

REVIEW REQUEST ORDER

Review Issue Date: Tuesday, February 05, 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): FRANK PLESKO

Applicant: EPIC DESIGNS INC

Property Address/Description: 56 FRANCES AVE

Committee of Adjustment Case File Number: 17 119727 WET 05 CO, 17 119731 WET 05 MV, 17 119732 WET 05 MV

TLAB Case File Number: 17 216598 S45 05 TLAB, 17 216599 S45 05 TLAB, 17 220424 S53 05 TLAB

Decision Order Date: Monday, December 17, 2018

DECISION DELIVERED BY Ian James Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for review (Request) made under Rule 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB). The Request is made by Frank Plesko (Requestor), also the Appellant in the above noted matter and a resident at 58 Frances Avenue, adjacent 56 Frances Avenue (subject property).

The Request was made by Affidavit (Form 10) sworn January 7, 2019 and was received by the TLAB on the same day, within the limitation period set by the Rules.

BACKGROUND

The matter that is the subject of the Request concerns the amending Decision and Order of Member S. Gopikrishna issued December 17, 2018 (Decision) in respect of the subject property. The Decision amends and supplements a decision by the same Member issued July 30, 2018 (Original Decision) in respect of the subject property. The Original Decision allowed the Requestor's appeal, in part. It approved the severance of the subject property and disallowed height variance requests while confirming the decision of the Committee of Adjustment (COA) on several other variances.

The Decision, as stated, amends the Original Decision by approving specific wall height variances, confirms the Original Decision in respect of its severance and variance approvals and the dismissal of an overall height increase. As well, it substitutes revised plans to give effect to the amending decision showing a revised roof plan, from a flat to sloped roof presentation.

The Requestor in a very succinct affidavit, cites Rule 31.7 c) and e), reproduced below and requests the Review of the Decision on the following ground, which I reproduce in its entirety:

“Having read the amended decision document, I feel Mr. Cheeseman's statement, within the Evidence Section, “the Appellant opted for a sloped roof instead of a flat roof” could have influenced the amended decision. I want to be clear I never stated anything regarding roof preferences at the July 26, 2018 meeting. The issue has always been about the height of the sidewalls. Mr. Cheeseman's statement implies I approve of the height as long as the roof changes. This is not the case. I am still opposed to the height variances requested in the amended decision.”

The Requestor acknowledged that he was not present at the December 6, 2018 meeting convened to address the height variance outstanding issues. No explanation for this non-attendance was provided as part of the Review.

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

Counsel for the Applicant, Mr. Cheeseman also made brief but unsworn submissions on the Request in which he made two points:

1. “It would seem very strange to have a party complain about a Decision that was issued out of a proceeding that he chose not to attend, even though as a party he had the obligation to appear.”

2. "The Member refers to a statement I made indicating that the "Appellant" opted for a sloped roof instead of a flat roof. In fact, I was acting for the "Applicant" that opted for the sloped roof instead of a flat roof.

He asserts the complaint reference to "Appellant" is "simply a typographical error made by Member Gopikrishna".

I have reviewed the submissions and filings around the Original Decision and the Decision.

It is clear from a reading of the Original Decision that the Appellant Plesko objected both to the severance and to the requested increases in height permission (to 9.7 m) of the proposed flat roof building typology. He shared success in the Original Decision in that the height variances were refused.

The Applicant, in the Original Decision, was placed under a regimen to submit revised elevation plans. In meeting that commitment, the Applicant, through Mr. Cheeseman, advised that the revised plans were available but compliance with the Decision was not possible "without the necessity for an additional variance to the by-law to allow for the height of the main wall of the dwelling units."

He requested an opportunity to speak to the matter.

This correspondence, dated September 7, 2018, was directed to the TLAB and Mr. Plesko, with copies to others.

Subsequently, the TLAB confirmed an in-person meeting to be held on the request, on December 6, 2018.

This correspondence, dated September 25, 2018, was directed to Mr. Cheeseman and Mr. Plesko, with copies to others. There is no denial that it was received.

The Decision recites that the meeting was convened on December 6, 2018 at which the Applicant was present with Mr. Romano, the professional planner who had given evidence leading to the Original Decision. At issue was to consider not a request in building height beyond that permitted by the by-law for which Mr. Plesko was previously successful, but to consider a resultant new variance to side wall height arising from the revised plans, all to avoid an absolute height variance previously refused. The new variance, entertained and approved by the Member on the evidence presented, was for permission for the side exterior walls facing a lot line to be "8.37 m on the south side and 8.46 m on the north side", despite the by-law maximum of 7.0 m.

It was open for the Member to consider this revision both by virtue of the provisions of the Planning Act, section 45 (18.1), but also to conclude that appropriate notice of that consideration had already been given.

It is not the place of a review request to entertain relief that is simply intended to give a Party an opportunity to re-argue a case they wish to make. Far less is it the prerogative of a review request to permit that to happen in a circumstance where the Requestor, without explanation, had declined to appear, inform himself or provide any input into the revised relief that had been invited - or input into the plans associated with the Applicant's response to being denied an absolute height increase.

I cannot agree that the statement recited by the Requestor is anything more than a typographical error. The Member had counsel for the Applicant before him and heard the evidence of the Applicants' planner, Mr. Romano, also present in attendance.

It was apparent that the Appellant was not present.

It would be speculation to imagine that the Member was attributing 'appellant' status to the Applicant, since it was the Applicant's request for a meeting to deal with a matter, building height, upon which the Applicant was unsuccessful in the first instance.

In any event, I am not prepared to attribute any weight whatsoever to the reference to "Appellant" as it is abundantly clear in the Decision that the Member knew exactly what was being addressed before him and by whom.

The mis-statement, if it was one, as to who it was that was projecting the plans and relief requested by them, in a pitched roof design, does not rise to establish that the Member either:

c) made an error of law or fact 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. (emphasis added).

I find that neither of these grounds have been established.

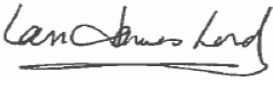
The Requestor, Mr. Plesko, pleads that his issue has always been about the height of the side walls. That may well be the case, although it is not patently clear on the record, other than by assuming the concern with the absolute height of a flat roof design translated into a parallel concern with the height of the supporting side walls.

I accept that Mr. Plesko remains opposed to the side wall height variances requested. His opportunity to dispute that was present in the December 6, 2018 Hearing convened to address the subject and to which he did not attend, without apparent explanation.

The failure to exercise one's rights for which adequate notice was given is not a basis for any remedy available on the Review.

DECISION AND ORDER

The Decision issued December 17, 2018 is confirmed.

X 

Ian Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord