Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Thursday, November 21, 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): Felix Leicher

Applicant: Felix Leicher

Property Address/Description: 33 Fernwood Park Ave

Committee of Adjustment Case File Number: 17 239907 STE 32 MV (A1046/17TEY)

TLAB Case File Number: 18 144824 S45 32 TLAB

Decision Order Date: Monday, October 28, 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 S. Makuch on September 27, 2019 (Decision) allowing, for the property address above, an appeal by the Appellant/owner.

The Request was submitted via Mr. Gordon C. Holtam, a Party, received on October 25, 2019 and supported by his Affidavit of the same date.

On November 19, 2019, the TLAB was in receipt of a response submission filed by Mr. Mark Kemerer's office, on behalf of the Appellant. Apparently, Mr. Kemerer had not been served with the Review Request and some delay had ensued in the communication of instructions. The submission was in the form of an affidavit by the Applicant/Appellant consisting of 39 paragraphs of submission (Response).

There were no other Party or Participant submissions on the Review; City Staff were not present on the appeal of the original relief requested. There were many Participants.

The matter is considered under the Rules of the TLAB in force prior to March 6, 2019, given that the request for seven or more variances anteceded the new TLAB Rules promulgated on that date.

The variances originally as requested were to allow the construction of a pair of three-storey semi-detached dwellings, located one behind the other, on a single lot, designed with the entrance to each unit fronting on the street. The Decision includes the variances sought as a Schedule and includes four elevation plans and a site plan. A Motion decision in the Fall of 2018 required that the Applicant ensure that all variances were accounted for, especially lot frontage/width of the proposed variances from the 6 m norm said to be required for each semi-detached dwelling unit.

Specifically, the variances sought and allowed by the Decision are:

a). a minimum lot frontage of a semi-detached house is 6 m (12 m total) whereas 9.48 m can be provided;

b). the maximum floor space index (FSI) of 0.60 times the area of the lot, whereas 0.908 x is sought (388.06 square meters);

c). for the lot, a maximum driveway of 3.2 m wide whereas the proposed driveway is 5.12 m at its widest point (north driveway, 2.04 m in width; south driveway, 2.02 m in width.) (see: Response, para.6)

The Request was filed in a timely fashion and served, except as above noted, in accordance with Rule 31 as it then existed. Responses were allowed upon receipt.

BACKGROUND

The Hearing consumed four days and the TLAB Member heard from two qualified professional planners (one under summons) in support of the appeal, and persons in opposition being area residents and the two immediate neighbours on either side.

I have reviewed carefully the Request (19 paragraphs, authorities referenced), the Decision, the extensive filings on the TLAB website including Committee of Adjustment filings, the support materials filed by or on behalf of the witnesses, and the October 25, 2019 Affidavit supplied in support of the Request. I have considered the Response as well; it sets out a fuller description of the Hearing process and events giving rise to the timing and efforts by the Member to ensure a fair and adequate opportunity was available to hear all facets of the evidence.

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:

a) seek written submissions from the Parties on the issue raised in the request;

b) grant or direct a Motion to argue the issue raised in the request;

c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or

d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

a) acted outside of its jurisdiction;

b) violated the rules of natural justice and procedural fairness;

c) made an error of law or fact which would likely have resulted in a different order or decision;

d) been deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision; or

e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

31.8 Where the Local Appeal Body seeks written submissions from the Parties or grants or directs a Motion to argue a request for review the Local Appeal Body shall give the Parties procedural directions relating to the content, timing and form of any submissions, Motion materials or Hearing to be conducted."

CONSIDERATIONS AND COMMENTARY

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

At the outset, it is appropriate once again (and despite the repetition) to state the circumstances surrounding the purpose and application of Rule 31 as it above appears. These comments are general propositions to be kept in the mind of the reviewer so as to ensure that the purpose of the Rule is not redrafted to something different than its public interest objective: to enable a sober second consideration to a decision of the TLAB on any of the grounds recited by the Rule.

