). Here, the Affiant addresses the Member's findings on neighbourhood character opining that the Member used an analysis "akin to an assessment of the policy direction in OPA 320 and is more restrictive than that policy directs". (paragraph 22) An acknowledgement is made that OPA 320 was not raised at the Hearing and a similar observation, as above, is related by the Affiant, that the Chair did not ask the planner to address either OPA 320 or the immediate block context. The remainder paragraphs relay the Affiant's reasons as to why OPA 320 does or does not support the detailed analysis to formulate prevailing characteristics employed by the Member.

The Affiant concludes that the "findings made by the Chair were not consistent with the evidence I presented at the hearing" - conclusions he had strengthened by after the fact research.

It is asserted that had the evidence been correctly interpreted, a different outcome would likely have ensued.

The Submissions add the argument that by focusing on the consent application, the Member disregarded the built form particulars represented by the variances, the 'package'. I am satisfied on this issue that the Member was alert to the variances requested and incorporated them in the Decision and evidence recitation; it is customary if not common sense for the TLAB to consider the variances requested to be dependent on the severance permission. Where that consent is not supported, it is unnecessary to examine variances that are intended to apply to that lot configuration. I do not consider the absence of reasons respecting the individual variances essential to the Decision or an error of law contributory to a different outcome. Certainly, it is preferable to fully and completely adjudicate all matters and I am not prepared to say this was not done.

Similarly, again the Submissions, not the Affiant, identifies a reference in the Decision to a statement by the Member of the Affiant describing the proposal as a

'detached dwelling' on the severed lot (the sentence structure is a bit unclear). This is described as the 'only description of the dwellings in the Decision'. In fact, the opening paragraph recites the intent 'to build a house on each of the lots' and clearly the plans filed and the clear reference in ATTACHMENT A is to 'a new three-storey semi-detached dwelling and a new rear semi-detached garage will be constructed'.

I am not prepared to find that any ambiguity in these references constituted a material or compelling error of fact.

The specific relief requested is found in the Submissions, paragraph 5 b.: for an Order overturning the Decision and granting the applications for severance and variance or, in the alternative, a new oral Hearing.

The Decision also canvasses a variety of issues in respect of area character: slow growth (page 8); a 44 lot frontage potential for parallel applications (page 8) for which "there is no direct evidence" to prove the assumption that they were unattractive for severance; the acknowledgment of street by street diversity, 'feel', lot size distribution and their challenges to the analysis described (page 9).

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

It is clear in the documents filed that at the Hearing the Affiant presented to the Member oral submissions and professional research as evidence in support of the applications and the appeals. It is clear there was no opposition. It is clear that the very subjects upon which the Member made his determinations and that are contested were matters that were raised in the Hearing and discussed.

The Member ultimately found that the demonstrable stability of the neighbourhood coupled with the descriptive character exigencies of the local neighbourhood that he found compelling, warranted not supporting the change reflected in the applications on appeal.

These are evidentiary matters subject to determinations of weight and policy direction. At issue is their relevance, the assertions of contrary evidence and whether a responsibility or obligation existed in the Member to identify and require the pursuit of specific lines of further evidentiary inquiry.

Whether the Hearing was provided the best evidence, whether it was the only evidence or even if that evidence allowed for or constituted conflicting perceptions of the area character, the Decision ultimately turned upon the Member's perception of the evidence provided, from all sources.

It is clear that a Request for Review is a right provided to a Party to challenge a TLAB decision. That challenge has several caveats, two of which, that are significant here, relate to the purpose of the Review and the grounds upon which it is pursued.

It is the Submissions that attempt to explain or connect the three grounds, as above listed, to the basis of the Review raised by the Affiant.

It is also the case that a Review is not provided to the Parties simply because they did not like the result of a decision and wish the opportunity to revisit it and argue a different conclusion.

A Review right is volunteered by the TLAB pursuant to statutory direction and the Ontario Regulation. It comes forward in the language of Rule 31 which attempts to enshrine a public purpose objective that there are categories of potential error into which a decision may fall for which a sober second review by the Tribunal itself may find a basis for relief.

The Tribunal remedies include requesting additional material or ordering a new Hearing and are ultimately specified in Rule 31.6: 'confirm, vary, suspend or cancel' the original decision, if the eligible grounds are met in a compelling way.

Under the Rule, the TLAB must be satisfied that the Member breached the applicable grounds in reaching the Decision. Disagreement with the TLAB's finding is not alone sufficient to establish a compelling basis on any of the Rule 31.7 eligible grounds. Rather, the Request must establish a compelling basis, a real likelihood of error that existed at the time of the Hearing and is reflected in the Decision. The Rule provides for the possibility that 'new evidence', on terms, can cast a different light on the Decision, that may or may not be compelling.

The Affiant asserts 'new evidence' in the form of his additional research, which he finds to be confirmatory of the evidence he provided generally to the Member. Namely, that the subject property proposal did not present a concern about precedent or destabilization.

Respectfully, that is not the test of 'new evidence': namely, after the fact 'finer grained' research. The Rule is quite clear:

"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". (emphasis added)

While the Affiant is to be commended on his research for the Review, it would be contrary to the Rule to afford it consideration or attempt retrospectively to evaluate its weight in the various considerations addressed by the Member when it could have been made available in the first instance.

The Member acknowledged the Affiants evidence in the first instance and his opinion on the issue. He expresses his reason for discomfort,

Any applicant or appellant has the Hearing process itself to disclose the evidentiary foundation of their opinions. On the one issue of 'precedent', this is a matter frequently addressed in the public policy regime of 'respecting and reinforcing the existing physical character of the neighbourhood'. Planning cannot turn a blind eye to the future and maintain its claim to legitimate contribution to decision making. It is this one known issue, precedent, that the Affiant recognized and addressed in evidence, albeit not to the satisfaction of the Member.

While there may have been reference to 'the logic of economics' and other factors potentially applicable to the 44 properties, the Member decried the lack of specificity in the evidence.

An alleged error of fact or law in understanding the evidence must rest on more that finer grained research on the very point undertaken for the purposes of a Review. It is not compelling to say that more could have been done if only the Member had been more determinative or direct in identifying issues considered outstanding or unproven.

It is not for the TLAB to engage the Parties, Participants or witnesses in an iterative investigation process or in the weighing of evidence or in their appreciation of the public interest in individual circumstances. Hearings are not iterative processes in which the trier of fact guides the search for finality with laser vision. The Member holds the responsibility to consider the evidence provided, determine its relevance, afford it the weight considered appropriate, and draw conclusions based on the larger considerations of administrative policy.

Those conclusions may but they do not necessarily have to accord with a strict reading of what the evidence was, overall or in its individual components.

To meet the threshold for a review under Rule 31, the Requestor must satisfy the TLAB that there were significant errors made on the evidence heard, in this case presented to be of fact. Further, that had the errors not been made, a different decision likely would have resulted.

The Requestor and the Submission suggests and infers that the Member did not properly understand the evidence submitted or fully comprehend it, or considered policy directions not mentioned, and therefore did not attribute sufficient weight to the Affiant's evidence and submissions. The weight attributed to evidence and submissions are within the discretion of the Member. Absent a significant error of fact or law, not including refined evidence researched after the fact but available at the time, the TLAB will not interfere with the Member's findings.

The Decision clearly identifies and discusses the issues raised by the Request: the potential for precedent; and the character of the applicant's neighbourhood. The Member provides a detailed description of the policy relevance of these issues and explains the application of the evidence. The Member identifies and acknowledges the evidence, its strengths and weaknesses and draws his own conclusions within the framework of the policy and statutory direction, clearly referenced.

This is done for the subject matter of precedent and local area character as well as other considerations. Clearly there was a weighing of the evidence, the factors and the policy.

If the Member could be said to have exaggerated the potential and the timing for consequences it is unfortunate, but it is not a basis to abrogate the finding if the factual basis existed to support the concern.

I am not satisfied the Member made any significant error, factual or legal, on the evidence available and before him at the time.

I have dealt earlier with the Submission respecting 'new evidence' and the more detailed precedent analysis. The Submission asserts certain of this information is 'new and was not available at the time of the Hearing' (paragraph 33 a.). I cannot agree; the Affiant describes the sources and work effort in his updated information. Those same sources and techniques were available for Hearing preparation. While it may well be that the potential for precedent is negligible, that is not the information that the Member had at the Hearing. Ordering a new hearing on the issue would be without authority and contravene the clear criteria of the Rule.

The Affiant relied on challenges to the Member's judgment, on informed evidence available but garnered after the Decision and on suppositions concerning OPA 320, as well as challenges to the Member's approach to area character assessment.

The physical character of an area may consist of unique attributes and the relevant area for those attributes may be large or small. The relevant and existing policy direction of the Official Plan does not prescribe an area extent for investigation. If it is too large, area characteristics can be diluted; if it is too small, the policy implications can become distorted.

It follows that the Member is to take guidance from professional evidence, but not exclusively the planner's derivative opinion.

The evidence, including the filings and exhibits both of the Affiant, and at the Hearing, and, as well, the transcript and the Decision canvass various character attributes of the Neighbourhood. From these, the Member is entitled to draw an assessment of significance. This paper to be exactly what was done. The Member notes that there are two dwellings currently on the subject property. The 'new evidence' of title separation simply confirms what was described.

There is no assertion of error in the relevant considerations brought to bear by the Member in his determination of conformity with the character of the area, only a disagreement on the approach, weight and the conclusion as to the Member's assessment. These aspects are within the discretion of the Member to determine.

The Submissions argue that it is not a part of the official Plan to 'anatomize' area character. In some fact situation, some hearing officers have accepted this proposition. In others, the characteristics of an area are derived from proximate attributes. The lack of clear guidance on the Official Plan definition of area character, its assessment and weighting has led to its reconsideration with the adoption and approval of OPA 320.

That amendment, however, is agreed as never having been mentioned in the Hearing or the Decision. It would be impossible to speculate on its role, if any, in the Decision by virtue of the lack of a reference. I cannot, in the absence of any proof, accept the speculation of the Affiant or in the Submissions that OPA 320 played any, let alone a definitive role in the Member's assessment of what he found to be significant concerning the local, existing, physical area character.

To suggest the Member, if he was bound to apply the guidance of OPA 320, would have come to a different conclusion, is pure speculation.

The Decision, unlike *46 Banff Road,* does not demonstrably introduce any new test or irrelevant consideration into the Member's area character assessment. There is no policy support for the suggestion (Submissions, paragraph 39) that the planner's, one or many, definitions of a study area, that the Member is fixed with this geography. To do so would detract from the autonomy of the decision maker and would require far clearer language than any referenced.

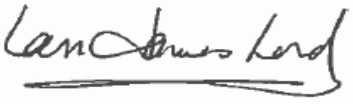
Again, an absence of evidence in the face of professional advice and inconsistent facts might warrant review; the Member discusses the lot pattern, albeit with emphasis but not to the exclusion of knowledge of the presence of smaller lots. The criteria to challenge those considerations are not found here nor do I find that the Member was under an obligation, in reserving the determination of the appeals, to reconvene, identify areas of concern and re-open the proceeding to provide an 'advance opportunity to address', as suggested.

Based on the reasons above, I find that the Request does not meet the relevance or threshold required under Rule 31 for relief. It seeks to re-argue the evidence, with elaboration. There is no convincing proof that the Member misdirected himself, permitted the introduction of irrelevant criteria or made 'incorrect' (as opposed to different) interpretations of the evidence.

In the result, I see no need for further submissions, a Motion or further consideration by way of a new hearing, to dispose of the Request.

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