Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Monday, November 18, 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): HAYES COLLIN STEINBERG

Applicant: CLIMAS GREEN LIANG ARCHITECTS INC

Property Address/Description: 65 TILSON RD

Committee of Adjustment Case File Number: 19 113330 NNY 15 MV (A0085/19NY)

TLAB Case File Number: 19 141090 S45 15 TLAB

Decision Order Date: Thursday, October 24, 2019

DECISION DELIVERED BY Ian James LORD

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This matter involves the request to review (Review/Request) a Decision and Order of the Toronto Local Appeal Body (TLAB) issued by Member T.Yao on September 24, 2019 (Decision) refusing for the property address, above, an appeal by the Appellant.

The Request was submitted via counsel, David Bronskill, and supported by an Affidavit of a Registered Professional Planner, Tae Ryuck sworn October 23, 2019.

There were no other Party or Participant submissions on the Review; City Staff had no reported objections to the original relief requested and which did not change before the TLAB.

The matter is considered under the Rules of the TLAB in force prior to March 6, 2019, given that the request for two variances for front and rear yard additions to an existing semi-detached dwelling unit was filed with the Committee of Adjustment (COA) in February 2019.

The variances requested were to increase the floor space index (FSI) from 0.60x lot area to 0.77x; and to reduce the front yard setback (FYS) from the minimum required

of 4.97 m to 4.36 m (2 feet), pertaining to a cantilevered overhang above the first floor level (Application).

The Request was filed in a timely fashion and served in accordance with Rule 31 as it then existed.

BACKGROUND

The Application came before the TLAB Member on three occasion, the latter resulting in the Decision. Nothing is made of the two prior procedural dispositions.

The Hearing consumed one day and the TLAB Member heard from three witnesses: two proximate neighbours, Mr. Plumpton in the adjacent semi-detached dwelling; Mr. Hippler, a Participant and neighbour, and the planner, Mr. Ryuck.

I have reviewed carefully the Request, the Decision, the filings on the TLAB website including the support materials filed by or on behalf of the three witnesses, and the October 23, 2019 Affidavit supplied in support of the Request.

I have also attended on the site and the surrounding area.

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:
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> a) seek written submissions from the Parties on the issue raised in the request;
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> b) grant or direct a Motion to argue the issue raised in the request;
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> 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

Having regard to Rule 31.7, above, the Applicant in the Request cites as a basis for consideration paragraphs 31.7 a), b) and c). The Request is sufficiently clear so as to permit each of these to be considered in turn. There are overlaps in the stated grounds.

A. The TLAB Acted Outside its Jurisdiction

In support of this assertion, the Request makes three (3) primary propositions:

i). the Member failed to address the 'Four Tests' in respect of each variance in a manner that is apparent, replicable and provides a sufficiency of 'analysis or roadmap', or reasons to, in colloquial terms, tell the 'loser why they lost'.

ii). The Member failed entirely to address the front yard variance request and provided no basis for its rejection.

iii). the Member failed entirely to address any analysis or consideration to the rear addition, the essential FSI contributor, or provide any relevant considerations of the applicable policy or tests to draw any conclusions.

B. The TLAB Violated the Rules of Natural Justice and Procedural Fairness

In support of this, the Request raises the following examples:

i). the Member misdirected himself by conducting his own research on a canvass of decisions related to semi-detached dwellings and drew from that canvass general propositions neither required by law or supported by policy or regulation, and that he did so without notice or exposure to the Parties or with any permission for them to comment.

ii). the Member misdirected himself by accessing case authorities and conducting his own analysis on case law and its application to the Application without Notice, the opportunity to make submissions and used the findings thereof as a critical component to the Decision; and

iii). the refusal in the Decision is grounded primarily on a rejection of the front facade design, an element unrelated to the only variance discussed, FSI.

C. The TLAB made Errors of Law or Fact which likely would have resulted in a different Order of Decision.

In support of this, the Request challenges:

i). the Member's reliance applying only a numeric interpretation in his analysis and only as it applied to the FSI variance request, contrary to court and tribunal authorities;

ii). improperly and incorrectly applied the policy considerations of the Official Plan neglecting the scope of the application of policy considerations, and creating and relying upon a distinction as to dwelling or building type (semi-detached dwelling units) for which there is no policy support or rationale for differentiation;

iii). as fundamentally and incorrectly determining that a single characteristic can constitute the assessment of area character and that 'most frequently occurring' can preclude developments with physical characteristics (here, the FSI of and presence of semi-detached dwellings) that are not the most frequently occurring; and

iv). the employment of undisclosed case authorities wrongfully extending or abusing the scope of the entitlement to employ 'specialized knowledge' as a tribunal Hearing Officer.

The Requests asks that a new Hearing be ordered.

In reviewing these alleged grounds, it is incumbent upon the reviewer to pay close regard to the Decision and the foundations for decisions upon which a Member can rely. The TLAB generally employs a template format to the delivery of its decisions, designed to ensure that the Member is prompted to review and state, in a logical and deliberative manner, the relevant considerations employed in the reaching the outcome.

A TLAB decision is to be respected not just for the preparation antecedent a formal Hearing in the receipt and review of filings and the mandatory site attendance, but for the conduct of the Hearing, the receipt and recording of the *viva-voce* evidence and the deliberative consideration given thereto as inherent in decision writing. The premise of this deliberation is that TLAB decisions can have a profound effect on any or all of the affairs of: individuals, corporations, the City and the public interest.

A Review Request is not afforded as an opportunity to re-litigate or re-argue a point that was made out, but not favourably received in the decision by a Party

Fundamental to assessing for Review purposes the assertions made in the Request is the need to give the Decision a fair and liberal interpretation and construction consistent with its role. A decision must project a determination on matters put to the Member in a fair, deliberative and reasonable manner, as can be best expressed using clear language. Members will differ in that regard and what is delivered by one may not be expressed in a manner suitable for another. It is often said that decision writing does not require a punctilious review and recital of every fact or kernel of evidence or that every stop on the road to a conclusion must be wrapped in detailed support.

On the other hand, a decision must reflect a suitable basis for its conclusions taking into consideration relevant considerations, discarding the irrelevant and applying the law and policy made germane to the Tribunals' mandate.

It is with these considerations in mind that I have read and reread the Member's Decision.

I find that the Decision identifies, on page 2 of 13, that the 'main issue' is whether a 0.77 FSI should be granted. It would therefore follow that a careful analysis of the evidence routed in the policy and statutory tests would be applied to that variance request.

Instead, the recitation under the 'Evidence' section of the template is 3 lines, without reference to any testimony content; the first 4 of 13 pages add nothing to the relevant considerations before the Tribunal.

Evidence is addressed on pages 5 through 11 with the balance of the decision commenting on case law never put to the Member for any argued purpose, or at all.

Indeed, the majority of the decision is constituted by a travel description and commentary, pages 7 to 11, on the planner Ryuck's 'Photo Analysis. and that of the others. It should be added that the other witnesses also supplied a commendatory record of photographs of area housing, both within and beyond the Ryuck Study Area Map.

I find the section of the Decision on 'Mr. Ryuck's photo analysis' to be largely, if not completely irrelevant to the 'main issue' of the consideration of the FSI variance.

I agree in the Request that the second variance for a front yard setback, while mentioned, is not addressed with reasons, for or against. It is entirely impossible from

the Decision to ascertain how that second storey projection, analogous to a large bay window, and its associated variance, was evaluated, or considered and or determined.

The Decision does note the projection of porches in the neighbourhood and does deal with design commentary.

The four pages on 'Mr. Ryuck's photo analysis' consists mainly of extracts from Mr. Ryuck's verbal testimony on area character architectural diversity (different: rooflines; dwelling types; architectural designs; height; materials; colours; looks; styles; porches; articulations; front facades and window treatments).

From his Expert Witness Statement (Exhibit 1), it is clear the planner used this information and assessment in over 70 paragraphs to draw conclusions (paragraphs 16-24) on: compatibility; the 'minor and appropriate' test; no adverse impact; maintenance of the Official Plan (paragraphs 42-50) and zoning by-law intent (paragraphs 51-57); appropriateness of design, massing and scale; provincial policy.

None of that evidence is recited or balanced in the photographic comments by the Member. Where commentary is provided that is not the description provided by the Witness, the Member draws from the photographic trip two topics: distinction between semi and fully detached dwelling types (Decision, page 8) and façade or 'design features' (page 9) of semi-detached examples, and particularly the 'unbalanced façade' proposed for the subject property (Decision, page 10 of 13).

From the photo mosaics of the Parties and Participants, the Member draws the conclusion that "adjoining owners of semis in this neighbourhood, while not being tied to renovate in mirror-image fashion, 'tend not to treat their front facades as freely as they would, if they owned single detached homes'.

I find this observation to be irrelevant to the FSI variance, an unsupported impediment to the consideration of the Applicants freedom of design expression and a wrongful concentration insofar as it limits the assessment of neighbourhood character. The Member criticizes the planner for never having "addressed the neighbourhood from a detached/semidetached analysis" (Decision, page 11).

While design is an acknowledged policy consideration and relevant to area character and 'streetscape', I cannot find in the reasons any attribution of the Member's comments to planning policy or planning principles apart from an oblique acknowledgement that development must be 'respectful' of area character. Design decisions, except in circumstances that warrant concrete concern, are still left in Ontario to the Owner and while the TLAB can encourage consistency in elements that form strong character attributes of a locality, such is not the clear premise of the descriptors employed in the Decision. Rather, it is the focus on semi-detached units and their design facades that appears, in the reasons given by the Member, to contribute materially to the decision on the Application. No policy is cited that the direction to 'respect and reinforce' can be tied solely to a particular unit type or to a selection of facades and their 'design', within a locality, 'Geographic', 'Immediate' or beyond.

I feel I am precluded from assessing the evidentiary merit and weight applied by the Member; however, when that weight has the appearance of being sole sourced to

ancillary factors of design and housing type to the exclusion of other defined relevant assessment criteria, the concern for misdirection arises.

The Member notes that the FSI variance has no manifestation in any other attribute requiring relief, such as height, side and rear setbacks, coverage, landscaping. Indeed, measures of height, bulk and massing, insofar as the two dimensional frontages shown in the photography review are concerned, bear no relationship to the discussion or assessment of the specific variances or the specific policy and tests reviewed and applied by the planner, at least in his Expert Witness Statement.

The Decision makes no reference to the advice of the planner that the 'as-of-right' FSI permitted on the subject property by calculation, not permission, is an envelope containing 0.76x lot area. In his opinion statement, the planner calls this difference an 'indiscernible' difference from the Application request for 0.77x (Expert Witness Statement, paragraph 53). This opinion is not evaluated.

I am concerned that no reference or weight is accorded the opinion evidence of the planner; I am concerned that the Decision reflects more on design preference and distinctions based on unit type and canvassed similarities, over the fulsome, broader evaluation considerations mandated by the policy direction and tests set out in the *Planning Act,* most of which are not raised, considered or resolved.

In this regard, I agree with the Request that the possibility exists that a different decision would have been reached absent the significant reliance on the Member's own independent assessment of statistics, percentages (Decision, page 7) and FSI (Decision, page 13). In the same vein, I am uncomfortable with the application of the evaluation criteria of the Official Plan being essentially absent and the focus fixation on design and semi-detached units, for which no policy support is referenced.

I am troubled as well, not by the ability of a Member to access case authorities but to do so wholly independent of recommended references or any ability in the Parties affected to address the tenets drawn therefrom that are supportive of or especially, fundamentally, adverse to the interests of the Parties.

A finding from a selection of case authorities never brought to the attention of the Parties that "most people in that situation (sic: renovation of a semi-detached unit) had not done so" (sic: deviated from the design of the attached unit), (Decision, page 13) appears as a fundamental rationale for the Decision. It is without an evidentiary foundation beyond researched commentary and, perhaps, implied observation.

It strikes me as potentially unfair to look outside of the evidence, limit its assessment and 'pile on' reasons from authorities that are employed to bolster a particular conclusion, without notice or participation. In so saying, I have no reason to conclude this theme was not addressed in the evidence, but it quite clearly had no support from disclosed case authority.

I find the failure to address any consideration to the second variance, beyond inferential design values, as to be inappropriate and an incomplete fulfillment of the TLAB mandate. No rational is provided as to why the expert testimony of these subjects

was not considered and was disregarded; that much acknowledgement and consideration is owning the Applicant from a trier of fact.

Indeed, the applicable tests are template identified to both variances but are not addressed in any meaningful way that expresses to the Parties the assessment as to why the appeal was dismissed related to their relevance.

None of these matters warrants a finding as expressed in the grounds as much as they are supportive of the fact that the matter deserves reconsideration. If necessary, I would find that the grounds of the review are established and that an appropriate remedy is warranted.

As the reviewer, I did not hear the evidence and prudence dictates that, in this case, a review of the digital recording is not warranted. It is sufficient that the deficiencies alleged in the Request have sufficient merit to support the relief requested.

DIRECTION (IF APPLICABLE)

I am satisfied that the Decision fails in its essential purpose of applying promulgated law and policy in a manner that communicates the Decision is premised and fully supported on relevant considerations and evidence.

I am not in a position of adjudicating on the merits or otherwise of the Application as that requires a Hearing process where the Parties and Participants have a full opportunity to address all relevant considerations. This does not exclude building type and façade considerations but, in my view, cannot turn exclusively on perceptions of any one particular attribute in the absence of a full and replicable consideration of policy, criteria and the application and consideration of generally accepted planning principles.

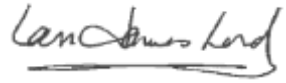
While this may well have occurred in the Member's deliberations, it is not transmitted in the Decision and therefore is not present.

DECISION AND ORDER

The Request for Review is granted. The Supervisor is directed to set the matter down for a new, entirely *de novo* Hearing, before a different Member.

In the interests of the Parties and Participants who have familiarity, a date for a one-day sitting on an expedited basis should be canvassed by Staff but providing a period of time, thirty (30) calendar days of Notice in advance of the Hearing, for the filing of any additional documentation.

The Decision is cancelled.

X 

I. Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord