TORONTO

Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Wednesday, September 04, 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): John Peck

Applicant: David Small Designs

Property Address/Description: 92 Glenview Ave

Committee of Adjustment Case File Number: 19 146033 NNY 08 MV (A0294/19NY)

TLAB Case File Number: 19 185665 S45 08 TLAB

Hearing date: Monday, August 26, 2019

DECISION DELIVERED BY G. Burton

REGISTERED PARTIES AND PARTICIPANTS

Appellant	John Peck
Party	Jane Rachel Shantz
Party's Legal Rep.	Marc Kemerer
Party	Mounir El-Ayari

INTRODUCTION AND BACKGROUND

This is a Decision on a Motion to Dismiss an Appeal without holding a hearing, as permitted by the Planning Act. The Motion was made by the owners of 92 Glenview Avenue in the North York. It is zoned *RD (f10.5; d0.35)(x1413)* under the City of Toronto Zoning By-law No. 569-2013.

The owners had been successful in obtaining approval from the Committee of Adjustment (COA) on June 20, 2019 for two variances for the construction of a new three storey dwelling. These variances were for FSI, and the distance from top of bank not on the lot, and had been required by City zoning staff, even though an approval for

the principal variances needed had been granted by the COA on October 26, 2017 (including both a GFA increase, and a similar setback requirement).

This more recent decision was appealed by Mr. John Peck, owner of 94 Glenview next door. Despite the Notice of Appeal containing the following requirement:

"Provide the nature of your appeal and the reasons and grounds for your appeal. Be specific and provide only land-use planning reasons. Include the specific provisions, sections and/or policies of the Official Plan or By-law(s) which are the subject of your appeal as applicable",

Mr. Peck provided no such reasons or grounds in his Notice of Appeal. In his Response to the Motion to Dismiss, he emphasized that his main concern was respecting the fill he believes surrounds the property and others nearby. On the only other topic he raised, he stated:

> " My main concerns at this time relate to potential adverse impacts to my property due to the construction of the proposed house. .....
> The proposed house will be significantly larger than the existing building that is to be demolished. It will have a wider footprint that will approach closer to my house than the existing house. It will extend further back than the main two-storey portion of the existing building, and it will extend beyond the single-floor porch on the rear of the existing house. The proposed house will be three storeys vs two storeys for the existing building."

The Hearing of the Appeal was set for November 1, 2019. However, counsel for the owner, Mr. Kemerer, brought the subject Motion (Exhibit 2) on August 9, 2019 to dispense with a hearing, based on many grounds. It was supported by an affidavit of one owner, Mr. El-Ayari, and one by his designer, Mr. Peter Giordano. The Toronto Local Appeal Body (TLAB) is permitted to accept a Motion to Dismiss the appeal without holding a hearing, if warranted, under subsection 45(17) et seq. of the Act (see below, Jurisdiction). The grounds for the requested dismissal were:

1. The reasons set out in the Notice of Appeal do not disclose any apparent land use planning ground upon which the TLAB could allow all or part of the appeal; and/or
2. The appeal is frivolous, vexatious, and commenced in bad faith;
3.. The appeal is made only for the purpose of delay.

The facts were that Mr. Peck had both commented and attended the first COA hearing of this application in 2017. Before the hearing and after, he had merely requested a copy of a soils report from the owners (a report prepared by Coffey Geotechnics, dated May 19th, 2010, which is referred to in the Toronto Region Conservation Authority – TRCA- letter to the COA of January 25th, 2017). He expressed no concerns to the owners then about the proposal, other than possible construction impacts because of the soil conditions. He spoke at the COA hearing expressing concerns about the size and height of the house. He continued to request the owners' soils report.

Mr. Peck neither commented on nor participated in the subsequent 2019 hearing of the COA, when it was considering only the two variances subsequently required by the City.

Yet he appealed the positive decision, and on irrelevant grounds, Mr. Kemerer alleged. The TLAB has no jurisdiction over construction issues. There is no planning merit to the appeal.

The Appellant, Mr. Peck, filed a Response to this Motion on August 16, 2019, supported by a letter from his planner, Mr. Terry Mills (prepared as a draft of his intended Expert Witness Statement). Mr. Mills provided his background as a designer/builder of similar structures: ravine hazard conditions, and construction matters involving foundation works that adversely impact adjacent properties. He urged that good planning should be exercised at the outset to prevent such situations. He provided arguments in his Response and in the hearing of the Motion, based on the applicable planning instruments, to back up his assertion.

MATTERS IN ISSUE

The issues in the Motion Hearing were whether the facts of this appeal fall within the language of the Act cited below, which allows for dismissal without a hearing in certain situations. There are also cases that define the parameters of such a decision.

JURISDICTION

Subsections 45(17), (17.1) and (17.2) of the Act state (some text not applicable in this matter has been deleted):

> (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 ….
>
> (b) the appellant has not provided written reasons for the appeal;…..
>
> (17.1) Before dismissing all or part of an appeal, the Tribunal shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal ……

(17.2) The Tribunal may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (17), as it considers appropriate.

EVIDENCE

The earlier COA decision in 2017 (A1002/16NY) had granted the following variances, upon the condition of construction in compliance with the plans:

1. Chapter 10.10.40.40.(1), By-law No. 569-2013
The maximum permitted Gross Floor Area is 0.35 times the area of the lot.
The proposed Gross Floor Area is 0.412 times the area of the lot.

2. Chapter 10.20.40.10.(2), By-law No. 569-2013
The permitted maximum height of all side exterior main walls facing a side lot line is 7.5m
The proposed height of the side exterior main walls facing a side lot line is 9.45m.

3. Chapter 10.20.40.10.(1), By-law No. 569-2013
The permitted maximum height of a building or structure is 10m
The proposed height of the (building/structure) is 10.6m.

4. Chapter 10.20.40.40.(1), By-law No. 569-2013
The maximum permitted Gross Floor Area is 0.35 times the area of the lot.
The proposed Gross Floor Area is 0.4289 times the area of the lot.

5. Chapter 10.20.40.40.(1), By-law No. 569-2013
The required minimum front yard setback is 3.49m
The proposed front yard setback is 2.81m.

6. Chapter 5.10.40.70.(6), By-law No. 569-2013
If the Toronto and Region Conservation Authority determines that a shoreline hazard limit or a stable top-of-bank crosses a lot, a building or structure on that lot must be set back a minimum of 10m from that shoreline hazard limit or stable top-of-bank.
The proposed building is set back 0m from that shoreline hazard limit or stable top-of-bank.

7. Section 6(3) Part II 2(II), By-law No. 438-86
The minimum required front lot line setback is 3.46m.
The proposed front lot line setback is 2.81m.

8. Section 6(3) Part I 1, By-law No. 438-86
The maximum permitted Gross Floor Area is 0.35 times the area of the lot.
The proposed Gross Floor Area is 0.4289 times the area of the lot.

9. Section 4(2), By-law No. 438-86
The maximum permitted building height is 10.0m.
The proposed building height is 11.5m.

A subsequent application in 2019 for two variances was required by the City as a result of two different reassessments of the facts by a new zoning examiner (see para. 14 of

Mr. El-Ayari's affidavit and para. 10 of Mr. Giordano's supporting the Motion). The plans would not change. The variances requested and **granted** (with a condition of a maximum GFA of 303.71 sq. m) were:

1. Chapter 5.10.40.40.(1), By-law 569-2013
The maximum permitted floor space index is 0.35 times the area of the lot.
The proposed floor space index is 1.44 times the area of the lot.

2. Chapter 5.10.40.80.(1), By-law 569-2013
On lands under the jurisdiction of the Toronto and Region Conservation Authority, a building or structure on a lot must be no closer than 10.0m from a shoreline hazard limit or a stable top-of-bank not on that lot.
The proposed building or structure is closer than 10.0m from a shoreline hazard limit or a stable top-of-bank not on that lot.

The reason for the 2019 requirement for an additional FSI variance was explained in a Planning Staff Report dated June 11, 2019:

> "The floor space index (FSI) was initially identified as 0.43 times the area of the lot, where the gross floor area (GFA) was 303.71 square metres and the lot area was 711 square metres. However, it was later determined that on lands under the jurisdiction of the Toronto and Region Conservation Authority, the portion of a lot below the shoreline hazard limit or stable top-of-bank is not included in the calculation of the FSI for that lot. As a result, the effective lot area became approximately 210 square metres. The same GFA of 303.71 square metres on a lot with an area of 210 square metres equates to a FSI of 1.44 times the area of the lot."

Respecting the setback variance, the TRCA comments to the COA dated June 18, 2019 prior to the hearing of the subject application were:

> "Site Specific Comments:
> The TRCA's Living City Policy document also allows for a setback less than 10 meters where the proposal has regard for the existing development setbacks on the subject property and within the context of existing development patterns within the valley and stream corridor reach. The rear wall of the proposed dwelling will be in alignment with the rear walls of the adjoining dwellings along this reach. As such, TRCA staff can support the proposal in principle.
>
> As per Section "5.10.40.80 Separation" of the City's comprehensive Zoning By-law No. 569-2013, we also question whether an additional setback variance from the stable top of slope on the lot may be required if the proposed replacement dwelling is less than 10 meters from the stable top of slope.
>
> TRCA Permit Application:
> An Ontario Regulation 166/06 Permit Application was received by TRCA staff on November 3, 2016 to facilitate the construction of the replacement dwelling. The drawings circulated to TRCA as part of this Minor Variance application are consistent with the plans most recently received with the TRCA permit application (CFN 56798).
>
> City of Toronto Ravine By-Law:

> Please be advised that the subject property is located within the jurisdiction of the City of Toronto Ravine Bylaw, and as such is subject to the approval of Urban Forestry Ravine Protection. Please contact David Bostock at (416)-392-0585 for more information.
> Conclusion:
> **TRCA staff reviewed the requested variances and they have no impact on TRCA's policies and programs. As such, TRCA has no objections to the approval of Minor Variance Application No. A0294/19NY. "** (emphasis added.**)**

Mr. Kemerer stated that a TRCA permit has now been issued for the development – Number C-190684. This followed TRCA's review of the **stamped engineering drawings, including a soil study and a shoring plan.** It is TRCA, he stated, that has jurisdiction over and regulates potential impacts from construction in ravine areas. It is not a planning issue.

He emphasized that the appellant, Mr. Peck, was seemingly interested only in obtaining a soils report, rather than objecting to the most recent 2019 variances. This is reinforced by his planner Mr. Mills' statement:
"Neither John Peck nor I have seen the report prepared by Coffey Geotechnics, dated May 19th, 2010, which is referred to in the TRCA letter of January 25th, 2017" (Letter, August 15, 2019, p. 2).

Knowing that some planning evidence is required to support an appeal when challenged by a Motion to Dismiss, Mr. Peck provided Mr. Terry Mills' testimony, an experienced designer and builder. He was qualified to give expert evidence in this Motion.

Mr. Mills reviewed many OP policies, as well as the other tests for a minor variance. He relied primarily on the fact that each lot is partially within the Natural Heritage System. Both policies 3.4.10 and 3.4.12 apply to "development in or near the natural heritage system" he testified. OP Policy 3.4.1 states that developments shall be assessed based upon "(e) reducing the risks to life, health, safety, property". In his opinion the test of general intent and purpose of the OP has not been met, particularly in light of policy 3.4.1(e) regarding "risks to life, health, safety, property". In his view, the Motion to Dismiss clearly acknowledges that it was understood even in 2017 that Mr. Peck was substantially concerned about these risks.

Mr. Mills stated that he has little confidence that the TLAB can be assured that the City will deal adequately with the soils issue, following issuance of a building permit. He queried the fact that the present application was based on identical plans to the earlier one. He raised two examples of recent builds in ravine lots where fill is present, one on Russell Hill Road and one on Dawlish Avenue. In both situations, construction in unstable soil has led to subsidence on a neighbouring lot. He provided an example of a neighbour at 88 Glenview here who had confirmation from a previous owner of the presence of fill on his property (he filed this 1998 report on August 16, 2019). Mr. Peck's concern is for the deep basement proposed – it would be 1 metre below the main floor of Mr. Peck's home. He fears that it would "probably not be built in the same fashion as proposed." The rear 12 feet of the existing addition at number 90 is not "in alignment" as the TRCA claims, and the proposed would be a solid wall rather than a lighter

addition as at 90. He asserted that it should be engineered and constructed with steel soldier piles with lagging between, so as not to damage Mr. Peck's existing structure. He gave as examples the solid concrete caissons of buildings at Yonge and Eglinton. The appellant Mr. Peck should have available the "proposed engineering" so that his engineer could review it. There had also been no discussion of how the mutual walkway would be dismantled and reconstructed.

In cross examination Mr. Mills explained that Mr. Peck did not participate in the subject COA hearing since he was out of town. He had no explanation as to why there was no comment to the COA, other than the fact that Mr. Peck still had not obtained a copy of the soils report. He agreed that the TLAB had no control over the issuance of building permits, nor of overseeing the construction. He had not conducted or arranged for a soil report to assess the presence of fill, as was claimed. He also agreed that the neighbour's letter about fill was at best hearsay (although he did file the1998 source report by J.T. Donald Consultants Ltd. on August 16).

ANALYSIS, FINDINGS, REASONS

It appears from all of the evidence, including Mr. El-Ayari's affidavit, that the appellant's only real concern was and is the surrounding soil conditions, raising what he sees would be problems with the proposed dwelling's construction. In paragraph 10 the owner states that in requesting the owner's engineer's report, Mr. Peck's "… *true* concern with the proposal was "***soil conditions that might impact the stability of my home during the excavation"*** . Mr. El-Ayari believed that any confidential information in the subject report should not be shared, although he agreed to share its conclusions. It is the City who would approve the permit drawings, and only if satisfied that the construction will be stable. The primary authority for construction in ravines, the TRCA, along with the Ravine and Natural Features Protection section of Urban Forestry have approved of this proposal, having indeed seen all of the required soil assessments and shoring plans. There is no evidence of any adverse impact of a planning nature here.

From Mr. Mills' evidence, it appears that the proposed FSI in the 2019 application, Variance 1 above, is not an issue. The dwelling is the same size as previously approved. With the issuance of the TRCA permit, there is not even remotely a remaining planning ground on which this appeal could be granted. I am satisfied that there is no planning issue upon which the TLAB could make a decision on the merits of the application.

As set out in the TLAB decision concerning 145 Royalavon Crescent (18 211094 S45 05 TLAB), which I repeat and adopt in this matter:

> "Evidence on the variances in a Motion to Dismiss is accepted only for the purpose of making findings on whether there is a triable issue to go to a hearing. If one is not found, there is no consideration of the merits required. In this case, as stated at the hearing of the Motion, I am satisfied that, as in subsection 17(a)((i) of the Act, 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. " (p. 4); and again at p. 5:
>
> "As mentioned, the purpose of this Motion to Dismiss is not to make findings on the merits of the proposal, but on the legitimacy and authenticity of the appeal."

Mr. Kemerer also cited a further finding in that decision that I agree applies to the present appeal as well:

> "Most significantly, there has been no planning evidence to prove that a legitimate, triable issue exists as between professional advisors. Two of these did address and support the height variance. Other than the slight increase in number, which I discount as unimportant, I had no evidence that there would be any adverse effect of a planning nature with the requested height variance that would warrant a Hearing on the merits."

The previous caselaw required more than an "apprehension" to found an appeal, there must be a legitimate planning issue, worthy of adjudication (see Decision, p. 8). As well, once a motion to dismiss is made, the onus shifts to the appellant to prove by planning evidence that the appeal has merit. It cannot "simply raise issues couched in land use planning terminology" ([*Sheldrake and Springwater (Township),* 2015 CanLII 66916 (ON LPAT), para 20], but must demonstrate legitimate planning grounds. Here, I find no legitimate planning grounds that have not been or will not be answered by the bodies controlling such matters as appropriate setbacks and fill control. The TRCA had even stated in its report of January 25, 2017, "…we do agree with the same report which was submitted with the TRCA permit application and states that **the overall valley slope is long term stable."** (p. 2, emphasis added).

The TRCA had provided an additional cogent reason for the present setback variance. Mr. Mills disputed this, but I accept the opinion of the body in charge of regulation of ravine slopes:

> "The rear wall of the proposed dwelling will be in alignment with the rear walls of the adjoining dwellings along this reach. As such, TRCA staff can support the proposal in principle."

Mr. Mills' mention of alleged inconsistent lining up of the rear walls here is only very notionally a planning issue. It is contradicted by the TRCA.

Mr. Kemerer termed Mr. Mills' quotes from the Official Plan (OP) and Zoning By-laws "a thin straw to hang on" to satisfy the tests in subsection 45(17). I agree with him that the only evidence he purported to adduce was directed to construction matters, which are controlled by responsible permitting authorities, and not the TLAB.

I conclude that Mr. Peck's appeal is indeed somewhat unfair, as argued by the owner and by Mr. Kemerer on his behalf. I am not sure why Mr. Peck refuses to rely on the authorities having soil stability here within their mandate. He did not undertake his own assessment, nor call an expert witness to contradict the owner's witnesses and existing approvals. The appeal, late in the appeal period, greatly delayed the proposed construction, at significant costs for the owners, and on the dubious grounds of obtaining an existing soils report. I would not employ the term "blackmail" as was

mentioned, but at the very least it was an inappropriate appeal launched on dubious non-planning grounds.

I provided additional reasons in the Hearing for my finding that the Motion should succeed, and the Appeal be dismissed:

> 1. The appellant Mr. Peck did not raise cogent evidence of a planning nature, worthy of adjudication by the TLAB. There was really no evidence on the merits of the proposal, the character of the neighbourhood or the assertion that "the ravine context is not appropriately addressed." I assume the reason for this is that all of the variances for the new dwelling, except the two now applied for, are in full force and effect. They were approved in the 2017 COA decision, and were not appealed at that time.
>
> 2. The only reason for the 2019 application was that the City department subsequently interpreted certain requirements differently. It was only a technical matter, and had nothing to do with the merits of the 2017 variance granted.
>
> 3. It was unfortunate that the results of the existing soils report were not shared earlier. However, it was equally unfortunate that the appellant did not accept the expertise of the TRCA in issuing its permit, in that it had the owner's soils report prior to the permit.
>
> 4. On the issue of possible construction damages, to my knowledge access could be had to the owners' insurance policy should there be any issue caused by the construction. The engineering issue need not be further examined, in my view, because of oversight by the responsible permit issuers.

DECISION AND ORDER

For the above reasons, the Motion is allowed, the Appeal is dismissed and the COA Decision and Order issued August 2, 2019 for the subject property is confirmed, with this condition imposed:

1) The proposed gross floor area shall be a maximum of 303.71 square metres.

For further clarity, these are the variances authorized:

1. Chapter 5.10.40.40.(1), By-law 569-2013
The maximum permitted floor space index is 0.35 times the area of the lot.
The proposed floor space index is 1.44 times the area of the lot.

2. Chapter 5.10.40.80.(1), By-law 569-2013
On lands under the jurisdiction of the Toronto and Region Conservation Authority, a building or structure on a lot must be no closer than 10.0m from a shoreline hazard limit or a stable top-of-bank not on that lot.
The proposed building or structure is closer than 10.0m from a shoreline hazard limit or a stable top-of-bank not on that lot.

X

G. Burton
Panel Chair, Toronto Local Appeal Body