**Toronto Local Appeal Body**

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# REVIEW REQUEST ORDER

**Review Issue Date:** Wednesday, December 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): SARVEN CICEKIAN

Applicant: ALI GOUDARZI

Property Address/Description: 610 SOUDAN AVE

Committee of Adjustment Case File Number: 18 159008 STE 22 MV

TLAB Case File Number: **18 246242 S45 22 TLAB**

**Decision Order Date:** Monday, November 11, 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. Gopikrishna on November 11, 2019 (Decision) granting for the property address, above (subject property), an appeal by the Appellant, Sarven Cicekian.

The Request was submitted via Mr. Al Kivi on behalf of the South Eglinton Ratepayers and Residents Association (SERRA) dated on December 9, 2019, and supported by his Affidavit.

There were no other Party or Participant submissions on the Review; City Planning Staff were not present on the appeal of the original relief requested. While City Legal Counsel participated in the appeal Decision, counsel declined to call evidence and, as stated, did not participate in the Review.

The matter is considered under the Rules of the TLAB in force prior to March 6, 2019, given that the initial request for the some eight (8) variances preceded the new TLAB Rules promulgated on that date.

The variances requested were to allow the construction of a new two-storey detached dwelling with integral garage. The Decision twice recites the variances in detail; the Affidavit, consisting of 38 paragraphs, lists them at paragraph 5 as:

a) An integral garage;

b) The required side yard setback for a rear platform without walls;

c) Front yard landscaped and soft landscaped open space (apparently released or satisfied);

d) Projection of eaves on the east side of the dwelling;

e) Maximum permitted floor space index;

f) Maximum height of the building and side exterior walls; and

g) Maximum building depth.

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

## BACKGROUND

The Hearing consumed three (3) days and the TLAB Member heard from three witnesses: Mr. Michael Goldberg, R.P.P., on behalf of the Appellant, Mr. Al Kivi, on behalf of SERRA and Ms. Joan Pilz, an immediate neighbour. As well, three (3) written submissions were considered on behalf of the Appellant, the City and from Mr. Robert Brown for his client, Ms. Pilz.

At the Hearing apparently the Party Rayburn Ho did not appear despite filings. The City appeared and participated actively in cross examination and submissions through counsel.

I have reviewed carefully: the Request (38 paragraphs, two authorities): the Decision; the extensive filings on the TLAB website, including the support materials filed by or on behalf of the witnesses and Parties; the revisions thereto; the Exhibits filed and the sole 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:

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 Request specifically cites as a basis for consideration paragraphs 31.7 b) and c), cited as 31.25(b) and (c), employing the numbering of the Rules applicable post March 6, 2019. The substance of the language referenced is identical. The Request is sufficiently clear as to the associated allegations so as to permit each of these to be considered in turn.

At the outset, as has become the custom, it is appropriate 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 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, 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

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 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 Tribunal.s (I believe you are referring to the TLAB specifically, if not, disregard) mandate, including its own deliberations.

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

The two principle 'grounds' and supporting elements advanced in the Request:

1. Violation of natural justice and procedural fairness for the failure to provided reasons for the Decision (Rule 31.7 b));

2. Error of Fact and Law which would likely have resulted in a different Final Decision and Order (Rule 31.7 c)).

A new oral Hearing is requested.

I address each of these in turn in the order addressed in the Review Request..

**A. Ground #1: Error of Fact and Law – Failure to make a Finding on the Ordinary Meaning Interpretation of Davisville Village By-law**

The Request cites the zoning history and provisions to the effect that within a defined geographic area, effectively 'integral garages' are "not permitted." It asserts that the planner Goldberg held the opinion that this by-law provision "was meant as a "guideline" and could be varied by the TLAB". Further, that prior to 2017 there was no prohibition on integral garages. It cites this latter recollection as an error that the "Chair may have relied on" as an incorrect statement (Request, para. 19).

Apparently seminal to the concern raised is that the Member failed to reconcile or make a finding on "the key matter in issue (was) whether the ordinary meaning of 'not permitted' should apply in this case," presumably as distinguished from 'prohibited'.

It is suggested this failure is an error of law (Request para. 23).

I think it self-evident from the position of SERRA that the principle objection taken was to the proposed integral garage and its consequential implications on design, built form, height, bulk and massing.

There was no pre-hearing conference in this matter that clearly articulated an Issues List. It is apparent that the Hearing proceeded on the basis of addressing the several variances requested and their support rationale, in support and opposed.

There is nothing in the Decision that supports the proposition that a specific distinction was requested to be resolved between the statutory interpretation of the words "is not permitted" and the descriptive language of 'prohibited' or 'proscribing the feature in question'.

It is accepted that in the world of restricted area (zoning) by-laws, absolute prohibition of all uses is not contemplated (*R. v. Schatz);* while there are some circumstances in section 34 of the *Planning Act,* where absolute prohibition is contemplated – principally areas of environmental significance – the independent jurisdiction under section 45 exists permitting applications for relief.

It is clear from the outset of the Decision that variance 7 requested was to permit "a vehicle entrance through the main front wall of a residential building": an integral garage (Decision, p.3). Indeed, the Decision recites on the same page that the "key difference" between the Parties was the issue of the integral garage.

The Decision involves 19 pages of evidentiary description of which the majority recites the focused evidence on this issue, its physical implications, approach, neighbourhood attributes, their measures and assessment of compatibility as well opinion evidence on the applicable tests relevant to that main as well as the other variances.

I see no undertaking on the part of the Member that accepts the Requests submission that a finding was owing on this distinguishing definition between a use not permitted and one that is prohibited - and that it would be made. Rather, I find that the Decision identifies and addresses the 'key differences' between the Parties and makes

a finding on the matter remitted: whether a variance to relax the By-law restriction on the permission of integral garages is appropriate in the circumstances.

If there is a distinction between 'is not permitted' and 'is prohibited' I find that it was not called upon to be addressed in the Decision. It is not an error of law to not address a matter not piqued and agreed to be resolved; the matter in issue is addressed directly and resolved, albeit contrary to the Requestors position.

Unlike *521 Hillsdale Avenue East,* the matter is not raised as a jurisdictional issue. Clearly the *Planning Act* affords an applicant the right to seek a variance from the language of a zoning provision.

**B. Ground # 2: Error of Law – Failure to make a Finding on a Key Planning Principle**

The request argues that a principle test of a variance approval is maintaining the general intent and purpose of the Official Plan. Further, that it follows in applying that test there must be a definitive determination of what the text of that Official Plan is, and that it applies.

In the Application before the Member, the Applicant's planner took the position that the application preceded the adoption and final approval of OPA 320 and ought to be considered in light of the policies in place at the time of the Application, at least insofar as local policy is concerned. The Decision recites that the Applicant's evidence also commented favourably on the application of OPA 320 whereas those in opposition eschewed the application of the *Clergy Principle.* They favoured the application of OPA 320 as it was substantively present in the Staff Report supportive of the Davisville Zoning By-laws instituting a restrictive permission for integral garages, by location and lot frontage, and was in full force and effect at the time of the Hearing.

The Member was fully alert to the distinction and undertook an arguably novel approach to its resolution. He found compliance with the Official Plan of the day and a failure to demonstrate on adequate grounds a proper application of OPA 320 that constituted a compelling basis on planning principles that mitigated against the variance, especially in respect of the integral garage permission sought.

During the transition between evolving policies, it has become established administrative law practice to apply the *Clergy Principle* to allow evidence and opinions on both Official Plan texts, while acknowledging that the evolving policy is instructive but not determinative.

Despite being differently phrased and labeled as a 'Bottom up' approach, I find that this is exactly what the Member did: he heard all related evidence on both sides of the issue and evidence on policy application and made a definitive finding that the application of policies in OPA 320 was defective or unsupportable on a 'crucial' delineation on Geographic and immediate area context basis; he accepted the only professional planning advice that the Official Plan intent and purpose was being maintained. The Official Plan does not speak to 'integral garages' or any particular form of parking accommodation; he was satisfied, on the evidence of area character, that

over an appropriately defined area that area character was being reflected, respected, reinforced and maintained by the Application as framed, including the integral garage.

Again, the failure to make a ruling on a particular articulation of a requested finding that was not piqued and accepted in advance is not an error if the essential application of the test is addressed with evidence on all relevant considerations.

I see no error of law in the approach formulation as articulated and applied and certainly no compelling a basis that would have led to a different Order or Decision.

**C. Ground # 3: Denial of Natural Justice and Procedural Fairness – Lack of Adequate Reasons**

The Request raises as a ground for review that the 'reasons' given in the Decision are inadequate, at least insofar as they relate to the 'key matter in issue', the integral garage (Request, para. 29).

The Request cites a portion of a passage (Request, para.29; Decision, page 16) that the Member would "follow the reasoning in *401 Balloil* to conclude that the methodologies that need to be fulfilled by an integral garage…are..a recommendation". It then asserts that the Member did not itemize the reasons that are associated with the methodologies and that "an itemization should include a comparison of the facts in each case and the governing Official Plan" (Request, para. 30).

The Request cites that there were "no photo's, maps or charts that would support detailed analysis and comparison with the referenced *401 Balloil* decision" (Request, para. 31).

It then cites an extensive passage from this Member's Decision in *521 Hillsdale Avenue East* wherein I supported a consistency in approach where similar circumstance decisions are called to the Member's attention in a subsequent Hearing. I stated that in such circumstances 'comments and reasons are warranted, especially with similar fact subject matter for properties located in the same general area and subject to the same development considerations'.

In *521 Hillsdale Avenue East*, a Review Decision, I found that the shortness of that decision was entirely inadequate to express any rationale that supports, in a replicable manner, the reasons as to how the disposition was reached.

In my view, the challenge raised in the Review is not that circumstance or it is otherwise misguided. What is essential is that a Member address the appeal before him or her and articulate cogent reasons as to why and how the decision, an administrative and discretionary decision, is arrived at. This tells the 'loser' why it is that a 'loss' was incurred.

I believe the Member provided ample support for his conclusions incorporating the evidence and the variances.

The fuller passage reads as follows:

> "While the Appellants argued that there was no blanket ban on integral garages, and that the "guidelines" set forth in the Staff Report had to be satisfied for an integral garage to be allowed, the Opposition was vehement in their submissions about "prohibition" of integral garages. After reading the Davisville By-Laws, and the Staff Report, I conclude that while integral garages are no longer as-of-right, they are not completely prohibited - **the key learning from the Staff Report is that a set of guidelines need to be followed by residents of the Davisville community, interested in incorporating an integral garage into the design of their house.** I add that not prescribing a given feature, such as an integral garage, or preventing residents from having the feature as-of-right, is not tantamount to proscribing the feature in question; the reason is best explained by the colloquialism about there being many shades of grey between black and white.
>
> I follow the reasoning of 401 Balliol to conclude that the methodologies that need to be fulfilled by an integral garage, as discussed in the Davisville By-Laws are closer to a recommendation, rather than a separate test. Given this conclusion, no weight is assigned to the evidence of the opposition with respect to the interaction of the Zoning By-Laws and the Integral Garage. On other variances, I note that Mr. Goldberg thoroughly explained how the requested variances satisfy the corresponding performance standards, and that there was no questioning from the opposition, except the length of the building. I was satisfied by Mr. Goldberg's explanation about how the impact of the requested 18 length of the house, would be comparable to the allowable 17 m length.
>
> Based on this evidence, I conclude that the proposal satisfies the test of upholding the intent of the By-Laws." (Decision, pages 15 and 16; the test of 'minor' and 'desirable/appropriate' follow in subsequent passages). Emphasis added.

From these passages and the balance of all of the "Analysis, Findings, Reasons" component of the Decision, I find appropriate consideration was given *to the application on appeal,* with replicable reasons making ample reference to the evidence accepted and rejected.

In my view there is no doubt that the Member addressed his mind to the evidence on each of the relevant tests and provided a reasoned rationale for the disposition.

What the Member did not do is draw an analytic comparison with another decision, *401 Balliol,* and provide a blow for blow list of similarities and distinctions. This was not called for as *401 Balloil* was not relied upon for its factual *precedent* basis, but rather for the *approach* it adopted. That approach was to consider as relevant the criteria of applicable planning principles, expressed in the Staff Report recommending the Davisville By-law, and apply them, as circumstances warrant, to the Application on appeal. These criteria are the '*methodologies'* that the Member addresses in his Reasons to dispose of the appeal. He accepted that approach of individual consideration over the concept of an absolute ban on integral garages

I find the criteria referenced to be relevant considerations although they do not warrant formal classification, such as 'policy' or Official Plan 'Guidelines', being contained in a Staff Report that has since been superseded by the enactment of the Davisville Zoning By-laws.

I see no merit in a criticism of the Decision arising from a failure to distinguish factual similarities or distinctions between two area examples of similar fact applications, where that factual distinction plays no role in the decision.

I find that the Member was consistent in adopting and following the methodology of considering the planning considerations earlier identified as relevant to this specific form of relief requested – an integral garage. On the evidence, these considerations were the subject of opinion evidence throughout the Hearing. The reasoning approach and its application is to be distinguished from the factual evidence comparison expected in the Request. The latter was not necessary to consider and weigh the evidence on the matter before the Member and does not appear to have been relied upon.

The Member followed the same reasoning approach as was employed in *401 Balliol* and, in my view, adopted a consistency that was appropriate. He did that in the context of the consideration of all the related and unrelated variances engaged by the appeal, albeit some not challenged by the Requestor.

I see no denial of natural justice or procedural unfairness in not providing a catalogue of similarities and differences for a prior decision that was not relied upon for its specific findings on area character.

## DIRECTION (IF APPLICABLE)

In the result, I find there was no obligation on the Member to make findings or statutory distinctions never crystalized and accepted as issues to be resolved provided all aspects of the appeal are addressed on relevant considerations.

I find that there are ample reasons provided in the adoption of a thorough recitation of aspects of the evidence and the Member's conclusions on the applicable tests. The Davisville By-laws provide a genuine and legitimate circumscription on the provision of integral garages but do not preclude either the application for exceptions or their consideration on proper principles of community planning.

## DECISION AND ORDER

The Request for Review is denied.

The Decision is confirmed without revision.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord