Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, August 09, 2019

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

Appellant(s): INES FERRI

Applicant: AJT DESIGN

Property Address/Description: 362 RUSTIC RD

Committee of Adjustment Case File: 18 262105 WET 12 MV

TLAB Case File Number: 19 114668 S45 05 TLAB

Motion Hearing date: Wednesday, July 17, 2019

DECISION DELIVERED BY D. LOMBARDI

APPEARANCES

NAME	ROLE	REPRESENTATIVE
CAROLINA FIORINO	OWNER/PARTICIPANT	ALISSA WINICKI
AJT DESIGN	APPLICANT	
INES FERRI	APPELLANT	FRANK DI GIORGIO
DIANA FERRI	PARTY	
DINO FERRI	PARTY	
AJT DESIGN	PARTY	ALISSA WINICKI

INTRODUCTION

The Applicant/Owner of 362 Rustic Road (subject property), Ms. Carolina Fiorino, submitted an application to the Etobicoke York District Panel of the City's Committee of Adjustment (COA) for two minor variances which would permit the construction of a new

detached garage in the rear yard and to convert the existing attached garage to habitable space on the subject property. The Applicant requested the following two variances:

1. Section 10.20.30.40.(1)(A), By-law 569-2013
   The maximum permitted lot coverage is 30% of the lot area (139.26 m^2).
   The altered dwelling and the new detached garage will cover 38.22% of the lot are (177.44 m^2).

2. Section 10.5.50.10.(3)(A), By-law 569-2013
   A minimum of 50% of the rear yard shall be maintained as soft landscaping (58.49 m^2).
   A total of 41.66% of the rear yard will be maintained as soft landscaping (48.74 m^2).

The subject Application was approved by the COA on January 24, 2019, subject to the following condition:

- The existing driveway (leading to the attached garage to be converted into habitable space) shall be restored with soft landscaping,

BACKROUND AND EVIDENCE

The Applicant submitted a previous application to the COA in November of 2018 which sought four (4) variances from the new, harmonized Zoning By-law 569-2013 to permit the construction of a new *attached* (emphasis added) garage on the north side of the existing dwelling and to convert the existing attached garage to habitable space on the subject property. That application was refused by the COA.

Subsequent to the approval by the COA on January 24, 2019 of the subject Application, Ms. Ines Ferri, the owner of 5 Blue Springs Road, the property abutting the rear of the subject property to the north, filed a Notice of Appeal (Form 1) with the Toronto Local Appeal Body (TLAB) on February 12, 2019, appealing the decision of the COA.

The Appellant provided the following grounds for her appeal:

> "The proposed variances do not satisfy the four tests required under Section 45(1) of the Planning Act. The variances are not desirable for the appropriate development of the land. The configuration of the adjacent properties at 362 Rustic Road (Applicant) and 5 Blue Springs Road (Appellant) are unique because 362 Rustic Road is a corner property and its rear year backs onto the front yard of 5 Blue Springs Road.

During a prior application on this matter (A0718/I8EYK) that was refused by the Committee of Adjustment that is referenced above, the Committee determined that the proposal was not appropriate as it represented too much intensification of the property at 362 Rustic Road (proposed 35.86% coverage) and would have essentially enclosed the front yard of 5 Blue Springs Road with a

wall. At that time the Committee recommend that the Applicant build a smaller, less intrusive, one car garage.

The second application (A0877/18EYK), which was unfortunately approved by the Committee, now consists of a larger detached 2 car garage with a worse result. Section 10.20.30.40(1)(A), By-law 569-2013 permits maximum coverage of 30% of the lot area, whereas the proposed coverage approved by the Committee is 38.22% and results in a garage located directly adjacent to the front yard of 5 Blue Springs Road. The Committee deemed this level of intensification unacceptable at the first hearing, yet approved even greater coverage at the second hearing? By-laws are designed to guard against this type of situation. The result of the Committees decision is undesirable and inappropriate. There are no other instances of this type of overbuilding anywhere in the surrounding area. This is not a minor variance given that it negatively impacts the adjacent property.

There is also significant concern about the proposed variance which would reduce minimum rear yard soft landscaping at 362 Rustic Road from 50% to 41 % (Section 10.5.50.10(3)(A), By-law 569-2013). 362 Rustic Road sits considerably higher than the adjacent 5 Blue Springs Road and the existing groundwater run-off already runs towards 5 Blue springs Road. One of the key purposes of soft landscaping is to absorb groundwater. Over time this will have a significant adverse impact on 5 Blue Springs Road. This is not a minor variance given that it negatively impacts the adjacent property."

The Appellant further submitted in her Notice of Appeal that the COA was not properly advised and did not have all the relevant information to make the correct decision on this matter. She stated (on Page 5 of Form 1, under 'Part 7: Other Applicable Information'), that "we believe that the City failed to identify a variance related to parking."

The TLAB set a Hearing date of June 19, 2019 to hear the appeal. Prior to the Hearing, several persons filed the appropriate forms declaring party status. These included Dino Ferri, the Appellant's son, and his wife, Diana Ferri, and Andrew Trotter, AJT Design, the Applicant's agent.

It is instructive at this point to detail the extensive document disclosure filed with the TLAB in this matter to serve as context for the issues raised in the proceeding pages of this decision.

Prior to the requisite March 28, 2019 deadline for disclosure in the Notice of Hearing, Dino and Diana Ferri submitted numerous emails to the TLAB on behalf of the Appellant related to the appeal grounds identified in the Appellant's Notice of Appeal form.

I recite these emails in summary form for succinctness as follows:

- A March 22, 2019 email in which the Ferri's assert that based on advice from their 'potential' representative they are of the opinion that there are some

'irregularities' surrounding the subject application and perhaps the City's notice for a zoning certificate overlooked three violations of By-law 569-2013, which they identified as: Section 10.10.60.70(1)B; Section 10.10.60.20(1)A; and Section 10.5.60.20(6).

The email continued that "these significant violations were not before the Committee in the form of variances and it is likely that the decision of the Committee may have been altered if the information was before them." The Ferri's requested direction as to how the TLAB would be addressing this matter and inquired about the efficacy of mediation in this situation.

- In a March 26, 2019 email response to the Appellant from the TLAB Chair, the TLAB advised all the Parties that the Applicant bears the risk of not identifying all required variances and that any action intended requiring additional disclosure be provided to the TLAB, the Parties and Participants within ten (10) days, otherwise the matter could be raised at the outset of the Hearing with whatever consequences that might flow, if any.

  The issue of mediation was also addressed in the TLAB's email response noting that the Tribunal encourages mediation where appropriate and can, pursuant to the TLAB's Rules of Practice and Procedure (Rules), order non-binding mediation where it believes that one or more issues in dispute may be resolved. The Parties were asked to approach the TLAB if such a session would be of assistance.

- On March 26, 2019, Andy Trotter, AJT Design, the Applicant's agent, forwarded an email to the TLAB from Marseel Shehata, a City Zoning Examiner for the Etobicoke York District. In that correspondence, the Zoning Examiner was asked by Mr. Trotter to address the Appellant's assertion that three sections of the By-law had been overlooked (referenced in the Appellant's March 22nd email). The Examiner responded to Mr. Trotter indicating that Sections 10.10.60.70(1)B and 10.10.60.20(1)A were not applicable to the subject property, and that no variance was required pursuant to Section 10.5.60.20.(6), as the proposal is in compliance.

- Dino and Diana Ferri advised the TLAB in an April 12, 2019 email that the Appellant had recently met with Mr. Trotter to discuss "a compromise on this matter." Mr. Ferri indicated that a revised plan was discussed whereby the proposed garage would be attached to the dwelling thereby allowing a greater rear yard setback in addition to an increased side yard setback from the Appellant's home. He asserted that Mr. Trotter had indicated a revised plan on this basis would be forthcoming.

- In a May 10, 2019 email to the TLAB, Dino Ferri stated that the Appellant continued to believe that the City inadvertently failed to identify all relevant variances that should have been before the COA at the January 24, 2019 hearing and that if these variances had been considered the Committee would

have reached a different decision. Referencing Section 10.5.30.11(2) of Zoning By-law 569-2013, he submitted that only the absence of complete and relevant information before the Committee would explain the decision to approve a lot coverage of 8.5% in excess of the maximum permitted when the COA had previously refused a variance increase of 5.86%. He requested that the appeal be allowed, the variances refused, and the matter be referred back to the COA for a more fulsome hearing.

- On May 22, 2019, the TLAB received correspondence from Frank Di Giorgio indicating that he had been retained by the Appellant to act as her representative before the Tribunal in the subject matter. He requested that the TLAB conduct a pre-Hearing conference prior to the scheduled June 19th Hearing to explore opportunities with the Applicant to narrow outstanding issues in order to, in his words, "diminish the length of the hearing and attached costs."

  He asserted that "the subject property is characterized by an undersized reverse corner lot and a non-complying building that includes an integral legal non-conforming garage and driveway. In accordance with Section 45(2)(a) of the Planning Act, the applicant is entitled to an extension of the existing building to achieve the stated objective of improving any unsafe and/or non-conforming conditions."

  He further submitted that "the proposed approach is consistent with both Sections 5.0.40.1(2) of the By-law 569-2019 as well as Section 10.10.80.1 that outlines the City's goal to support the removal of reverse slope driveways found mostly in R zones but rarely in RD zones. Finally, he stated that "this approach rightfully returns the application to a previous position of dealing with a refusal decision for an addition to the existing building made by the Committee of Adjustment on November 8, 2018. Additionally, this approach eliminates discussion on any apparent missing variances that are relevant to the subject appeal and require specific approval under Section 45(1) of the Planning Act."

- Pursuant to Mr. Di Giorgio's request, the TLAB responded on June 5, 2019 providing the following direction from the Tribunal Chair, "While a pre-Hearing conference may have proven meritorious, the request is neither timely under the applicable Rule nor for TLAB scheduling. The Requestor is advised that it may be prudent to consult with the parties for a consent to attempt to broaden the TLAB jurisdiction on the appeal for which Notice has been sent under s. 45(1). Additional matters may be raised at the outset of the Hearing in accordance with the Rules."

- The above response by the TLAB Chair was forwarded to the Applicant's agent (Mr. Trotter) by Mr. Ferri on June 12, 2019, with two recommended options: having the parties meet to explore a possible compromise solution; or, support the Appellant's request for an adjournment of the Hearing to allow "the proper processing of your application under the Planning Act."

  The Applicant responded that she did not wish to adjourn the matter.

Hearing Day 1 - June 19, 2019

The matter proceeded to the scheduled June 19th Hearing and at the outset it became apparent that there was significant animosity between the Parties in attendance, each making several rather unsubstantiated accusations against the other. I surmised that communications between the Appellant, Ms. Ferri, and her son and daughter-in-law, and the owners of the subject property, Carolina Fiorina and Eddie Ribeiro, had clearly become severely strained and each blamed the other for acting in bad faith.

Given my review of the extensive pre-filed material and after listening to the rather rancorous opening remarks from the Parties, I suggested that the Parties might benefit from mediation pursuant to the TLAB Rules, if agreeable to the Parties and I enquired whether the Parties were amenable to such an intercession at this junction in the proceedings. Both the Appellant and the Applicant acknowledged the wisdom of engaging in such mediation if it could be accommodated through the TLAB and agreed to temporarily adjourn the Hearing and commence the mediation given that the Parties were present.

I advised that mediation, as a dispute resolution strategy, is contemplated in the TLAB Rules (Rule 20) and is encouraged where the TLAB is satisfied there is good reason to believe that one or more of the issues in dispute can be resolved. I suggested that given the undercurrent of this matter, productive mediation could be of assistance.

Given that the Parties expressed a genuine interest in non-binding mediation to narrow the outstanding issues in the hope of arriving at a settlement of the issues in dispute, and upon oral consent from all Parties agreeing that I conduct the Mediation (pursuant to Rule 20.4), I adjourned the Hearing provisionally in order to enter into a confidential Mediation session.

Mediation Session

The Mediation session encompassed much of the day that was allotted for the scheduled hearing of this matter. Although there was some constructive dialogue, the Parties ultimately conceded that the schism between the outstanding issues was too great, and that the Mediation session should be concluded and the Hearing recommenced.

The Mediation session ended in the late afternoon on June 19th and, as a result, a second Hearing Date (September 5, 2019) was secured in order to complete the disposition of this matter. I advised the Parties that pursuant to TLAB Rule 21.5, as the Member who conducted a Mediation in which one or more of the issues have not been resolved, I could not preside over any Hearing related to those unresolved issues unless all Parties consented and I agreed. With this understanding, all the Parties orally requested that I continue as the presiding Member on Day 2 of the Hearing, which I agreed to do. Subsequently, the Parties acknowledged this consent in writing to the TLAB.

Prior to adjourning the Hearing on Day 1, Mr. Di Giorgio reiterated his client's position that the subject application was being processed incorrectly and that the TLAB should consent to varying the Tribunal's procedures to enable processing the application in accordance with either Section 45(2) a or 45(3) of the *Planning Act* (Act). I directed Mr. Di Giorgio to file a formal Notice of Motion (Form 7) in this regard and advised that I would deal with the request as a Written Motion (pursuant to TLAB Direction No. 2). A deadline date of June 28, 2019 was set for filing and, in turn, the due date for a Notice of Response to Motion was set for July 16, 2019.

On June 27, 2019, the Appellant, through her representative Mr. Di Giorgio, filed the above reference Notice of Motion, along with the requisite Affidavit and accompanying addenda, with the following relief requested:

> 1. To vary TLAB procedures to enable expediting the building permit issuance process by processing the application in a more appropriate and expeditious manner in accordance with either:
>
> (i) Sec 45 (2)a of the Planning Act, or
> (ii) Sec 45 (3) of the Planning Act.
>
> 2. Each proposed option for processing the application will result in similar outcomes with respect to coverage and different outcomes with respect to location of garage (attached or detached) but will allow the applicant to satisfy all applicable law and qualify for a building permit.
>
> 3. The request for relief also includes that TLAB deny the two identified variances under Sec 45(1) of the Planning Act to replace a presumably attached garage with a larger detached garage.
>
> 4. That any incremental development on the property be approved by TLAB subject to conditions that include an attached garage with a total coverage of 35.84% on the property and that the attached garage have the following setbacks that relate to the main building:
>
> a) A west side yard setback of 6.25m
> b) An east side yard setback of 2m
> c) A rear yard setback of 3.6m

Under the heading 'Grounds for Motion', Mr. Di Giorgio submits that the Applicant's existing attached garage and 'excessive' (his word) reverse sloped driveway is a legal non-conforming use protected under Section 34(9) of the *Act*. He further submitted that an incremental development (just as the subject proposal) on any property that is consistent with and subject to Section 45(2) a) of the Act does not require minor variance zoning relief as the development criteria under that Section necessitates full compliance with all current zoning standards. Therefore, the underlying Official Plan policy seeks to eliminate legal non-conforming uses and replace them with uses that conform.

He asserted that this Official Plan policy is reflected in the development criteria under Section 45(2) a) and that this policy is satisfied if new zoning regulations are not exceeded. Accordingly, the implementing By-law (569-2013) must deny and restrict zoning relief to ensure that changes or alterations or additions to an existing building do not result in an increase in non-compliance. He submitted that the burden on the Applicant is to demonstrate that the requested variances "although incomplete and under appeal, would improve the impact on the abutting neighbour/Appellant and surrounding neighbourhood and reduce the adverse impact that an attached garage that is in compliance with the current zoning standards."

In expounding on these grounds, Mr. Di Giorgio asserts that Section 45(2)(a) fully captures the real nature and substance of the Applicant's development proposal and identifies the development criteria to evaluate the merits of the application which, he concludes, supports refusal of the variances before the TLAB. He further asserts that the general provisions of Section 5.10.40.1(1) of By-law 569-2013 capture the intent of the OP policy to eliminate legal non-conforming uses and highlights the zoning relief under Section 45(2) of the *Act*.

As this relates specifically to the subject property, he opines that it is an undersized lot with built form that reflects generous side yard setbacks to the benefit of the owners, but a reduced rear yard setback to the detriment of the Appellant. He notes that this reduced rear yard setback was not in compliance with the former North York zoning By-law 7625 but is in compliance with the 569-2013. By comparison, the Appellant's property at 5 Blue Springs is, in his words, "designated a key lot and is unique with a minimum front yard setback requirement of 5.25m. The built form on that lot respects the character of the neighbourhood by siting the integral garage with a front yard setback of 6.94m and a front yard setback from the front main wall of 10.77m."

Mr. Di Giorgio suggests that a significant objective of 569-2013 is to remedy, over time, the inclination of property owners of rectangular corner lots (such as the subject property) to construct homes with the front elevation fronting on a flankage street even though the front lot line or frontage was along the shorter dimension of the rectangular lot. He suggests that pursuant to Section 5.10.30.20(1), By-law 569-2013, allows the property owner to select the front lot line in any building or 'ancillary building' on the same lot being constructed on the property.

He further states that the Appellant will provide evidence at the Hearing to demonstrate that the owners of the subject property have physical problems locating a detached garage on the property so that the front wall of the garage faces in the same direction as the front wall of the main building. In doing so, he asserts that the owners have neglected to recognize that a reorientation of the garage alters the designation of the front lot line and setbacks for a detached ancillary garage structure, resulting in the 'de facto' selection of the front lot line for the garage as the abutting flankage street (Blue Springs). This, he contends, is in contravention of Section 5.10.40.70(1) of 569-2013.

This 'determinative' (his word) variance is "easily overlooked under Section 45(1) of the *Act*," and he notes that "when the front wall of a detached garage faces a flankage street the distance between the rear wall of the garage and the closest property line (the

Appellant's) is the rear yard setback for purposes of the ancillary building." He suggests that this confusion occurs primarily on corner lots and that the variance request is clearer when reviewed under Section 45(3) of the *Act*.

Mr. Di Giorgio concludes that despite the applicability of Section 45(2)(a) to the subject application, the Appellant is also 'receptive' (again, his word) to having the application reviewed under Section 45(3) since this Section recognizes that new relevant variances may emerge or become evident as a result of inconsistencies in the manner that zoning relief is requested under Section 45(1). He maintains that assessing the Applicant's proposal to construct a new detached garage in the rear yard and convert the existing garage into habitable space under this Section does not fully and truly reflect the substance of the application. He contends that the application misrepresents the real nature of the change in use which is, in his opinion, to eliminate a legal non-conforming garage and driveway and relocate both in a way that "benefits the applicant but creates an additional adverse impact on the Appellant's property." Notionally, he submits that the application must qualify for a change of use permit and satisfy all applicable law.

In response to the Appellant's Notice of Motion, the owners of the subject property served on the Parties a number of documents with the TLAB on July 12, 2019 including: a Notice of Response to Motion (Form 8), accompanied by an Affidavit (Form 10) and supporting documentation in the form of a Schedule A outlining in detail the response to the Motion. The Applicant's solicitor included as part of this documentation a recent TLAB Decision for 294 Roncesvalles Avenue, for guidance.

Additionally, however, the Applicant also filed a Notice of Motion (Form 7) for a written Hearing requesting the following relief:

1. An Order dismissing the appeal in this matter with costs, pursuant to subsection 45(17) and (17.2) of the Planning Act, R.S.O. 1990, c. P. 13, as amended (hereinafter the "Planning Act");
2. An Order dismissing the appeal in this matter with costs, pursuant to Rule 9.1 (a) to (e) of the TLAB's Rules;
3. In the event the relief sought in paragraphs 1 and 2 above is not granted, an Order granting an exception to Rules 16.2 and 16.5 of the TLAB's Rules to extend time to deliver Document Disclosure and an Expert Witness Statement at the earliest dates permitted by the TLAB pursuant to Rules 2.10 of the TLAB Rules; and
4. Such further and other orders as TLAB deems just.

Accompanying this Notice were the requisite Affidavit (Form 10) from Ms. Winicki, the Applicant's solicitor, and supporting documentation including Schedule "A" to the Notice of Motion, and two previous TLAB Decisions (re: 37 Hatherley Rd. and 13 Denton Ave.).

Ms. Winicki also filed an Acknowledgement of Expert's Duty (Form 6) and the Expert Witness Statement (Form 14), dated July 12, 2019, of Christian Chan, a land use planner, in support of item 3 above.

I note that both the Applicant's Notice of Response to the Applicant's own Motion and the Notice of Motion arise from the Appellant's Notice of Motion and, in effect, result in the Applicant's requested relief to either dismiss the appeal with costs or, possibly, adjourn the revised Hearing Date to permit further submissions.

For the purposes of this decision, I will address each separately as the Notice of Response to Motion is a direct reply to the Appellant's Motion, whereas the Applicant's Notice of Motion is, I believe, a distinct request of the TLAB ensuing from the arguments provided in the Applicant's submission.

A. Notice of Response to Motion

With respect to the Notice of Response to Motion, Ms. Winicki notes that the subject application to the COA was brought pursuant to subsection 45(1) of the *Act* and that the application was approved on condition that the existing driveway be restored with soft landscaping. She then chronicles numerous attempts by the Appellant within the two months preceding the June 19th Hearing date to delay the application through the attempted introduction of various inapplicable sections of By-law 569-2013 even after the correspondence from the City Zoning Examiner, Ms. Shehata, was communicated to her.

She further notes that when the Appellant filed her Notice of Appeal (Form 1) on February 12, 2019, she specifically decided to rely on and reference subsection 45(1) of the *Act* as grounds for the appeal and that it was only on May 22, 2019, that Mr. Di Giorgio, the Appellant's Representative, initially asserted that the subject application should be more appropriately assessed under Section 45(2)(a) of the Act. She concludes that the Appellant appears to have declined to elect to proceed under subparagraphs 45(2)(a)(i) and/or (ii) as well as subparagraph 45(2)(b), as outlined on the said Form, subsections on which she now intends to rely.

Ms. Winicki respectfully submits that subsections 45(2) and (3) of the *Act* are not applicable to the subject application and that the relief sought by the Appellant should be denied as both provisions have no relevance to the appeal before the TLAB, nor were they indicated in the Appellant's Notice of Appeal. She asserts that subsection 45(3) is ***beyond the TLAB's jurisdiction*** (her emphasis), and not even a *Planning Act* ground that can be appealed in the TLAB's Form 1.

She submits that subsection 45(2) deals with permission for the extension and/or enlargement of land uses that are not permitted in a particular zone category and that a below-grade garage, as existing on the subject property, is not a 'land use' but is a form of parking accommodation on the site that is regulated by the built-form regulations and, therefore, is a non-complying building or structure that is subject to subsection 45(1).

As to subsection 45(3), Ms. Winicki notes that the Appellant's requested relief includes a requested variation of the TLAB's procedures to enable expediting the building permit issuance process by administering the application in a more appropriate and expeditious manner in accordance with either 45(2) and/or 45(3). She asserts that

neither provision bears any authority to determine the varying of the TLAB's procedures or expediting the application.

B. Applicant's Notice of Motion to Dismiss with Costs

With respect to the Applicant's Notice of Motion, Ms. Winicki is, in essence, requesting that the TLAB dismiss the appeal before it with costs, pursuant to subsections 45(17) and (17.2) of the *Act* and TLAB Rule 9.1 (a) to (e). Alternatively, the Applicant is requesting relief from the TLAB Rules to allow delivery of Document Disclosure and an Expert Witness Statement at the earliest dates permitted prior to the Day 2 Hearing Date, scheduled for September 5, 2019.

In Schedule "A" attached to the Notice of Motion, Ms. Winicki specifically references subsection 45(17) of the *Act* which she submits allows the TLAB to dismiss all or part of an appeal without a hearing, on its own merits or on the motion of any party, if:

a) It is of the opinion that,

   (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning grounds upon which the Tribunal could allow all or part of the appeal,

   (ii) the appeal is not made in good faith or is frivolous or vexatious,

   (iii) the appeal is made only for the purpose of delay, or

   (iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process;

b) The appellant has not provided written reasons for the appeal;

c) The appellant has not paid the fee charged under the Local Appeal Tribunal Act, 2017; or

d) The appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal.

She includes case law for guidance in the form of two TLAB decisions that she characterized as relevant to the Motion request for dismissal of the matter: *37 Hatherley Road (18 184039 S45 17 TLAB)*, a September 11, 2018 Motion decision issued by Member Burton; and *13 Denton Avenue* (19 114147 S45 19 TLAB), a Motion decision delivered more recently by Member Leung.

In the case of *37 Hatherley Road,* the Motion was brought by the owner of the property to dismiss an appeal of a COA approval for several variances to permit the construction of a duplex and permit parking in a front yard space and to retain an existing rear shed without holding a hearing. Ms. Winicki submitted that in that matter, there was no land use planning basis upon which the Member could allow the appeal.

Ms. Winicki attached as part of her document submission the actual grounds for the appeal for *37 Hatherley* as submitted by Mazierski Law. At paragraph 30 in that decision, she notes that the author references several cases in support of the following argument:

> "Regardless of when the onus is placed on the Appellant, the Appellant is required to not only name valid planning grounds, but to prove the planning issues to be worthy of adjudication and to demonstrate, through their conduct in pursuing the appeal, including gathering of evidence to make their case, that the issues raised justify a hearing, which itself requires that the Appellant put forward proof of the existence of cogent evidence at the dismissal motion hearing upon which the tribunal (sic) could rely on to satisfy the Appellant's onus."

In the case of 13 Denton Avenue, this was an appeal to the TLAB regarding the COA's decision to approve variances to legalize an already constructed second storey addition to an existing one storey detached dwelling unit. Although a Hearing was tentatively scheduled for June 14, 2019, the applicant's solicitor submitted a request prior to the Hearing seeking dismissal of the appeal, pursuant to TLAB Rule 9.1 and s. 45(17) of the Planning Act (Act), arguing that the appeal "is frivolous or vexatious in nature and had been submitted as an attempt to stymie her client's proper participation in the Planning process." (pg. 4 of the Decision)

On page 8 of that Decision, Member Leung wrote that "…it appears that the appellant is not acting in good faith by submitting this appeal for several reasons," two of which were as follows:

- The Notice of Appeal Form 1 does not provide comprehensive and well-articulated planning arguments pertaining to their opposition to the initial approval of this minor variance application; and

- The appellant does not provide additional rationale as to how the four tests for a minor variance threshold have not been met with this application.

She notes that Member Leung granted the Motion to Dismiss the appeal in that matter.

She asserts that in the case at bar, TLAB Rule 9.1(b) and s. 45(17)(a)(ii) of the Act permit the Tribunal to dismiss all or part of a proceeding without a hearing on the ground that the proceeding is 'frivolous, vexatious, or commenced in bad faith'. She argues that the TLAB has previously deemed 'frivolous' to mean "characterized by lack of seriousness" and 'vexatious' to mean "instituted without sufficient grounds for the purpose of causing trouble or annoyance."

She contends that the subject appeal has been commenced on similar grounds as above noted, and maintains that throughout the proceedings, including the hearing before the COA, as well as the appeal, the Appellant's conduct has been suggestive of a continued effort and intent to delay the matter without merit. She provides the

following points to support this assertion (as outlined on pg. 5 of the Schedule "A" to her Notice of Motion):

i. The Appellant's correspondence, as outlined, brought forward a slew of inapplicable variances at the eleventh hour forcing the Applicant to incur additional time and expense to verify and respond to same. In highlighting this point, Ms. Winicki also notes that none of the new additional variances identified and alluded to by Mr. Di Giorgio are included in the Appellant's June 27th Notice of Motion;
ii. The Appellant has completely disregarded TLAB Chair Lord's, in her opinion, "albeit, informal refusal to extend the TLAB's jurisdiction;"
iii. The Appellant has failed to include one shred of land use planning evidence to date, to support her position; and
iv. The Appellant is abusing the system in an attempt to redesign the Applicant's proposal, "on her (the Appellant's) own terms."

Ms. Winicki concludes that none of the objections included in the Appellant's February 12, 2019 Notice of Motion (Form 1), disclose a land use planning ground upon which the TLAB could allow all or part of the appeal and, therefore, the appeal should be dismissed accordingly.

MATTERS IN ISSUE AND JURISDICTION

The Applicant's Motion requests an Order pursuant to Rule 9.1, which is further delineated under Section 45(17) and (17.2) of the *Planning Act,* a statutory empowerment to dismiss an appeal, which states:

(17) Despite the Statutory Powers Procedure Act and subsection (16), the Tribunal may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if:

(a) it is of the opinion that,
(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process.

TLAB Rule 9- Adjudicative Screening by Member, states:

9.1 In the case of an Appeal under subsection 45(12) of the Planning Act the Local Appeal Body may propose to, or upon Motion, dismiss all or part of a Proceeding without a Hearing on the grounds that:

a) The reasons set out in Form 1 do not disclose any apparent land use planning ground upon which the Local Appeal Body could allow all or part of the Appeal;

b) the Proceeding is frivolous, vexatious or commenced in bad faith;

c) the Appeal is made only for the purpose of delay; d) the Appellant has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;

e) the Appellant has not provided written reasons and grounds for the Appeal;
f) the Appellant has not paid the required fee;

g) the Appellant has not complied with the requirements provided pursuant to Rule 8.2 within the time period specified by Rule 8.3;

h) the Proceeding relates to matters which are outside the jurisdiction of the Local Appeal Body;

i) some aspect of the statutory requirements for bringing the Appeal has not been met; or

j) the submitted Form 1 could not be processed and the matter was referred, pursuant to Rule 8.4, for adjudicative screening.

9.3 Where the Local Appeal Body proposes to dismiss all or part of an Appeal under Rule 9.1 or 9.2 it shall give Notice of Proposed Dismissal, using Form 16, in accordance with the Statutory Powers Procedure Act, and to such other Persons as the Local Appeal Body may direct.

9.4 A Person wishing to make written submissions on a proposed dismissal shall do so within 10 Days of receiving the Local Appeal Body's notice given under Rule 9.3.

9.5 Upon receiving written submissions, or, if no written submissions are received in accordance with Rule 9.4, the Local Appeal Body may dismiss the Appeal or make any other order.

9.6 Where the Local Appeal Body dismisses all or part of an Appeal, or is advised that an Appeal is withdrawn, any fee paid shall not be refunded.

The Appellant's Motion seeks relief of the TLAB to process the Application in accordance with either of the following Sections and subsections in the Act:

Section 45(2) of the Planning Act

This Section is referenced in the materials, and provides as follows:

Upon Appeal, the TLAB, upon any such application where any land, building or structure, on the day the pertinent by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit:

Legal Non-Conforming Use and Other Relief Applications– S. 45(2)(a)

In addition to its powers under subsection (1), the committee, upon any such application:

(a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit:

i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or
(ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee; or

Power of Committee to Grant Minor Variances – S. 45(3)

A council that has constituted a committee of adjustment may by by-law empower the committee of adjustment to grant minor variances from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement the official plan, and when the committee of adjustment is so empowered subsection (1) applies with the necessary modifications. R.S.O. 1990, c. P.13, s. 45(3).

ANALYSIS, FINDINGS, REASONS

I will deal with the Motions in chronological order as submitted to the TLAB.

1. ***Appellant's Notice of Motion - Jurisdiction***

Subsection 45(2)

The Appellant argues that the Applicant seeks approval for a change in the use of the existing building to facilitate safer access and satisfy their parking needs. She also submits that there is no Official Plan policy that encourages making parking more convenient for an applicant to the detriment of an abutting property owner. She asserts that the existing integral garage, which is located in the basement and that has an excessive reverse slope driveway with 0% coverage is a 'legal non-conforming use' protected under s. 34(9)(b) of the Planning Act. Legal non-conforming uses enjoy special status under the Planning Act as they are protected under s. 34(9) of the Act.

She also argues that any incremental development on any property that is consistent with and subject to s. 45(2)(a) of the Act does not require minor variance zoning relief because the development criteria under s. 45(2)(a) necessitates full compliance with all current zoning standards. The Appellant's fundamental premise is that s. 45(2)(a) of the Act captures fully the real nature and substance of the subject proposal and identifies the development criteria to evaluate the merits of the application. She argues that the Appellant misrepresents the real nature of the change in use which is to eliminate a legal non-conforming garage and driveway and relocate both the garage and driveway in a way that benefits the owners but to her detriment.

She further submits that s.45(3) of the Act recognizes that new relevant variances may emerge or become evident as a result of inconsistencies in the manner that zoning relief is requested under s.45(1) and that the Applicant must qualify for a change of use and satisfy all applicable law. Any relief for a minor variance under s.45(3) and, indirectly, under s.45(1) must be reviewed in the context of incremental zoning relief and compliance with an underlying OP policy that seeks to eliminate legal non-conforming uses and replace them with uses that conform to the current zoning standards.

While these are interesting interpretations and applications of various sections of the *Planning Act*, I note, as highlighted by the Applicant's solicitor, that the Appellant decided to rely on subsection 45(1) as grounds for her appeal when she filed her Notice of Appeal (Form 1) with the TLAB on February 12, 2019. It follows logically, then, that the Appellant declined to elect to proceed under s.45(2)(a)(i) and/or (ii), as well as s.45(2)(b), which she now intends to rely on, fully five months after the fact.

I find that subsections 45(2) and 45(3) are not applicable in this proceeding because I find that this appeal rests on an application for relief under section 45(1) of the *Act.* Further, that the Applicant has neither consented to nor requested broadening that formative jurisdiction. The Applicant bears the burden of that election, and while it is open to the Appellant to question the relief sought under it, by the same token the Applicant is not capable of forcing the Applicant to revise the Application in the manner the Motion proposes. Moreover, I have doubt as to whether the subject matter of the variances sought qualifies as a matter of protection under the sections above recited, as referenced by the Appellant. Legal non-conforming use protection extends to the use of a building or structure but not to regulations (performance standards) under zoning, the matter in issue here.

Subsection 45(2) deals with the permission or the extension and/or enlargement of land uses lawfully existing in defined circumstances and not permitted in a particular zone

category. A land use that is prohibited under the By-law but occurs in the zone in which it is located, can be a legal, 'non-conforming' land use. Despite the creativity of the Appellant's assertions, the Applicant has sought no relief under these and related provisions of the *Act* and the TLAB does not have that jurisdiction before it on appeal.

In consideration of the above clarification, I do not consider it necessary to determine whether I agree with the Applicant (in her Response to Motion); namely, that a below-grade garage is not a 'land use' but rather more a form of parking accommodation on the site that is regulated by the built form regulations in the Zoning By-law for the location and provision of parking spaces. I accept that the below-grade garage does not comply with By-law 569-2013, pursuant to 10.5.80.40(2), which prohibits reverse-slopes leading to a parking spot. That determination does not appear to be in dispute as between the Parties. Its implications, if any, are a matter of evidence at the Hearing.

This can be more appropriately addressed as matter under s.45(1) including the policy directions of the *Act* and the four criteria tests for minor variances contained therein.

Subsection 45(3) of the Act

The Appellant states (in her grounds for Motion in paragraph 13), "in the spirit of cooperation and for the purposes of the elimination of an excessive reverse slope driveway that is legally non-conforming, the Appellant is supportive of an application that proceeds under Sec. 5.10.40.1(20 of the By-law and requests a minor use variance under s 45(3) of the Planning Act." Further, in paragraphs 14, 15 and 16, she submits that the objective of By-law 569-2013 is to remedy the inclination for property owners of rectangular corner lots (such as the subject property) to construct homes with the front elevation fronting on a flankage street even though the front lot line is along the shorter dimension of the lot.

She argues that 569-3013 (Sec. 5.10.30.20.3(1)) allows the property owner to select the front lot line for any building or ancillary building (the proposed detached garage) on the same lot being constructed and extrapolates that access from a flankage street does not mean that the front wall of the anticipated detached garage must face a flankage street as proposed by the Applicant. The Appellant asserts (in paragraphs 22 and 23 of Grounds for Motion) that the Applicant is misusing the zoning provision of the proper identification of a front lot line for 'any building or ancillary building' and that s45(3) is the more appropriate subsection to address a minor use variance.

Subsection 45(3) refers to the ability of a council (i.e., Toronto City Council) to empower the COA to grant minor variances from a By-law that implements an Official Plan, such as a Zoning By-law and/or site-specific By-law. The Appellant's requested relief includes variation of the TLAB's procedures to enable expediting the building permit issuance process by processing the application in a more appropriate and expeditious manner in accordance with paragraph 45(2)(a) and subsection 45(3) of the *Act.*

The suggestions of the Appellant are gratuitous and undoubtedly meant to be constructive. However, the Applicant has not endorsed nor sought extension of the

TLAB jurisdiction in this regard. Perhaps of a potentially more important nature, I was not pointed to any authorization in the constitution and the creation of the TLAB of the vesting by City Council of jurisdiction in the TLAB under section 45(3) of the *Planning Act*. For both reasons, I am not prepared to address this submission by the Appellant any further in substance.

I agree with the Applicant that neither of the referenced provisions of the Act bear any authority to determine the varying of TLAB procedures or expedite the application. I also accept the Applicant's argument that both provisions noted above have no relevance to the appeal before the TLAB and that they were not indicated in the Appellant's Notice of Appeal, as previously noted.

2. Applicant's Notice of Motion

With respect to the subsequent Notice of Motion (Form 7), dated July 12, 2019, filed by AJT Design, the Applicant is requesting an Order dismissing the appeal in this matter with costs, pursuant to subsection 45(17) and (17.2) of the *Planning Ac*t, and TLAB Rule 9.1 (a) to (e). Failing the granting of such relief, the Applicant is alternatively requesting an exception to TLAB Rules 16.2 and 16.5 to extend the time to deliver Document Disclosure and an Expert Witness Statement at the earliest dates permitted by the TLAB pursuant to Rule 2.10.

I will deal first with the request for dismissal of the appeal. Pursuant to subsection 45(17) (a) through (c) of the Act, previously cited in this Decision, the TLAB may dismiss all or part of an appeal without a hearing, on its own initiative or on the motion of any party for a number of reasons including:

- The reasons set out in the Notice of Appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal;
- The appeal is not made in good faith or is frivolous or vexatious, and is made only for the purpose of delay;
- The Appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of power; and
- The Appellant has not provided written reasons for the appeal.

These grounds are similarly expressed in the TLAB's Rule 9.1, under the heading *'Adjudicative Screening by Member'*, but that Rule serves a different purpose and need not be further considered. In the requisite Affidavit (Form 10) that accompanied the submission of the Notice of Motion, Ms. Winicki submits (at paragraph 11) that the Appellant's conduct throughout the proceedings has been suggestive of a continued effort and intent to delay the subject matter without merit by principally bringing forward a slew of inapplicable variances at the 'eleventh hour' (her words) thereby forcing the Applicant to incur additional time and expense. Additionally, she asserts that the Appellant has not included "one shred of land use planning evidence to support her position to date...and is abusing the system in an attempt to redesign the Applicant's proposal on her own terms." (paragraph 25 of Schedule "A" to the Notice of Motion)

Ms. Winicki states that, as previously recited, the TLAB has deemed “frivolous” to mean “characterized by lack of seriousness” and “vexatious” to mean “instituted without sufficient grounds for the purpose of causing trouble or annoyance,” definitions sourced from the cited Decision for 13 Denton Avenue. She argues that by introducing the Motion recently brought forward by the Appellant and the subsequent numerous communications filed, the subject appeal has been commenced on such grounds thereby failed to put forward a reasonable basis on which to establish her appeal.

While I agree with the Applicant that the Appellant’s appeal has taken a number of ‘twists and turns’, so to speak, and she has indeed attempted to introduce myriad grounds for the appeal, I disagree with Ms. Winicki that the appeal at this stage can be found to meet the standard of frivolous, vexatious and/or commenced in bad faith, and for the purpose of causing trouble or annoyance. I believe the Appellant to be a sincere and forthright individual and I believe her concerns with the proposed development to be worthy of consideration. As the neighbour most potentially impacted by the subject application, I suspect that Ms. Ferri initiated the appeal anticipating adverse impacts to the enjoyment of her property from the proposed detached garage.

In her Notice of Motion (Grounds for Motion section), Ms. Ferri discusses concerns regarding coverage, setbacks, ground water run-off towards her property characterizing the development as the construction of “a much larger detached garage…in a way that benefits the Applicant but creates an additional adverse impact on the Appellant’s property.”

As such, I disagree with Ms. Winicki that “the Appellant has not included one shred of land use planning evidence to support her position to date (paragraph 25(e) - Schedule “A” to Notice of Motion). Furthermore, I also respectfully disagree with Ms. Winicki that the appeal was made only for the purpose of delay and that “the Appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of power” or invoking the doctrine of *res judicata*.

Although the appeal was filed with the TLAB in early February of 2019, the Appellant was only able to retain expert representation in May at which point additional information pertinent to the appeal was lodged with the Tribunal and disclosed to the Applicant. While this may be interpreted by the Applicant as an attempt at obfuscation by the Appellant, I see it more as an inexperienced member of the public unfamiliar with the TLAB process receiving additional input following a ‘sober second look’ of the matter from the lens of her recently retained and more knowledgeable representative, Mr. Di Giorgio.

Granted, the Appellant has not retained an expert in land use planning, however, her representative, Mr. Di Giorgio, demonstrates familiarity with the City’s Official Plan and Zoning By-laws. Lay citizen and professional opinion evidence are but one input to the decision making process in land use planning.

In requesting the dismissal of the appeal in this manner without a hearing, Ms. Winicki has referenced the TLAB decision for *37 Hatherley Road*, and argues that the onus placed on the Appellant requires the Tribunal “to go further than just determining

whether the Appellant has raised any triable issues…to determine the likelihood of success of the Appellant with respect to land use planning grounds the Appellant is raising." [paragraph 31 in Mazierski Law – Form 7 Part 4, *and Whiteley v. Guelph (City)*, 1999 CarswellOnt 4855 (OMB)]. I note that in her 'Grounds for Motion' filing attached as part of the Notice of Motion (Form 7), the Appellant asserts, at paragraph 17, that "evidence will be provided at the hearing by the appellant parties to demonstrate that the property owner has physical problems locating a detached garage on the site so that the front wall of the garage faces in the same direction as the front wall of the main building."

Although the Appellant did not respond to the Motion to Dismiss, or the arguably premature cost claim (under the TLAB Rules), I am prepared to accept that the Appellant has advanced more than mere apprehensions and is on course to support her concerns with cogent evidence. Should this not occur, there may be reason to revisit some of the findings herein.

I am prepared to hear the evidence on the scheduled Hearing Day 2. I find that the arguments put forward by the Applicant are insufficient to demonstrate on a compelling basis at this stage that if the Hearing proceeds it will constitute an unsubstantiated proceeding.

With respect to the Applicant's request for costs related to this matter, I believe it is premature to deal with this at this time given that I am not issuing an order dismissing the appeal. Therefore, I am suspending, until there is a final determination of the matters before the Member, any procedure or consideration of this request, other than the determination that the main issue must await the Final Decision and Order. Upon that being issued, the Applicant is free to make a submission to the TLAB respecting the awarding of costs pursuant to Rule 28, without prejudice, as may appear necessary in the circumstances.

Finally, with respect to an Order granting an exception to TLAB Rules 16.2 and 16.5 (this may be an error as I believe the Applicant intended to cite Rule 16.6 – Witness Statement of Expert), to extend the time to deliver Document Disclosure and an Expert Witness Statement at the earliest dates permitted pursuant to Rule 2.10, I am prepared to grant this relief even though I suspect most of the evidentiary materials have already been filed by both Parties.

Nevertheless, given that Day 2 of this matter is scheduled for September 5, 2019, I am prepared to extend the deadline for submission of those documents to no later than August 23, 2019 with any replies by August 30, 2019, served on all parties and the TLAB. This latitude extends to both Parties, although I note that the Applicant submitted the Expert Witness Statement (Form 14) of Christian Chan, a land use planner, and his Acknowledgment of Expert's Duty (Form 6) on July 12, 2019, in anticipation of the continuation of these proceedings on September 5th.

DECISION AND ORDER

The Appellant's Motion to vary the TLAB procedures to enable processing the application in accordance with either s. 45(2)(a) or s. 45(3) of the Planning Act is denied

The Applicant's Motion is allowed, in part; the request to dismiss the appeal without a hearing is denied and the Day 2 Hearing scheduled for September 5, 2019 is confirmed.

The Applicant's request for relief for an extension top deliver Document Disclosure and an Expert Witness Statement is granted; those documents are to be submitted to the TLAB by no later than August 23, 2019 with any replies by August 30, 2019, served on all Parties and the TLAB.

If difficulties arise in the application of this decision, the TLAB may be addressed on request with notice to the Parties and participants.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body