Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Monday, October 28, 2019

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

Appellant(s): MARIANA BOCKAROVA

Applicant: MARIANA BOCKAROVA

Property Address/Description: 14 GRANTBROOK ST

Committee of Adjustment Case File Number: 17 237010 NNY 23 CO, 17 237018 NNY 23 MV, 17 237028 NNY 23 MV

TLAB Case File Number: **17 275185 S53 23 TLAB, 17 275190 S45 23 TLAB, 17 275194 S45 23 TLAB**

Decision Order Date: Friday, August 30, 2019

DECISION DELIVERED BY Ian James LORD

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request) of a decision of the Toronto Local Appeal Body (TLAB) made by Member Gopikrishna, issued August 30, 2019 (Decision) refusing an appeal made by Mariana Bockarova (Requestor), the Applicant and Appellant. The Committee of Adjustment (COA) had refused both the consent and variance relief requested by the Appellant.

Ms. Bockarova is the owner of 14 Grantbrook Street (subject property).

The Request is made for a review under Rule 31 of the Rules of Practice and Procedure (Rules) of the TLAB, as they then were prior to the May 6, 2019 revisions.

The Decision was in respect of the subject property wherein the Member dismissed the appeal and upheld the Committee of Adjustment's refusal decision.

The Request consists of a submission of some seven pages and 33 paragraphs (Submission).

The Request asks that the Decision be overturned, the severance and variance relief requested (Applications) be granted or the TLAB order a new Hearing.

The City of Toronto (City), a Party to the Decision, served and filed a Notice of Response to Review (Form 26) on October 21, 2019 consisting of a 31 paragraph rebuttal of the Request (Response) principally on the grounds of a simple attempt to re-litigate the appeal without demonstrating any supported grounds. The City asked that the Request be dismissed

I am of the view that the Request was commenced in proper form accompanied by an affidavit sworn by the Affiant on September 29, 2019. The Request was accompanied by five (5) identified decisions of the TLAB, Ontario Municipal Board (as it then was) and the COA of the City of Toronto (City).

BACKGROUND

The Decision records that the matter was heard over three Hearing days with two principal Parties, the Appellant and the City, the latter in opposition to the Applications. A lengthy presentation of the evidence is included in a 28 page Decision. There were some nine exhibits recorded, extensive filings on the public record and two qualified land use planners who, without challenge, addressed the substance of the appeals.

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:
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> 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

To paraphrase the applicable directions on a Review Request:

'the foregoing Rules restrict the scope of inquiry afforded a Review; the public interest sought to be addressed by the Rule is to permit the TLAB to have a sober second look at a Decision in light of the defined criteria on the types of errors that, if they occurred, might be afforded relief through the expedient remedies available to the reconsideration.

Rule 31.7, above, has several clearly defined components which, if met, permits consideration by the TLAB of the remedies afforded by Rule 31.6, also recited above.

In essence, a Review is not an open invitation to simply challenge a decision with which one disagrees. Rather, the Rules clearly envisage that there must be a demonstrable error in the categories identified that warrants relief of the variety and to the standard provided for in the Rule."

I note that the Submission accompanying the Request affidavit was well organized but did not specifically identify the applicable Rules supporting the Request as required by Rule 31.4 d). Instead, the Requestor reiterated factual matters and arguments made in testimony during the Hearing and extracted several passages from the Decision, illustrative to the matter being described. I find this to be somewhat deficient given the direction to Affiants required by above referenced Rule.

Nevertheless, the Submission makes a sincere effort to identify 'errors' despite the failure to define specific grounds in her Affidavit.

Despite the City protestations as to the lack of clarity, I am prepared to consider Ms. Bockarova's Request - as afforded by the TLAB Rules and described – as a claim for "a lack of procedural fairness and errors in administrative and planning law."

I accept this description as invoking the grounds listed in Rule 31.7 b) and c).

These are considered in the order communicated by the Affiant in her Submission and as addressed in the Response.

"**Errors in Qualifying an Expert Witness"**

The Submission challenges the Member's discretion to recognize the planner tendered by the City as being qualified to give expert opinion evidence in land use planning matters. The assertion is made: "Ms. Choi's limited experience and lack of membership with the OPPI (Ontario Professional Planners Institute) **preclude her** from being qualified as an "expert". She should not have been recognized as such." (para.9, emphasis added).

The Response points out that Ms. Choi has "worked as a community planner with the City of Toronto since April of 2007" (Response, para. 7).

The suggestion is made in the Submission that the Member used a 'different approach' in reciting the evidence of the two planners by 'condensing' the evidence of the City planner. It continues by reciting the submission made to the Member that 'no weight be assigned the City planner', for failure to be bound by the Code of Practice applicable to OPPI full members. Further, that it was not evident to the Appellant that Ms. Choi 'possessed expert knowledge' (Submission, para.13), as defined for an Expert Witness by the TLAB Public Guide (Submission, para.15).

This complaint raises a number of first principles.

The duty of a Hearing Officer includes acting as a gatekeeper as to the standards of professionalism and conduct of all those giving testimony in a Hearing setting. It is the exclusive prerogative of the Member to determine both the qualifications status of a witness and, eventually, to assess the weight to be given to the testimony of any person appearing. Challenges to the qualifications of an expert are an entitlement of a Party; challenges to the credibility of a witness need to be addressed prior to the testimony in

a more formalized identification of the nature of the complaint. This affords the opportunity to prepare a response; such credibility challenges are generally not to be addressed via shock and surprise.

The Response argues this is a re-litigation of a matter that is within the exclusive jurisdiction for determination by the Member; further that it is a matter not pursued by the Requestor's counsel and that, in any event, 'being a member of OPPI is not required in order to give expert land use planning evidence" (Response, para. 9).

Here, I see from the Decision that the issue of expert qualifications was properly raised and the Member considered and admitted the witness. Credibility was not challenged at the outset as required; however, it is raised parenthetically in the Request, based on observations on the progress of the Hearing and the Requestor's own perceptions of value and weight.

Such commentary is not evidence and does not engage a permitted ground for review.

Moreover, the absence of Full Membership even in an accredited organization such as OPPI does not preclude the acceptance of qualifications. There is no such Rule, law or regulation governing the planning profession.

An expert witness can gain expertise in a number of ways, certainly through education and training, but also through experience. The 'weight' attributed to expert testimony is an amalgam of hearing the witness, observing the demeanour and responsiveness, hearing contrary views and argument and ruminating on the totality.

Both functional determinations, admissibility and weight, are the prerogative of the Member having the benefit of first affording a full and fair consideration to the matters raised. Moreover, the duty of a Member in writing a decision is to communicate an assurance not to the 'winner' but to the parties adversely affected by the Decision that the evidence was heard, understood, considered and accepted (or rejected) as part of a deliberative assessment process. That expression may well involve more or less description of a witness and the related evidence, as circumstances warrant.

The Member in the Decision clearly assessed the educational basis of expertise and the analogous compliance undertaking of the witness to adhere to standards of professional conduct. The Member admitted the witness as an expert and did not fail to assess the weight of testimony in a comparative and individual sense. By providing a fuller version of the Appellant's planner's own evidence, the Member provided the assurance to the Appellant that what was said by that individual was fully and properly noted and recorded.

The Member is not bound to accept the evidence of any witness, including an 'expert', provided all relevant considerations are brought to bear. As well, membership in a voluntary membership association such as OPPI, as stated, is not, as yet, an

absolute prerequisite to the qualification of an 'expert' in land use planning - although it can go to the establishment of credentials where that aspect is properly put in issue.

I have no basis to afford any consideration to the Submission that the qualification process, the assessment of credibility of the witness, the weight ascribed or the manner of the detailed expression of the evidence was in any way in error. The matters were raised and the prerogative of the Member was properly exercised, apparently on proper principles. I agree with the Response that the Requestor's assertions do not raise any new facts and are baseless on this alleged ground.

Absent any eligible grounds, the dissatisfaction of the Requestor with those determinations is not a ground for a remedy.

"Errors in Evidence".

The Submission raises the issue that a request for information made before the Hearing of the COA was refused; further, that the refusal to share the basis of information employed to prepare a lot study analysis was of concern and demonstrated 'a lack of procedural fairness' (para.19).

The City Response states the information employed was publically available (for a fee) and the study itself was not obliged to be shared until the disclosure obligations under the TLAB Rules were reached, including Witness Statements (Response, para.15).

If this were a matter before the TLAB and the subject of a Ruling, it might warrant further examination. However, and as gleaned from the Decision, this complaint was in respect of matters that arose antecedent the COA Decision where the procedural remedies of production and discovery and Motion are not as readily available as in matters on appeal to the TLAB.

There is no evidence from the Decision that this matter was formally carried forward into the TLAB sittings or that any procedural remedy, avenue or Rule was even explored let alone refused. There is no allegation as to any circumscription on the right of cross examination at the TLAB involving access to information.

As noted above, a TLAB Hearing is *de novo,* in the nature of a complete new Hearing that is capable of remedying any procedural defects below. The TLAB does not sit on appeal from the procedures invoked by the COA or any alleged deficiencies that may have occurred before the COA.

Consequently, claims of a lack of procedural fairness during the COA process can play no part in a Review Request under Rule 31.

'Errors in Analysis'.

The issue of the relevance of 'lot studies' is pursued in the Submission as it related to the evidence heard by the Member. It appears to be raised in the role

afforded area character assessment as a necessary component of Official Plan assessment criteria of, among other matters, compatibility and 'fit' of the proposal with the existing physical character of the community.

The issue of the appropriate 'Study Area' is afforded prominence in the Decision. The Appellant chose a 120 m radius around the subject property and the Member found this to be inadequate (Submission, para. 24).

The Requestor argues that the existing character of the area 'is allowing for denser growth' and 'the addition of one residential lot is appropriate and desirable as it is consistent with provincial policy and the public interest' (Submission, para. 25).

Citing examples from other decisions related to 'edge conditions' (the subject property is the third residence in from a major arterial commercial frontage), the Requestor re-argues local evidence that was called and that accompanying decisions favour or support the Applications.

The City Response describes the Request to be a 'flagrant attempt to re-litigate the entire case' (Response, para.17, 22) and rejects each of the attachments to the Request as not being available to the Member, irrelevant and not to be non-contributory to any grounds for review (Response, para. 23-27).

Respectfully, the suitability of the subject property for severance and variance approvals is the very matter remitted to the Member for determination. It is fully open to the Member to assess the adequacy of the Applicants evidence on Official Plan criteria, including the evidence on comparative lots, as directed by policy. There is no denial of the presence of the evidence or its consideration, only as to the resultant determinations made by the Member on the applicable criteria.

Again, denial as to the Member's conclusion on matters such as policy compliance does not constitute a ground of authorized review under the Rule. The Member's reasons for rejecting the evidence of the Appellant, being based on a criticism of the City evidence but lacking in relevant own evidence, is not a listed ground for review. Indeed, the Member's reasons are obligatory to trace the rationale for the Decision. It cannot be an 'error in evidence' to specify and tell the Appellant the inadequacies of the case as being the basis of the Decision. There is nothing in the reasons to suggest that the Member did not consider all the evidence tendered by the Appellant, including the tactic of eschewing the City evidence.

The case authorities were not before the Member and their relevance to a ground for review under the Rule is not made out in the Request.

I see no merit in this alleged 'ground' and certainly none that could warrant meeting the test of making "an error of law or fact which would likely have resulted in a different order or decision."

"Plagiarism".

In para. 32 of the Submission, the Requestor addresses the Member's 'reasons' related to the Appellants criticism of the City Planner whose report clearly copied the work of an earlier co-worker, without the semblance of attribution.

The Decision deals with this substantive fact throughout, both directly and by inference. It struggles with whether there is substance to the allegation that the witness giving evidence, while acknowledging 'adopting' earlier text, committed some travesty such that her testimony should be entirely disregarded.

Ultimately, the Member concluded the complaint concerning plagiarism to be 'much ado about nothing', borrowing a Shakespearian epithet, equating 'adopting' an earlier report's language, to be copying with sufficient oral recognition.

The Requestor abandons the evidentiary challenge by saying: "My counsel should not have claimed "plagiarism". Templates were used."

It is then suggested that the quoted extracts related to a TLAB decision on a property requesting similar relief but at a different location – which was approved. It is assumed that the association should therefore have been considered as an element of support for a similar disposition of the appeal.

The use of case authorities to demonstrate similarities and differences and the application of administrative law principles of good community planning is well established.

The difficulty with the submission is that it is not established that the Member was mis-directed by the 'plagiarism' issue or that he failed to give consideration to the decision related to 116 Bogert Avenue, being the source of the parroted staff report assessment language. It is not for a Review to have this issue re-litigated as the substance of the Submission argues.

The TLAB is an administrative tribunal charged with the responsibility, on appeal, to dispose of the matter before it. Apart from statutory and judicial direction, it is not obliged to follow the principal of precedent, *stare decisis*, as in a superior court of law. The TLAB can come to a different determination even on a similar fact circumstance. It can consider, distinguish, follow or reject decisions of equal stature tribunals to which it is referred.

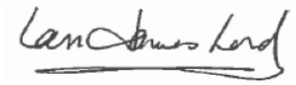
There is no basis in the language of the Submission to suggest, let alone demonstrate, that the Decision committed an error of fact or law in respect of these aspects, that warrants relief.

In summary, I conclude that the Submission falls short of raising any ground for relief under Rule 31.6: namely, further submissions; motion; rehearing; or reversal.

I agree with the City Response as summarized and expressed in its paragraph 30.

DECISION AND ORDER

The Decision issued August 30, 2019 is confirmed. The Request for Review and its associated relief is refused.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord