Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Wednesday, December 04, 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): Souvik Mukherjee

Applicant: Stavros Theodorakopoulos

Property Address/Description: 120 Hendon Ave

Committee of Adjustment Case File Number: 18 254749 NNY 23 MV (A0776/18NY)

TLAB Case File Number: 19 113459 S45 18 TLAB

Decision Order Date: Friday, June 07, 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. Talukder (Member) on October 25, 2019 (Decision) refusing, in part, for the property address above (subject property), an appeal by the Appellant/owner, Souvik Mukherjee.

The Request was submitted by the Appellant/owner received by the TLAB on November 19, 2019 and supported by the owner's Affidavit dated November 21, 2019, the dates themselves being something of an anomaly.

There was one other Party submissions on the Review: the City of Toronto (City) responded with a reply submission and affidavit of Ms. Ameena Khan affirmed November 28, 2019. The appeal Hearing heard three witnesses on behalf of the owner. City Staff, a solicitor and planner, were also present on the appeal and had reported in opposition to the original relief requested; the City actively participated before the Member on the appeal. There was one other Participant or person active on the appeal to the TLAB, Mr. Andrew Lee, as detailed in the Decision.

Only the City elected to participate in the Review Request.

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

The variance originally as requested was to allow the re-construction to a flat roof on an existing garage structure or building, by the replacement of an existing, aged, peak roof structure and an existing front dormer.

The application was revised in the course of its evolution as detailed in the Decision. The revisions modestly reduced the proposed height, eliminated elements that related to privacy and responded to, apparently, a City Plans Examiner's advice that additional variances be sought to recognize and maintain existing conditions respecting the proximity of the existing garage to the lot lines.

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

1. **Chapter 10.5.60.20.(2), By-law No. 569-2013**

   If an ancillary building or structure is located on a lot with a lot depth greater than 45 metres, and its height is greater than 2.5 metres or its floor area, including areas for the purpose of parking, is greater than 10 square metres, the minimum rear yard setback for the ancillary building or structure is equal to half the height of the ancillary building or structure 3.35 metres.

   The proposed rear yard setback for the ancillary building is 1.02 metres.

2. **Chapter 0.5.60.20.(3), By-law No. 569-2013**

   The minimum side yard setback for an ancillary building or structure in a rear yard and 1.8 metres or more from the residential building on the lot is 0.3 metres.

   The proposed east side yard setback for the ancillary building is 0 metres.

No issue was taken in the Review with either of these variances allowed by the Member; presumably as a precaution, these variances were part of the Review Request, but the Decision is not sought to be altered with respect to them.

Effectively, if the Decision stands, these variances permit the recognition of the location of the existing garage building.

The Request targets the third variance that the Member did not support:

"The appeal with respect to the following variance is denied:

3. **Chapter 10.5.60.40.(2), By-law No. 569-2013**

   The maximum height of an ancillary building or structure is 4.0m. The proposed height of the ancillary structure is 6.65m."

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

Responses were allowed upon receipt.

The formal Request is that all the variances be allowed on the appeal, or that a new Hearing be ordered before a different Member.

BACKGROUND

The Hearing consumed at least the day and the TLAB Member heard from two qualified professional planners, one in support of the appeal (Ms. K. Pandey), one opposed (Ms. A. Khan), and a neighbour (Mr. A. Lee) to the rear of the existing garage, in opposition.

The TLAB also heard expert testimony on behalf of the Appellant on land use planning evidence (Ms. C. Winsborough) on sun/shadow studies and a construction specialist (Mr. R. Dalla-Zuanna).

The maximum height of an ancillary building or structure is 4.0m. The height of the existing structure in a peaked roof configuration exceeds the zoning permission. The proposed height of the ancillary structure is 6.65m, contemplated to be designed as a flat roof.

I have carefully considered the Request (29 paragraphs, authorities referenced), the Decision, the extensive filings on the TLAB website including Committee of Adjustment (COA) filings and its decision mailed January 31, 2019, the support materials filed by or on behalf of the witnesses, the Motion decision issued April 10, 2019 and, again, the November 21, 2019 Affidavit supplied in support of and constituting the Request, as well as the City Reply and Affidavit. 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;
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> b) the grounds for the request;
>
> c) any new evidence supporting the request; and
>
> d) any applicable Rules or law supporting the request.
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> **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 (para.4) specifically cites as a basis for consideration paragraphs 31.7 a), 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, while they are addressed in a different order, 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 Participants. Although the latter are 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, the Request itself and the City Response.

1. Challenges of the violation of the Rules of Natural Justice and Procedural Fairness

There are two instances asserted under this ground:

a) The placement of the Applicant's planning witness under cross examination prior to a break and the failure to accord the same treatment to the City planning witness, thereby in the one case prohibiting discussion with the witness, but allowing such in the case of the latter, an "impairment to procedural fairness." (para.9)

b) The Member purportedly afforded different treatment to the recognition of witnesses as 'experts' in a manner indicative of 'pre-formed opinion' or 'bias', based on the presence or absence of academic qualifications.

It is not necessary for me as the reviewer to listen to the digital audio recording to deal with the nuanced difference in the stated treatment of witnesses entering cross-examination. The law is clear that when under cross-examination, unauthorized contact between a witness and counsel is forbidden. The point of entry into cross-examination can vary with the circumstances. Where a counsel is finished with a witness in-chief, that admission may give rise to a Member to invoke the no communication rule, prior to a break – either on request or on own initiative. The consideration is not mandatory and I am not prepared to make it so, despite the City commentary on the applicable Rules of the Law Society. There may well be instances where, in anticipation of a break, counsel may wish to leave open the prospect of concluding examination-in-chief thereafter. The temporal circumstances can easily differ and the discretion and courtesy of a Member's treatment may go either way. I see nothing in this ground that offends the TLAB Rule 31. 7 b).

The City Reply deals with this aspect in its paragraphs 5-11, calling the claim of the Request a "serious and baseless accusation". I am content to give it no weight.

The matters of witness credentials and the acceptance of expertise is a 'gatekeeper' function of the Tribunal. It simultaneously performs at least two principle roles: attributing recognition and potential weight to fields of enterprise of recognized academic or experiential practice; and assuring, including to the public, a distinction is notionally drawn between those who are attributed 'expert' status and those who offer opinion advice based on own recognizance but without the necessity of an informed background or the disciplined structure and organized accountability of a professional association with disciplinary powers.

The planning profession has members ascribing to membership in the Ontario Professional Planners Institute. This membership corporation has a Professional Standards Board offering academic quality assurance program accountability and a professional Code of Conduct, the standards of which are applicable to candidate members. Similarly, other professions have membership accountability standards and the Ontario Home Warranty legislation offers accountability standards for members.

In addition, the TLAB Forms requires a sworn attestation by a claimed professional that their primary duty is to independence, the assistance of the Tribunal and to acknowledge and apply the public interest – a differentiation from lay citizen obligations.

Once the professional qualifications are established, I see nothing in the Member's alleged remark, especially following acceptance by the Appellant as underscored in the City Reply, and as recited in the Request (para.11). At best, assuming it occurred, it was an unfortunate and unnecessary quip, but fully consistent with the qualification assessment process.

Persons wishing to challenge the credentials of a professed expert are entitled to do so. Challenges to a witness's credibility, independence, character and such like

matters are to be identified in advance prior to the sitting; challenges to qualifications may arise during the witness tendering process; and challenges as to the evidentiary submissions are the grist for cross-examination.

There is nothing in the Decision that supports the suggestion that the Member required "a Master's Degree" as a basis for professional recognition (Request, para.14). The evidence of Mr. Dalla-Zuanna was heard and apparently accurately recorded without challenge in the Request.

On the issue of legal non-conforming protection, the Member found that the statutory protection applies to the use of the land, building or structure, a matter or subject not challenged in the evidence (Decision, para. 33). The Application and appeal is in relation to performance standards under zoning, not use. There is nothing in that determination that constitutes a commentary on or the use of the qualifications of the witness, his expertise or any bias against the academic standards of the witness.

The Member made her determination based on the relevance of the evidence and the statutory basis of her jurisdiction to consider the relief sought. I see nothing in this ground that offends the TLAB Rule 31. 7 b).

2. Challenges of Acting Outside of Jurisdiction

It is asserted under this ground that the Member exceeded her jurisdiction in writing in the Decision: "it is not clear why a flat roof of height 6.65 m is desirable instead of a flat roof with a height of 4 m" (Decision, para. 36).

Respectfully, this is not an error of jurisdiction but an effort to challenge or re-position the evidence at the Hearing. The Member was asked to consider the merits of a height recognition of 6.65.m configured as a 'flat roof'. The height maximum for an accessory structure under the zoning, from which relief was sought, is 4 m, however configured. The City Reply also states this fact as a relevant consideration. In comparing the Application to the zoning, the Member was performing exactly what the statute directs: an assessment of the merits of the Application and its differential from zoning in all its ramifications - on provincial policy, the statutory tests and having regard to the COA decision.

Comparing as-of-right conditions to the proposal is not an iterative process of reacting to an evolving application, the evidence as tendered or the questioning by a Member during a Hearing. The Member was not satisfied with the rationale or support justification for the increased height configured as proposed. I see nothing in this ground that offends the TLAB Rule 31. 7 a).

3. Challenge of an Error of Fact or Law which would likely have resulted in Different Order or Decision

There are two instances asserted under this ground:

a) Failure to consider the evidentiary foundation for the variances;
b) Failure to reference the evidence correctly on the visibility of the garage.

Both these aspects are focused on the presence of evidence, the appreciation or weight of the evidence, its articulation or the lack thereof. Such matters are relevant to a Review Request in limited circumstances of new, false, misleading or irrelevant consideration evidence.

Where there is an appreciable identification of conflicting evidence that is not resolved, referenced or ignored, there is an obligation in the Request and on the reviewer to distinguish the alleged grounds. Otherwise, the prohibition on simply re-arguing matters decided unfavourably to the Requestor applies.

This consideration under the Rule requires the reviewer to accept that: it has been demonstrated that there was an error of fact or law; that it is of a compelling nature, and; that it would likely have resulted in a different order or decision.

The Member opined that “no specific attempt was made to analyse available data or compare this proposal with the height and massing of other garages in the neighbourhood” (Decision, para. 39).

The Request states that the Appellant’s planner did address a ‘qualitative and quantitative analysis’ (Request, para. 18) by stating in her evidence that the subject garage ‘was the only two-storey garage in the study area – a ‘short but powerful analysis’.

The Decision reviews the Appellant’s planning opinion evidence on neighbourhood character compliance in significant detail (Decision, para 11-19).

I accept that there is no reference to the asserted evidence of Ms. Pandy as having no neighbourhood comparable. I accept that that can be a foundation fora factual error on the complaint as to the absence of analysis of ‘available data’. There is, however, considerable discussion by the Member in the recitation of the evidence that goes to the assessment of area character and impact assessment criteria that led the Member in the direction of the ultimate disposition. On this basis, I agree with the submission of the City (Reply, para. 20), that there was a considerable amount of planning evidence on neighbourhood character, demonstrated in the Expert Witness Statements as well. Further, that the issue of neighbourhood character and ‘desirability’ turns on ‘many factors’ (City Reply, para. 21) and cannot be reduced to a single consideration.

Would acknowledgement that there were ‘only two garages in the study area’ and their character attributes have led to a different decision? I find no compelling basis for that conclusion. Indeed, it is not asserted by the Requestor. There is simply the lament that the absence of reasons to support the side and rear yard variances had little or no Decision reasons, whereas this identified evidence of other garages was not weighed.

The reference to the side and rear yard variances is spurious; these are existing conditions which the Member recognized, without extensive or any reasons, that should be weighed heavily in favour of the Appellant/owner. There is no standard in length or substance as to the ‘consistency’ of reasons or evidentiary considerations applicable to variances that have entirely different origins.

I am not convinced that the absence of a reference and consideration to garages in the neighbourhood amounts to a compelling error that would or could have changed the Decision, and it is not so asserted. I see nothing in this ground that offends the TLAB Rule 31. 7 c).

I also accept the City Reply exposition on the issue and evidence of the 'drainage' reference. In the absence of compelling evidence of drainage as a factor tied to a variance, the subject matter of drainage controls is normally the prerogative of the City Buildings Department, in the oversight of building permit compliance.

The Request also asserts that the Member incorrectly employed a definition, on language attributed to the Applicant's planner, referencing the relative 'obscurity' of the garage from a street view perspective (Decision, para.19).

Different definitions of the meaning of obscurity are referenced but not tied to the Member's disposition in a meaningful way.

It is argued that an entire section of Ms. Pandy's evidence on the zoning test and the 'desirability' test was not addressed, including: opinion evidence on height and streetscape effect; desirability; letters of support; benefits; and improved drainage.

It is observed that the 20 week delay between the Hearing and the Decision may have led to the omission to reference this evidence and that the attribution of zero weight, in the absence of a reference, is an error that would likely have resulted in a different order or decision.

While I appreciate the arguments, I find they have no substantive support. The existing garage is visible from the street. Its visibility in its entirety is obscured in part by the existing residence and driveway overhang, but only in part. The issues identified, and others including height, shadowing, privacy adjustments, are acknowledged as part of the evidence in the Decision and were not left unreferenced. Their employment in the reasons is open, transparent and replicable: it simply led to a different appreciation and conclusion to that supported by Ms. Pandy or desired by the owner.

It is the Member's prerogative to attribute weight to evidence heard.

The owner has built a prestigious residence of a flat roof design and it is easy to link the need to rebuild or repair the garage in a similar style as a legitimate objective.

It is apparent from the reasons that the matter of design or the improvement of the garage structure in the location of that existing building was never in issue. It is the height proposed in the configuration requested that was the subject of the Decision.

The Decision assessed, that on an individual and cumulative basis the variance of the proposed height was not supportable. I see no error in the reasons provided in reaching that conclusion, a discretionary decision arrived at on all relevant considerations.

Again, not every point in evidence has to be addressed by the Member provided there is an awareness of relevant considerations and no mis-direction or irrelevant considerations that appear determinative.

I disagree with the submission that the Decision paints no replicable path. The Decision accepts much of the evidence in support of the proposal.

I see nothing in these grounds of alleged factual error that offend the TLAB Rule 31. 7 c).

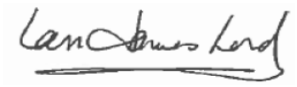
The Decision in the result recognizes and maintains a substantial garage structure, and permits its repair and maintenance in its historical location. It permits its reconstruction, including a flat roof, to zoning by-law accessory building standards, as varied by the acceptance of location variances.

The positions of the Parties is well expressed in the materials and I am appreciative of the focus and the brevity of the submissions.

DECISION AND ORDER

The Request for Review is dismissed.

The Decision is confirmed.

X 

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