In reviewing the circumstances of 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 relies. The TLAB generally employs a template format to the delivery of its decisions, designed to ensure that the Member is prompted to review, describe and state, in a logical and deliberative manner, the relevant considerations employed in 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 right is not afforded as an opportunity to re-litigate or re-argue a point that was made out but was not favourably received, in the Decision, affecting a Party or a Participant. Although the latter is not entitled to request a Review, they can participate in a Review that is properly constituted.

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 it in a fair, deliberative and reasonable manner, as can be best expressed using clear language. Members' expressions will differ in that regard and what is delivered by one may not be expressed suitably 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 tribunal's mandate, including its own deliberations.

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

There are two principle 'grounds' asserted to request that the 'appeal be denied, or, at the very least, conditions…be applied' (Request, para. 19):

A. Rules of Natural Justice and Procedural Fairness
    a. A City witness was called on behalf of the Applicant/Appellant after the 'close of the case';
    b. 'As-of-right' drawings were introduced after the 'close of the case';
    c. The 'less complex' case of *40-42 Elmer Avenue*, is demonstrative of an attention to detail, evidence and analysis, including conditions, not reflected in the 3 pages of analysis in the Decision. The 'real, present and negative' loss of light not recognized in the Decision arising from massing is not properly addressed in the subject Application and use of an 'as-of-right' model exercise 'is not acceptable' (Request, para.15-18).

B. Error of Law or Fact
    a. Site parking was an opposition issue and was mischaracterized as being unimportant as attributed to the opponents;
    b. Lot frontage was wrongfully cited as having neighbourhood similarities "of the proposed size or less" and 'even the smallest existing frontage on Fernwood Park Ave is 70%larger than the proposed frontage of 2.9 m' (Request, para. 7);
    c. A 'lot frontage 'variance was missed; one of the semi-detached houses has a frontage of 2.9 m, less than one-half of what is required in the by-law but was never included as a variance…' (Request, para.8);
    d. Neighbourhood assessment must be done in its totality and when done so, the Application "does not meet the 4 Tests" (Request, para.10);
    e. The Decision does not take into account evidence of area character; the Application would set "a very serious and irrevocable precedent" and is therefore neither "appropriate or desirable" (Request, Para. 11);
    f. The absence of side and rear yard variances as demonstrating a lack of impact is an 'error of logic' and 'an opinion and not a fact' (Request, para. 12);
    g. The 'application and not the variances should conform to the PPS and the Growth Plan'. "The *Planning Act* sets out the 4 Tests by which the application is to be evaluated" (Request, para 13);
    h. The Member should not have referenced a 22 year old apartment building or used it as a "precedent of area character" (Request, para. 14);

I address each of these submissions in accordance with the framework of the Rule, the above approach considerations and the detailed submissions in

support of the two grounds. I have also considered the Response commentaries of Mr. Leicher where I have found them to be of interest and value.

A. Rules of Natural Justice and Procedural Fairness

It is the duty of a TLAB Hearing Officer to conduct a proceeding with integrity, listen to the evidence, afford Rulings consistent with principles of natural justice and make decisions based on the application of law, policy, the evidence and the public interest. As stated, the decision that flows from a Hearing is, nevertheless, a discretionary decision based on the Member's perception of the evidence and relevant considerations.

It is instructive that the Request identifies no Hearing deficiencies but rather finds the Decision wanting on particularized submissions. There is no assertion that there was any absence of evidence on the points raised or that there was any curtailing of the freedom of expression or the right to bring matters of interest and relevance to the Member's attention for consideration.

Indeed, I have reviewed the filed submissions in this matter both before the Committee of Adjustment, the Motion and the TLAB as to the main Hearing. Those filings are extensive, represent an expression of the Applicant's and the community interests and were, by all appearances, fully accessible and aired before the Member.

The Member is in charge of the conduct of the Hearing in respect of all matters of procedure. In the absence of some egregious Ruling and a curtailment of the right to address it, procedural allowances can rarely amount to a denial of natural justice or procedural unfairness. The 'right to be heard' is a powerful protection for all. The calling of a City Witness under summons and the introduction of pre-filed 'as-of-right' drawings or studies are all procedural decisions with no apparent curtailment of rights, notice failure or unanswerable 'splitting of the case' circumstance.

In the main, these allowances appear to have occurred in the course of the case in chief of the Applicant /Appellant and they were preceded with disclosure. In any event, there is the sworn assertion by Mr. Leicher, in para. 32.b., page 5, of his affidavit that Parties and Participants opposed were afforded every opportunity to review and respond to materials. There is no property in a witness and no circumscription on what a witness may be asked, provided it is relevant to the matters in issue. It is the case that if a witness introduces new and previously undisclosed evidence that an eligible ground for objection and censure can arise. In my view, a witness under summons who is a professional planner can be asked questions of relevance on opinions and is obliged to answer same as an aid to the Tribunal.

It is also asserted that the Decision pays scant homage to the more detailed merits consideration demonstrated in *40-42 Elmer Avenue*, a decision of this Member. It is asserted there are similarities and that these warrant, in the arena of massing, a more detailed exposition by the Member and protective conditions aimed at preserving the living environment of immediate neighbours. While the principle is sound, it is the factual circumstances that need to be considered. It is clear from the site plans of the respective properties that the built form, variances and incremental additions to massing, by design, variances and building positioning on the lots do differ dramatically.

In the subject case, there is no building length or rear yard incursion of moment and although there is a noticeable FSI increase, it is not accompanied by any relief request to height overall, main wall height, building length, side-yard or rear yard setbacks. These latter measures are usually considered attributes of massing, the relief from which can generate an assessment as to whether the proposal constitutes an overdevelopment of the lot.

Not being present here, but applicable in *40-42 Elmer Avenue,* creates a distinction with a difference. The Member in the subject appeal may well not have been compelled to address the degree of impact where any measure is absent, and impact is unsupported by objective evidence.

It is a common element of planning appraisal evidence to examine what can be constructed 'as-of-right ' on a lot; and then compare that to a proposal. That is entirely acceptable but provided the assessment respects the 'as-of-right' conditions of all the zoning performance standards. Often this analysis can vary (by increasing) or omit an essential restrictive component, e.g., FSI, coverage, building length or depth or height controls in zoning and thereby render the comparison valueless.

There is nothing in the Request that demonstrates such an error was made here so as to render the evidence of the comparable 'as-of-right' circumstance as lacking in value.

I find that there has been no natural justice or procedural fairness breach demonstrated that warrants the relief requested in the Request.

B. Error of Law or Fact

It is important that the reviewer apply the language of the Rule and not enter into a set of considerations that depart from the responsibilities of the Review. A Review is not, as above stated, a rehearing of the matter with a view to considering whether the reviewer might have come to a different conclusion. It is not a re-argument of the case; rather, it is a canvass as to whether any of the statutory grounds afforded a review under the *Statutory Powers Procedures Act* are established.

In this regard, the full consideration must be stated and applied which is as follows; namely, whether the Member:

> "c) made an error of law or fact **which would likely have resulted** in a different order or decision;" (emphasis added)

This standard implies that the reviewer must not only be apprised by the Review Request of a clear error of law or factual matter of significance but also be satisfied that if the error occurred it would likely have led to a different decision.

a. Site Parking and Driveway opposition. The Review Request identifies these matters as linked and expresses a preference for a longer driveway and standardized parking. There is a legacy element to this issue as I understand from the filings: a parking variance was previously under the Application.

That said, there is no longer a 'parking', 'parking space' or parking variance being sought. There is a driveway reduction from 6 m to 5.12 m that was the subject of evidence.
I am not prepared to convert the driveway width into a parking issue for which no relief is requested. The Member found on the considerations before him that the driveway width variance "is not a noticeable variance," a finding well within his purview. While he may have appraised it as not a 'significant issue', it is equally explainable that he focused on the variance and not so much its implications for parking, with which there was no apparent City by-law concern. That focus is not an error.

b.,c. Lot Frontage. The variance for lot frontage seeks a recognition of the existing lot frontage of 9.48 m from the minimum by-law standard of 12 m for a semi-detached house.
The Request parses this frontage issue to that which exists for each unit, a standard of 6 m whereas the narrowest unit has a 'frontage of only 2.9 m'.
While it concerns me that the Member did not spend the time and resources to address this aspect in any detail, I am equally concerned that the issue raised is in the nature of a 'red herring'. Namely, not only is there a distinction between 'lot frontage' and 'development frontage' but also it is clear on the evidence that the Application was not seeking to establish separate conveyable parcels for the subject lot.
There is no severance application and therefore no lot consideration of the standard for separate conveyable dwellings.
Rather, there is, apparently, a permitted use for a semi-detached dwelling form on the lot uncoupled from a requirement that these demonstrate separate frontages (6 m) on separate lots. The standard is that there is to be a minimum frontage for a semi-detached dwelling of 12 m, which the subject property could not meet.
The legal question as to whether the standard for each unit must be met at 6 m where there is no lot division is one that is not raised and which I am not called upon to address.
I do note, that very early on in the saga of this file, disclosure identified that there was a change in the definition of a 'semi-detached dwelling' with the coming into force of the harmonized zoning by-law.
Perhaps this is a legacy issue; in any event, it appears the applicable definition from By-law 569-2013, reads as follows:

> "b. Under the harmonized City By-law 569-2013 the definition (800.50.745) of a semidetached dwelling is:
>
> i. Semi-Detached House means a building that has two dwelling units, and no dwelling unit is entirely or partially above another." (Witness Statement of Robert Brown filed 18/11/30, para. 7 b.)
>
> This demonstrates no 6 m prescriptive lot or frontage recognition; however, it is just a definition that contemplates this dwelling type is subject to zoning recognition.

On this aspect I also have had regard to the following:

> "Revised Notice 4. The applicant requested the revised notice from the Building Department as directed. Subsequently, Mr. Kemerer wrote to TLAB and all parties on October 15, 2018. Mr. Kemerer advised that, "Buildings staff carefully reviewed this issue of frontage (10.10.30.20(1)) in the original Zoning Notice. They have done so again at the request of TLAB. Buildings staff again advise that By-law 569-2013 does not define or regulate "unit frontage" and that the By-law only applies "lot frontage" for the subject site. There is no unit frontage. As there is no proposal to sever this lot, Buildings confirms that the variance remains as follows: "The required minimum lot frontage for a semi-detached house is 6 metres for each dwelling unit, a total of 12m frontage is required. The proposed lot frontage is 9.48 metres." … In order to assist TLAB with the question asked by Mr. Makuch about frontages, staff have set out the unit frontages (6.38 and 3.10 metres). These measurements do not include the actual width of the rear dwelling, which is largely located behind the front dwelling." (2018 Witness Statement of Paul Johnston)

The Response at para. 18 as well cites the clarification received from City Buildings that dwelling unit frontage is not regulated. At para. 32 c., the Response acknowledges this was "a fact that was never accepted by Mr. Holtam and Mr. Venema". Apparently so; however, the TLAB is obliged to rely on the findings of the Plans Examiner and it is the Applicant that bears the risk should there be an error.

On this basis I am not prepared to find either that a variance was missed or that the Member misdirected himself or did anything beyond consider the evidence of the standard of lot sizes within the 'character of the area' assessment - and building presentation to the streetscape, all as directed by the Official Plan.

Certainly, there is insufficient substance in the concerns raised to be compelling and conclude a different decision would result.

d., e., and h. Neighbourhood Totality, Area Character and Precedent. The Member makes the finding (Decision, page 5 of 7) that the proposed building respects and reinforces the character of the neighbourhood. He had heard the evidence and visited the neighborhood. While he might well have been more rigorous in the description and expression of his findings, it is clear the Member was alert to the considerations and addressed the Official Plan criteria, albeit without detail.

The issue of the concern for precedent is a real and present matter worthy of consideration. There is the appearance here that semi-detached dwelling units on the same lot could constitute an enterprise having scope for repetition. However, it is not clear whether this aspect was raised, pressed and ignored or was simply not an issue. In any event, no evidence germane to the assessment or demonstration of precedent implications was called to my attention and I am not at liberty to speculate on its presence or importance. With certainty from the Request submissions I am not able to conclude it could have been a matter or error capable or likely of changing the decision.

The Request questions the assessment of area character, argues that a 22 year old apartment building should not be listed or identified as an element of the existing physical character - as well as raising the rhetorical question spectre of potential precedent. The Request, in my view on this issue, is asking for little more than an opportunity to introduce new evidence or reargue the evidence, place different emphasis on it or introduce a consideration in the Review of a subject not dealt with favourably by the Member. I agree with the Response, para.32 h., that it is not an error of fact to recite the existence of an Apartment building. Re-argument is not the purpose of a Review or the Response; nor is there an error that is compelling for which a different order or decision would have resulted.

f. Variances not Required. The Request suggests that the planner's conclusion, drawn from no 'side yard', 'building length', 'rear yard' or 'height' variances, infers no impact is an error of logic and an opinion, not a fact.

Even if the Member ascribed weight to these assessment comments, there is no error warranting review. A Planner is entitled to form an opinion that the absence of certain characteristics of built form - that deliver massing – and that the same negates any argument of undue adverse impact. The premise is that compliance with the zoning regulations axiomatically is impact acceptable. It is for the trier of fact to assess this evidence; to consider it credible or disregard it, in weighing the concern for massing as expressed both by Mr. Holtam and Mr. Venema, and perhaps others.

Planning decisions frequently rest on opinion evidence, professional and lay. It is not for a Review Request to entertain a refutation of opinion evidence, but rather to identify and evaluate alleged errors in its consideration. None were present on this issue.

g. PPS and Growth Plan. I have read carefully the phrasing of this example ground of error and can give it no weight; the Request misstates the tests and distinguishes between the 'application' and the 'variances' in a non-meaningful way.

In law, the trier of fact must, on a variance application, be satisfied the variances are 'consistent with' the PPS and 'conform to' the Growth Plan. These are statutory directions and supplement the '4 Tests'. There are other considerations imposed, as well.

The variance application and the variances sought are an identical.

I am not prepared to substitute the opinions of the Request stating non-compliance. The findings of the Member raise, address and conclude that the tests, policy and regulatory are met. While there could have been fuller and greater communication of the reasons and weight preference where contrary evidence is resolved, this was not the essential element of the Request; rather, it sought to reargue the findings in the Decision, not the limited support basis. It is sufficient to conclude that no relevant consideration was identified to be absent giving rise to a ground for review.

DIRECTION (IF APPLICABLE)

I have examined the matters raised in the Review Request and considered them, individually and collectively.

I find that none of the separate matters or their overall import amount to an eligible ground to find relief under Rule 31.

It is clear that the proposed change to the built form on the lot has caused apprehensions not just to the immediate neighbours but also to a wider community of interest.

I find those considerations were heard and considered in concluding a disposition that is somewhat overly brief in explanation. However, I can find no error in the Request as presented that warrants the intervention requested.

The relief also sought the addition of conditions that might be warranted so as to preserve some of the concerns for loss of light reaching adjacent properties. I have no evidentiary basis presented to frame such conditions. I also note that the built form proposed, in appearance, has few if any of the characteristics demonstrably present in *40-42 Elmer Avenue.* Without evidence or comparative similarities, I have no authority or basis to embark on an exercise of crafting site specific conditions.

I do note a request by Urban Forestry that its standard conditions be imposed; there is nothing in the Decision that addresses the Urban Forestry request and I did not see on the face of the record its release.

DECISION AND ORDER

The Decision is varied to add to Appendix 2 the following conditions:

1) Submission of complete application for permit to injure or remove privately owned trees under Municipal Chapter 813 Article III, Private trees.

2) Where there are no existing street trees, the owner shall submit a payment in lieu of planting one street tree on the City road allowance abutting each of the sites involved in the application or elsewhere in the community if there is no space. The current cost of planting a tree is $583.00, subject to changes.

In all other respects, the Request is denied, and the Decision is confirmed.

If there are difficulties arising, the TLAB may be spoken to.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord