Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Monday, December 02, 2019

PROCEEDING COMMENCED UNDER section 53, section 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): CHARLOTTE SHEASBY-COLEMAN

Applicant: VICTOR HIPOLITO

Property Address/Description: 11 STANLEY AVE

Committee of Adjustment Case File Number: 17 267606 WET 06 CO, 17 267617 WET 06 MV, 17 267618 WET 06 MV

TLAB Case File Number: 18 135459 S53 06 TLAB, 18 135460 S45 06 TLAB, 18 135463 S45 06 TLAB

Decision Order Date: Monday, January 21, 2019

DECISION DELIVERED BY DINO LOMBARDI

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request/Request for Review) pursuant to Rule 31 of the Rules of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB) made on behalf of Giuseppina Deo (Requestor), a Party and the owner of 11 Stanley Avenue (subject property).

The Request consists of an affidavit (Form 10) sworn by Eliott Cheeseman, a Student-at-Law with Russell Cheeseman, Barrister and Solicitor, retained by the Requestor, sworn on February 19, 2019. The 10-page Affidavit includes the following attachments:

- **Exhibit A** – An Interlocutory Decision and Order issued by Member Yao on September 21, 2018 permitting a Participant (Craig Goodman) to testify as an

"opinion" witness as well as a "fact" witness to give opinion in the area of "*architecture, with a perspective on urban planning*."

- **Exhibit B** – A Ruling following the Interlocutory Decision, issued on January 4, 2019, delivered by Member Yao in respect of this matter;
- **Exhibit C** – The final Decision and Order in respect of the subject application issued by Member Yao on January 23, 2019 allowing the appeal, refusing the applications for consent and variances, and setting aside the Committee of Adjustment decision of March 8, 2018.

A well prepared 'factum' of some 20 paragraphs accompanied the Request (Submission).

The Owner/Requestor, Ms. Deo, had sought severance of the subject property and associated variances to permit the erection of a new detached residential dwelling with an attached garage on each of the new lots created.

On March 8, 2018, the COA approved the consent and variance applications, subject to conditions. Ms. Charlotte Sheasby-Coleman, the Appellant in this matter, appealed the COA decision to the TLAB and a Hearing date of September 14, 2018 was set to hear the appeal.

Following four non-consecutive Hearing days (Sept. 14, 2018, Dec. 19, 2018, Dec. 20, 2019, and January 4, 2019) TLAB Member Yao (Member) allowed the appeal, and refused the consent and variances thereby setting aside the decision of the COA.

The Requestor now seeks a review, in respect of each of the following: the member's Interlocutory Decision, his Ruling, and his final Decision and Order (Decision) above referenced, pursuant to Rule 31 of the TLAB Rules. Ms. Deo is requesting a rehearing of the matter before a different Member.

The TLAB recently (May 6, 2019) adopted revised TLAB Rules of Practice and Procedure (New Rules). The New Rules were crafted and perfected following a lengthy public process, and those Rules now apply to all proceedings brought before the TLAB after May 6th. As the subject application and the related motion(s) were commenced prior to this May 6th date, this Review Request is being conducted under the regulations of the previous iteration of the Rules (Old Rules) antecedent the original appeal application was submitted to the TLAB by the Applicant.

Service is a condition precedent to a validly constituted Request, but only on Parties as outlined in Rule 31.3. There is no obligation on a Party or Participant to respond to a Review. However, by service and posting on the TLAB website, all Parties and Participants are on Notice that the Decision has been challenged. The Rules do not prohibit the right to contribute to that consideration. However, it is to be noted that, because of the initial election made, a Participant cannot initiate a Review as a

Participant enjoys only prescribed and limited privileges within the current Rules of the TLAB, at the original Hearing.

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

The grounds for relief and the available remedies under Rule 31.6 are below recited, under the heading 'Jurisdiction'. However, there is a significant and somewhat complex context to this matter antecedent this Review Request requiring a broader explanation which I provide in the following section.

BACKGROUND

The Owner of the subject property requested that the COA grant her a severance plus a number of associated variances to facilitate the construction of the two proposed dwellings. The most important variances are for the lot frontage, floor space index and exterior main wall height which, together, will permit two houses with integral garages, with four feet between the new houses.

Germane to this matter is the application for 15 Stanley Avenue, the lot immediately to the south of the subject property, where that owner obtained similar planning approvals (consent to sever and associated variances) at the COA, on February 8, 2018. Ms. Sheasby-Coleman appealed both decisions, although for 15 Stanley she did not appeal the variances as a result of what she submitted was a misunderstanding of the process.

On June 29, 2018, she brought a Motion before the TLAB to consolidate both appeals on the grounds that the respective owners of each property had retained the same lawyer (Russell Cheeseman) and planner (T.J. Cieciura). Subsequently, in a decision issued on July 12, 2018, TLAB Member S. Gopikrishna denied Ms. SheasbyColeman's Motion.

On September 14, 2018, the first day of the TLAB Hearing (subject Hearing) for the subject property, TLAB Chair, Mr. Lord, denied the severance of 15 Stanley Avenue, the decision having been released minutes before the commencement of the subject Hearing. In that decision, Chair Lord refused the severance application for 15 Stanley based on tree and environmental-related evidence adduced by Ms. Sheasby-Coleman as well as others.

After obtaining and reading the decision for 15 Stanley Avenue, and just prior to the commencement of the subject Hearing, Mr. Cheeseman requested an adjournment so that he could file an arborist's report that he had commissioned but had not served on Ms. Sheasby-Coleman, the Appellant.

In specifically addressing the decision issued by Member Lord for 15 Stanley at the Hearing, Mr. Cheeseman stated the following:

> *"But Mr. Lord seems to put considerable weight on the fact that an arborist's report wasn't prepared. But in this case an arborist's report has been prepared, because we expect it will have to go through the Tree By-Law process, and this owner chose to do that. We did not file the arborists report, sir, as part and parcel of this hearing, because it hadn't been completed until after the dates for filing had been set. So, sir, given the decision of Mr. Lord which affects the property directly next door and speaks to certain evidence that he would have liked to have seen, that we weren't aware of, that Ms. Sheasby-Coleman hasn't seen the decision, I'm sure when she reads it, she will be glad to read it and understand how the decision was rendered.*
>
> *But today sir what I rise to do is ask the Board to allow me an adjournment to reschedule this hearing. This hearing was not going to finish today anyway, with the witnesses that are to be coming forward, and we know that, because we did have a motion on this file. Ms. Sheasby-Coleman brought a motion to put the two matters together, that motion was fully argued, the decision of the TLAB was to keep them apart, two separate owners, two different matters, because on 15 Stanley [Nunes], the minor variances weren't appealed, . . .so it was just the severance. And as I say I 've only had about two minutes to review the decision very quickly. I've got some concerns with it and I'll have to look at those, but*
>
> *in the interim sir, I would like the opportunity for a motion to adjourn, to bring a motion to allow me to introduce some further evidence, an arborist's report that I haven't disclosed to anybody, I'm quite prepared to do so, given the decision of Mr. Lord, in this case."*

In response, Member Yao queried Mr. Cheeseman as to why he had not served the arborist's report notwithstanding the deadline, to which counsel responded, *"Because in our opinion, sir, it had no relevance before the Board."* (Exhibit B, p. 22)

At the same September 14th Hearing, Member Yao allowed Craig Goodman, who had elected Participant status pursuant to the TLAB Rules, to testify, and he reserved the decision on whether to qualify Mr. Goodman to give opinion evidence in the area of *"architecture, with a perspective on urban planning."* Mr. Goodman is an architect licensed to practice in Ontario, for some 30 years, has attended numerous COA sessions, and was cognizant of planning documents such as the City's Official Plan (OP).

Mr. Cheeseman asked to be able to file case law on the issue and subsequently did forwarded two cases to the Member on September 18, 2018, four days after the completion of Hearing Day 1. He provided the following cover email:

Please find attached the two OMB cases to which I referred. The first is PL140319, concerning 82 Twenty Seventy Street. I have highlighted paragraphs 7 to 11 of Member Whitney-Carter's Decision, which I would like to bring to the attention of Mr. Yao.

The second case is PL140328, concerning 6 Shamrock Avenue. I have highlighted paragraphs 13 to 15 of Member Taylor's Decision, which I would like to bring to the attention of Mr. Yao.

Both cases speak to the principle that the hallmark of an expert is his or her independence from the outcome of the matter.

Our position is neither Mr. Godley nor Mr. Goodman should be qualified as experts in the within matters.

On September 21, 2018, Member Yao issued an Interlocutory Decision (Interlocutory Decision) which permitted Mr. Goodman to qualify himself to testify as an "opinion" witness as well as a "fact" witness and to provide evidence on architecture with a perspective on urban planning. In brief, Member Yao found *that "an architect, whose job consists of designing the physical form of buildings in compliance with the zoning by-law, well situated to give possibly relevant evidence on the issues in this hearing."* (Exhibit A, p. 3)

With respect to the September 14th Hearing, Member Yao ultimately refused the request for an adjournment and ordered the Hearing to proceed on the general basis that *"all parties were ready to proceed and were unusually well prepared, since they had just undergone the similar hearing before Mr. Lord."*

The Hearing of the appeal was not completed on September 14th and, so, a second Hearing date was scheduled for December 19, 2018 (Day 2). On Day 2, Mr. Cheeseman advised the Member that he had filed his Arborist's Report (Report) and that it had been posted to the TLAB website; he requested permission under the Rules to use the Report as part of his case.

Ms. Sheasby-Coleman objected, asserting that the Applicant was, in effect, *"accomplishing by the back door what couldn't be done by the front door."* (Exhibit B, p. 3) She further argued that the date of the Report was later than the September 14, 2018 dated of preparation alleged by Mr. Cheeseman.

Although the Member accepted Mr. Cheeseman's explanation that indeed the Report had been revised, slightly, after September 14th, he issued a Ruling that the Applicant's arborist would not be permitted to be called as a witness and that information in the Report could not be submitted as evidence in the proceedings. In this regard, the Member wrote in his Ruling that, *"Ms. Sheasby-Coleman has already called the City's arborist. It would be unfair to allow the second arborist's findings to be introduced after the City's arborist has testified and who has been cross-examined by Mr. Cheeseman."*

As noted previously, the entire Hearing regarding the subject property required a total of four full Hearing days culminating on the final day of the proceedings on January 4, 2019. In Member Yao's decision issued on January 23, 2019, he allowed Ms. Sheasby-Colman's appeal, and refused the severance and variances requested by the Applicant.

In arriving at his decision the Member highlighted at page 5 (Exhibit C, p. 5), under the 'Matters in Issue' section, that he had considered the adjacent provisional consent received by the owner (Georgette Nunes) of 15 Stanley Avenue, writing "…*it would seem to me to be common sense and the usual practice to consider what is happening right next door. There was only an indication that neither owner objected to the other. Mr. Cheeseman advised me that leave to appeal the decision of Chair Lord in 15 Stanley is being sought in February 2019. The Divisional Court may or may not return the matter to TLAB and I would assume the owners of 15 Stanley are waiting until litigation is finalized. I have decided there is too much uncertainty to delay my decision when no party has asked me to temporize."*

In his comprehensive 21 page Decision and Order (Decision), the Member addressed a number of areas that related to the evidence he heard including: the depiction of the neighbourhood's physical character and lot frontages; heritage landscape issues; urban design considerations; and the impact of the proposed development on existing City-owned and privately-owned trees.

In brief, Member Yao disagreed with the Applicant's planner's assessment that the neighbourhood included an existing character of narrow lots (25 ft. frontages) that the proposed severance will respect. On page 13 of the Decision (Exhibit C, p. 13), the Member wrote in reference to the proposal:

"This is due to insistence on an integral garage, legal but very narrow side yards, and a lack of sensitivity to the built form patterns of the streetscape."

With respect to heritage landscape issues, Member Yao considered the heritage inventory documents, '*Mimico 20 20 Secondary Plan Final Report (Mimico 20/20)* and the *Cultural heritage Resource Assessment'* prepared by URS Canada for the City's Department of Planning, Heritage Preservation Services, tendered by Ms. SheasbyColeman. These documents identified five streetscapes worthy of consideration as Cultural Heritage, including the streetscape "pocket" (Member Yao's word) of Stanley Avenue. The Member also suggested that the documents identified this streetscape as *"ticking three criteria used to indicate significant PCHDs, that is: design; historical theme; and environmental/context attributes."*

He concluded that, as suggested by *Mimico 20/20*, the larger neighbourhood could also be segmented into what he termed as 'sub neighbourhoods', including the section of Stanley where the subject property is located as well as Albert Street, and in

his opinion therefore these streets could potentially be part of a Cultural Heritage District.

With respect to urban design considerations, Member Yao found favour with the evidence presented by Mr. Godley through his mapping of the Stanley Avenue portion

of the 'sub neighbourhood' noted in the paragraph above. The Member agreed that for this 'sub neighbourhood', the prevailing pattern of rear and side yards is as observed by Mr. Godley. Furthermore, he agreed that the rear yard pattern is not respected by a building that increases overhang to the Requestor's property by a considerable amount, nor is a building-to-building distance of 1.2 m respectful of the prevailing pattern of side yards in this area (Exhibit C, p. 19).

In discussing the design of the proposed new dwellings, the Member agreed with Mr. Goodman's (the architect neighbour) assessment that it was the applicant's decision and *"desire to 'squeeze two properties [out of] a current single dwelling that has exaggerated many complex and competing design treatments."* (Exhibit C, p. 18) He also agreed with Mr. Goodman's statement that the fundamental decision to build approximately 100 m^2 on two levels above grade with an integral garage on two 25-foot lots *"is at the root of the resulting negative design solution."*

Finally, regarding the impact of the proposed development on existing trees and the impact of OP policy 3.4 with Policy 4.1.5, the Member acknowledged on page 20 of the Decision that *"This is a complex issue with no easy one-size-fits-all answer."* That reference related to the conflicting evidence provided by Dr. Max Dida, City Urban Forestry, relative to that of the Applicant's planner, Mr. Cieciura.

Mr. Dida asserted that the development *"may require the injury or removal of a healthy City-owned tree as well as the possible injury or destruction of privately-owned trees*" whereas Mr. Cieciura concluded that in-lieu planting of replacement trees was always *"adequate mitigation."* (his words)

Ms. Sheasby-Coleman concurred with the opinion of Dr. Dida and took the position that even if one tree is injured, the proposed development should not take place.

In the end, Member Yao agreed that Ms. Deo's proposal does not provide a suitable growing environment for trees or increase the tree canopy and concluded that *"It does not meet the affordable or accessible goals of the Growth Plan in a meaningful way, which might offset this lack of 'environmental friendliness'."*

The Review Request

Subsequently, the owner submitted a Review Request on February 19, 2019, requesting a review of the Interlocutory Decision, the Ruling and the Final Decision. The Requestor asserted the following grounds for the Review, which I summarize below:

I. The Arborist Report

The Member refused the request for an adjournment of the Hearing in order that Mr. Cheeseman might call an arboriculture witness as well as refusing to call the arboriculture evidence (the subject of the Ruling). In addition, the Member ordered the Hearing to proceed on September 14th, stating that *"all*

parties were ready to proceed and were unusually well prepared, since they had just undergone the similar hearing before Mr. Lord re 15 Stanley Avenue (my addition)."

Additionally, the Requestor asserts that the Member erred in making a determination that the Applicant's proposal does not provide a suitable growing environment for trees or the replacement of tree canopy.

II. Wrongly Qualified Experts, Wrongly Admitted Evidence, and Prejudice

It is the Requestor's position that the Member incorrectly allowed a witness, Craig Goodman (Mr. Goodman), to be qualified as an expert and to provide opinion evidence on architecture with a perspective on urban planning.

Furthermore, the Affiant argues that Mr. Goodman *"did not possess the 'independence' (Mr. Cheeseman's word) required of an expert witness and that his opinion was not "fair, objective, and non-partisan."* (Affidavit, para. 10) This position also applies to Mr. David Godley (Mr. Godley) who the Member qualified as an expert and allowed opinion evidence as a 'local expert'.

III. Independence of the TLAB Member Yao

The Member's incorrect declaration on page 6 of the Final Decision (Exhibit C, p. 6) that he (Member Yao) is "answerable" (Affidavit, para. 13) to Toronto City Council (Council) who appointed him to the TLAB as a Member as opposed to being "independent" and administering "a fair hearing."

IV. Deficiencies in Decisions

The assertion by the Requestor that Member Yao misinterpreted and effectively 'made up' (Affiant's words) his own evidence during his analysis of the "reports" begins on page 11 of the Final Decision.

Mr. Cheeseman argues that the Member further misinterpreted the evidence presented by Mr. Cieciura, who was qualified to provide expert opinion evidence in land use planning, and the Member's suggestion that the witness was an 'advocate' (the Mmeber's word) for the Owner (Ms. Deo) and that he attempted to 'justify' (again, his word) the proposal.

The Affidavit contends that the Member's position highlighted in the above paragraph ultimately resulted in prejudice to Ms. Deo.

V. Heritage Neighbourhood Confusion

The Member incorrectly misunderstood the evidence presented by Ms. Sheasby-Coleman (Appellant) that the subject neighbourhood is considered a

potential Cultural Heritage District as a result of the document, *Mimico 20/20*. That document was submitted as part of the Appellant's and her son's evidence at the Hearing. The Member also should have known the status of *Mimico 20/20* and should not have given any weight to its contents.

This assertion of misunderstanding exhibited by the Member stems primarily from the concluding section of the Final Decision, where the Member wrote, *"I find the proposal fails…This finding is supported by a comprehensive analysis of social, economic, urban design, natural environment and heritage conservation factors."*

The Requestor argues that this conclusion would have been "impossible (his word) to arrive at if the Member had relied on the only expert evidence presented at the Hearing."

Ms. Sheasby-Coleman's Response to Request for Review

The Appellant filed a Response (Response) to the Request for Review with the TLAB on March 19, 2019. In that response, she argued that the Request did not meet the requirements of TLAB Rule 31.7 which she noted requires that reasons and evidence attached to any grounds for a Review Request must be "compelling', a test she contended has not been met in any way.

She also argued that the request to a rehearing of the matter before a different Member shows clear disregard for the TLAB process and results in financial and personal costs to everyone involved, not the least of which is the Tribunal itself. She addressed the following three specific points from the Requestor's Affidavit in her response and asks that these be considered in arriving at a decision regarding the matter.

a. The Arborist Report and Request for Adjournment

The Appellant highlights numerous items in a chronological manner addressing this issue including: the fact that as far back as the Committee of Adjustment hearing the Applicant was aware of urban forestry matters and the Applicant declined to defer the matter on the request of Urban Forestry staff; the Applicant had a clear 'heads up' that resident objection to the proposal related to urban forestry/tree matters; and that she had filed a Request to Summons the Urban Forestry Supervisor, Dr. Max Dida, on July 23, 2019, thereby alerting the Applicant that "urban forestry matters would be front and centre."

The Appellant also asserted that she brought a Motion on June 29th to consolidate the hearings for 11 Stanley and 15 Stanley based, in large part, on the overlap between the two applications noting "that the Appellant would ...for the most part offer the same evidence in each case." She argues that this effectively speaks to the Applicant's lack of preparedness to deal with the issue of trees in this matter.

With respect to the Applicant's request for an adjournment of the proceedings in order to file an arborist's report after the disclosure due date had passed, she argues this is a "clear attempt to circumvent TLAB Rule 16.2." (Response, p. 3) She submitted that adherence to Rule 16.2 was demanded of her by the Applicant in a late submission filing in the 15 Stanley Avenue application and therefore the Applicant is being disingenuous.

Nevertheless, she provided the following statement of Member Yao found in his Interlocutory Decision of January 4th summarizing the interaction he had with Mr. Cheeseman as evidence of the lack of import the Applicant placed on urban forestry concerns with the proposal:

"At this point I asked Mr. Cheeseman why he had not served the (arborist's) report notwithstanding the deadline. His answer was 'Because in our opinion, sir, it had no relevance before the Board (sic)'." (emphasis added by the Appellant)

She noted that when the Applicant filed the arborist's report (December 11, 2018) no Expert Witness Statement or any witness statement for that matter had been submitted in conjunction with that material as required by TLAB Rules 16.6 and 16.7. Ms. Sheasby-Coleman also submitted that the Affiant's statement in paragraph 8 of the Request for Review suggesting that the testimony of Dr. Dida was "called out of order" is, in her words, 'simply a red herring.'

b. The Evidence of Mr. Craig Goodman

The Appellant asserted that the Requestor made several "untrue and misleading statements" about Mr. Goodman and the evidence he provided relating to whether the

subject proposal would have a direct effect on his property (54 Albert Street) and whether, as the Affiant asserted, his Participant Statement (Form 13) showed a 'clear indication of Mr. Goodman's bias towards the development'.

She noted that the materials (e.g., Form 4, Form 13, Letter of Objection to the COA) filed by Mr. Goodman would have allowed the Requestor to become familiar with his background and objections to the proposal, and that this information was further revealed during cross-examination by Mr. Cheeseman at the Hearing.

The Appellant also suggested that although the Applicant filed an Expert's Witness Statement for an Architectural Technologist (Victor Hipolito) to give evidence regarding aspects of the proposal related to architecture and urban design, Mr. Hipolito was never called by Mr. Cheeseman. In fact, Ms. Sheasby-Coleman submitted that Mr. Hipolito made a brief appearance on the last day of the proceedings (Hearing Day 4) only upon direct request by the presiding Member and simply to answer several clarifying questions.

c. Mimico 20/20 Cultural Heritage Assessment

Ms. Sheasby-Coleman submitted that the Requestor's attempt to discount the significance of the cultural heritage attributes in the immediate vicinity of the subject proposal is unwarranted.

The Appellant's Response to the Request for Review precipitated a series of emails between the Applicant and Ms. Sheasby-Coleman. In an email dated April 30, 2019, from M. Deo (apparently Ms. Deo's son) the Applicant acknowledges the Appellant's 'response', states that they intend to respond "by the end of the week, Friday, May 3, 2019," and requests that *"TLAB staff grant us time to submit our response and confirm receipt of this correspondence, as you did for Charlotte (Ms. Sheasby-Coleman)."*

On May 2, 2019, Ms. Sheasby-Coleman writes that her Response was submitted to all the Parties *"a full 42 days ago"* and questions why Ms. Deo has not responded and furthermore, why it is acceptable to respond at this late date.

She also raised the issue that communications from the Applicant were being authored by a 'Mr. M. Deo' who, she insisted, *"has never been a Party to this matter."*

In a subsequent email dated May 3rd, authored by M. Deo and signed from 'The Deo Family', Mr. Deo writes that they will be responding to the additional issues and comments raised by Ms. Sheasby-Coleman in her May 2nd correspondence because *"…her representation cannot go unanswered as it contains important inaccurate information."*

The Deo Family responds on May 6, 2019 and files with the TLAB their response to Ms. Sheasby-Coleman. For brevity, their response can be summarized as follows:

- At no time after the Request for Review was filed did the TLAB seek written submissions from either Party, as stipulated in Rule 31.6. Consequently, Ms. Sheasby-Coleman is not entitled to make submissions, yet alone opine on whether the Applicant's grounds for review were 'compelling' unless those submissions were specifically sought by the TLAB.
- Her Response is improper, contrary to the TLAB Rules, an attempt to 'skirt' the Rules' and should not be considered by the TLAB in the Review Request.
- The Applicant, Ms. Giuseppina Deo, is over 80 years old and has instructed her family to act on her behalf.
- The Appellant continues to be opposed to the introduction of an arborist's report notwithstanding her professed concerns about the environment.
- In the interest of fairness, the Applicant should be allowed a further response to Ms. Sheasby-Coleman's Response and subsequent correspondence in this regard which they did by attached a Schedule "A" to their May 6th email.

Ms. Sheasby-Coleman responds to the communication from the 'Deo Family' in detailed correspondence (dated May 6th) in an email on May 9, 2019 to the TLAB and Mr. Cheeseman. In that correspondence, she opposes the Deo Family's most recent submission asserting that it is *"improper, vexatious and misleading and is in clear violation of the established Rules as adopted by the Local Appeal Body pursuant to the Statutory Powers Procedure Act."*

She addresses three main aspects of the May 6th Deo Family correspondence, as follows:

- *Challenge of Appellant's Right to a Response for Review* – she submitted that the argument presented by the Requestor regarding her right to respond "is incorrect" (her words) and that there is nothing in Rule 31.6 or in any part of Rule 31 that disallows a response to a request for review from a Party. To bolster this assertion, she highlighted several TLAB Request for Review Decisions that she maintains show that "such responses are not only allowed but that they are commonplace." These Decisions include: 30 Westridge Drive (Dec. 20, 2018); 116 Briar Hill (Jan. 8, 2019); 54 Maresfield Drive (March 8, 2019); 56 Seymour Avenue (Nov. 28, 2018); 629 Rushton Road (Oct. 2, 2018); and 70 Laburnham Avenue (Dec. 4, 2018).

  Additionally, she noted that she clearly articulated to the Applicant one day after the Request for Review (Form 10) had been filed that she intended to respond and had a right to do so. This was done through emails to TLAB staff and Applicant's counsel.

- *The Deo Family Assertion that Non-Parties Have a Right to participate in TLAB Matters* – Ms. Sheasby-Coleman highlighted TLAB Rules 12, 13, and 14 and challenges the participation of other Deo Family members as part of the matter before the TLAB arguing that Giuseppina Deo is the only one to have elected Part status. She submitted that the May 6th correspondence on behalf of the owner of the subject property came from Ms. Deo's son, Mario, whose corporate address appears on the TLAB application (Form 5).

- *False Representation Contained in the May 6th Deo Submission* – She suggests that in their submission, the Deo Family has "presented false and misleading evidence and maligned my integrity and character citing the offending paragraph (p. 2, para. 4). Ms. Sheasby-Coleman asserts, with some fervour, that the Deo Family has never been her neighbours and the Family has not contacted her since the COA hearing to "understand her concerns" and "to attempt to resolve this matter amicably."

She concludes the correspondence by arguing that the Deo Family's May 6th submission is a *"blatant attempt to re-argue evidence that was well examined during four days of our TLAB hearing" and is "…completely antithetical to the request for review process at TLAB."*

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

I have now carefully reviewed the Request, the Decisions, both the Interlocutory and Final, the January 4, 2019 Ruling, the extensive filings on the TLAB website including the support materials by or on behalf of the witnesses, and the February 19, 2019 Affidavit in support of the Request.

I have also attended on the site and the surrounding neighbourhood.

The Request is sufficiently clear as to the associated allegations so as to permit each of these to be considered in turn although I note there is some overlap in the stated grounds.

However, prior to considering the grounds it is necessary to deal with the myriad assertions made in the additional correspondence identified as the response to Ms.

Sheasby-Coleman's Response to the Request for Review, the Deo Family's response to that Response, and Ms. Sheasby-Coleman's 'response to Communication from the Deo Family'.

The Requestor asserts that the Appellant's Response to the Review Request is improper, contrary to the TLAB Rules, and that Ms. Sheasby-Coleman is not entitled to make submissions on the issues raised in the Review Request. Interestingly, however, the Requestor requested that since the TLAB accepted her Response, and in the interest of fairness, they should be able to respond to this "in the same manner that Ms. Sheasby-Coleman's 'response' was processed." That is exactly what happened.

With respect to the Appellant's right to respond, I agree with the Appellant that there is nothing in Rule 31 that disallows a response to a Request for Review and, in fact, as highlighted in the TLAB cases identified by Ms. Sheasby-Coleman, such correspondence is often allowed by the presiding Member. The TLAB requires a Request to be served on all Parties and such service is considered a prerequisite to a validly constituted Request.

While there is no obligation on a Party or Participant to respond to a Review, by service, all Parties and Participants are on notice that the Decision has been challenged. Therefore, I agree with the Appellant that a right exists under the Rules to contribute to that consideration.

Regardless, the Requestor was given the opportunity to file a 'response' to that Response and address the issues raised by the Appellant, which I have now taken into consideration in this matter. As such, I agree that her Response to the Review Request should be allowed and considered.

With respect to the right of family members other than Ms. Deo to participate in this matter on behalf of the Applicant, I agree with Ms. Sheasby-Coleman that the TLAB's Rules, specifically 12, 13, and 14, clearly set out who may engage in a TLAB Hearing. These guidelines specify three explicit categories: Parties, Participants; and

Representatives. Each role is distinct and the Rules, unequivocally, detail the actions required for election.

The requisite form (Form 5) filed by the Applicant indicates only one Authorized Representative, that being Russell Cheeseman, the Applicant's counsel. There was also no one else who elected Party status other than Ms. Deo.

Nevertheless, I accept, as outlined in Schedule "A" to the Deo response to Ms. Sheasby-Coleman's Response, that the Applicant is over 80 years old and that she has instructed her family members, and specifically her eldest son, to act as a conduit between herself and her counsel on her behalf in this matter. Although I am not prepared to make a determination as to how many times or whether, for that matter, the Applicant and Appellant ever spoke to each other about the subject proposal, I agree

that the Applicant's immediate family has a moral right to act on her behalf in attempting to understand Ms. Sheasby-Coleman's concerns regarding the application.

While I understand the Appellant's assertion that there is a Representative duly authorized by the Applicant in this matter and the only communication should be emanating solely from that source, I see no obfuscation, malice or prejudice to the Applicant in allowing correspondence signed 'The Deo Family' as a submission on behalf of Ms. Deo.

I now turn to the Affidavit and the Review Request submitted on behalf of the Applicant. It is clear that a Request for Review is a right provided to a Party to challenge a TLAB decision. That challenge has several caveats that relate to the purpose of the Review and the grounds upon which it is pursued. It is the Submissions that attempt to explain or connect the grounds, as previously recited, to the basis of the Review raised by the Affiant.

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.

However, a Review is not an open invitation to simply challenge a decision with which one disagrees. Rather, there must appear a demonstrable error in the categories identified that warrants relief of the variety provided by the Rule. The Tribunal remedies include requesting additional material or ordering a new Hearing and are ultimately specified in Rule 31.6: "confirm, vary, suspend or cancel" the original decision, if the eligible grounds are met in a compelling way.

The Request before the TLAB seeks a review, in respect of each of the Interlocutory Decision, the Ruling, and the Decision, and a rehearing of the matter before a different Member.

The specific grounds upon which the Review Request is being sought overlaps to a certain degree with the three decisions of the presiding Member, above identified. The Affiant highlights four separate reasons related to Rule 31.7 b), c) and d) which I address below in the order they are presented in the Affidavit

1. The Arborist Report

On September 14, 2018, Day 1 of the subject Hearing, just prior to commencement, Mr. Cheeseman requested an adjournment of the Hearing in order to bring a Motion to adjourn to permit the filing of an arborist's report commissioned by the Applicant but not yet served on the other Party (Ms. Sheasby-Coleman). He said:

> "Subsequent to the committee's decision, an arborist's report was prepared for the purpose of going to the City's alternative process, I'm going to call it side-by-side process under the Trees By-law, to deal with the health of the trees and the impact. As the Board knows, to remove any

tree, or injuring a tree in the City of Toronto, one has to apply for a permit. And we went through that before Mr. Lord, [Interchange establishing that the ultimate decision is City's Council's].

"But Mr. Lord seems to put considerable weight on the fact that an arborist's report wasn't prepared. But in this case an arborist's report has been prepared, because we expect it will have to go through the Tree By-Law process, and this owner chose to do that. We did not file the arborists report, sir, as part and parcel of this hearing, because it hadn't been completed until after the dates for filing had been set. So, sir, given the decision of Mr. Lord which affects the property directly next door and speaks to certain evidence that he would have liked to have seen, that we weren't aware of, that Ms. Sheasby-Coleman hasn't seen the decision, I'm sure when she reads it, she will be glad to read it and understand how the decision was rendered.

But today sir what I rise to do is ask the Board to allow me an adjournment to reschedule this hearing. This hearing was not going to finish today anyway, with the witnesses that are to be coming forward, and we know that, because we did have a motion on this file. Ms. Sheasby-Coleman brought a motion to put the two matters together, that motion was fully argued, the decision of the TLAB was to keep them apart, two separate owners, two different matters, because on 15 Stanley [Nunes], the minor variances weren't appealed, . . .so it was just the severance. And as I say I 've only had about two minutes to review the decision very very quickly. I've got some concerns with it and I'll have to look at those, but in the interim sir, I would like the opportunity for a motion to adjourn, to bring a motion to allow me to introduce some further evidence, an arborist's report that I haven't disclosed to anybody, I'm quite prepared to do so, given the decision of Mr. Lord, in this case." (Exhibit B, p. 2)

When asked by Member Yao why he had not served the Arborist's Report notwithstanding the deadline, Mr. Cheeseman's response was *"Because in our opinion, sir, it had no relevance before the Board (sic)."* (Exhibit B, p. 3)

In the interim, between the first and second Hearing dates, the Report was disclosed by the Applicant and at the commencement of Hearing Day 2 (December 19, 2018), Mr. Cheeseman again requested permission under the TLAB Rules to enter it as evidence. Given that Ms. Sheasby-Coleman objected on the basis that submitting the

Report was *"accomplishing by the back door what couldn't be done by the front door,"* (Exhibit B, p. 3) and the fact that the Member had allowed the Appellant to call the City's arborist, Dr. Dida on Hearing Day 1, Member Yao refused to allow the Report.

In his Ruling, the Member wrote, *"In my view, it would be unfair to allow the second arborist's findings to be introduced after the City's arborist' has testified and who has been cross examined by Mr. Cheeseman."*

The Affiant submitted that the Member made this Ruling despite the fact that Dr. Dida was called *'out of order'* by the Member on Hearing Day 1 to accommodate the witness' schedule, and submitted that if called in normal order he would not have testified until after the Applicant's case had been completed. He disagrees with this

Ruling and with the Ruling to deny the Motion to Adjourn, arguing that both prejudiced Ms. Deo in not being able to call direct evidence on a subject [i.e., urban forestry issues] that the Member ultimately made findings on.

In this regard, he noted that Member Yao, on page 20 of the Decision (Exhibit C, p. 20), wrote*,"Ms. Deo's proposal does not provide a suitable growing environment for trees or increase the tree canopy."*

I am not satisfied that the Member made any significant error, factual or legal, by not allowing the Motion to Adjourn or by refusing to allow the introduction of Arborist's Report or on the evidence available and before him at the time. I also find that the

Member was not deprived of new evidence which was not available at the time of Hearing Day 1, but which would likely have, if allowed, **resulted in a different order or decision**. I agree with the Appellant that the Affiant is attempting to fault the Member for what could be termed "*a failing of the Applicant and her representative."*

The evidence in this proceeding suggests that the Applicant had numerous opportunities to deal with urban forestry matters going back to the COA hearing when Urban Forestry staff submitted clear opposition to the application and requested a deferral on that basis. The impact of the proposal on trees was also a common theme in many of the Participant Statements filed with the TLAB and it appeared to be a critical component of Ms. Sheasby-Coleman's disclosure documents. Furthermore, the Applicant should have been alerted to the importance of urban forestry issues given that the Appellant filed a Request to Summons Dr. Dida.

I also note that it appears the decision by Chair Lord regarding the application for 15 Stanley Avenue impacted the strategy developed by the Applicant in approaching the matter of the impact on trees as part of the subject application. This is clear in that the Applicant stated, and I paraphrase, that they were seeking an adjournment because they were not prepared to deal with the trees, given the decision of Mr. Lord in his 15 Stanley decision.

I agree that the Applicant's request for an adjournment to file an Arborist's Report after the disclosure date is an attempt to circumvent TLAB Rule 16.2 which states that "Parties shall serve on all Parties a copy of every Document or relevant portions of public Documents they intend to rely on or produce in a Hearing and File same with the Local Appeal Body not later than 30 days after a Notice of Hearing is served." In this matter, the due date for disclosure was **June 25, 2018**. The presiding Member has the discretion to grant exceptions or relief to the Rules as he considers appropriate pursuant to the Rule 2.10 but chose not to do so in this case.

With respect to the Affiant's submission that Dr. Dida was called 'out of order' by the Member and that that ruling prejudiced the Applicant, I note that the Applicant did not object to the witness testifying on Hearing Day 1. In fact, Mr. Cheeseman conducted

what appears have been a lengthy and comprehensive cross-examination of the witness which was completed the same day.

2. Wrongly Qualified Experts, Wrongly Admitted Evidence

The Affiant asserts that the presiding Member incorrectly allowed two witnesses, Craig Goodman (Participant) and David Godley, to be qualified as experts and to provide opinion evidence. I deal with each, separately, below in the order they are addressed in the Affidavit.

With respect to Mr. Goodman, the Affiant submits that the Member allow him to be qualified to provide opinion evidence in the field of architecture with a perspective on urban planning. The primary objection appears to be that Mr. Goodman filed neither an expert witness statement as required by Rule 16.6 nor an Acknowledgement of Expert's Duty (Form 6) required by Rule 16.7.

The Affiant concluded that Mr. Goodman has a clear 'bias' (Affiant's word) towards the development as he is a neighbour, will be directly impacted by the proposed development, and is opposed to the application and, therefore, could never be considered a *"fair, objective, and non-partisan"* (Affidavit, p. 6) expert witness pursuant to the TLAB Rules.

The Affiant also asserted that Mr. Goodman is not a planner and that the Applicant is further prejudiced by the fact that the lack of an Expert Witness Statement resulted in an inability to seek out an architect to counter Mr. Goodman's opinions. Furthermore, the Affiant alleges that the Member utilized Mr. Goodman's 'expert' evidence to counter the evidence presented by the Applicant's planner, Mr. Cieciura.

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. Here, the issue of expert qualifications was properly raised, and the Member considered and admitted the witnesses.

I note that Member Yao, in his Interlocutory Decision issued September 21, 2018, provided rather extensive and compelling reasons for allowing Mr. Goodman to testify as an "opinion" witness as well as a "fact" witness. In brief, he allowed Mr. Goodman to testify 'for convenience' (Exhibit A, p. 3) and to reserve the decision on whether he was qualified to give opinion evidence pending the submission of case law as requested by Mr. Cheeseman.

I note that the Applicant had filed an Expert's Witness Statement of an Architectural Technologist, Mr. Victor Hipolito, who stated that he was the designer who prepared the drawings for the subject proposal and would be giving evidence regarding

the drawings. Despite this, the Applicant made the decision not to call Mr. Hipolito, although he did attend the last Hearing day on a request from Member Yao.

With respect to Mr. Godley, the Affiant asserted that the witness also failed to file an expert witness statement or an Acknowledgement of Expert's Duty prior to appearing before the TLAB, and that he made 'several incorrect statements' (Affidavit, p. 6) at the Hearing.

On September 18th, Mr. Cheeseman forwarded two cases of the former Ontario Municipal Board (OMB): *82 Twenty Seven Street*, *PL140319*; and *6 Shamrock Avenue, PL 140328* to the presiding Member. Both cases speak to the principle that the hallmark of an expert is his/her independence from the outcome of the matter.

The submitted cases deal specifically with the Board's decision regarding allowing Mr. Godley to testify as an opinion witness. Although he was not allowed to testify in *82 Twenty Seven Street,* in 6 Shamrock Avenue the Board Member allowed Mr. Godley to discuss his evidence and compare it with other qualified opinion witnesses. Member Yao determined the Board's ruling *"in effect admitted Mr. Godley's evidence provisionally, but after doing so found it was of little weight."* (Exhibit A, p. 3)

Member Yao's Ruling, which generally discusses both witnesses, is focused primarily on Mr. Goodman's fitness to give opinion evidence. In reading and re-reading that decision, I do not disagree with the Member's reasoning for qualifying the witness. The fact is that Mr. Goodman was not qualified as a planner, as acknowledged by the Affiant on page 6 of the Affidavit. Mr. Goodman was an architect licensed to practice in Ontario, for some 30 years, and, as Member Yao noted in his Interlocutory Decision, was *"cognizant of planning documents such as the Toronto Official Plan through continuing education and self-study."*

As such, I agree with the Member's statement about Mr. Goodman that *"I found that an architect, whose job consists of designing the physical form of buildings in compliance with the zoning by-laws, is well situated to give possibly relevant evidence on the issues in this hearing."*

In his Decision, Member Yao goes to great lengths to provide a very thorough analysis of the TLAB Rules related to an expert's duty and the mandatory content of an expert's reports, contrasting the Rules (16.7 and 16.8) with those of the Rules of Civil Procedure. The Member, rightly so in his Decision, notes that Mr. Goodman did not hide the fact that he lives in the neighbourhood (54 Albert Street) but not close to the subject property and Mr. Cheeseman did cross examine him on this issue.

In the end, Member Yao concluded that Mr. Goodman's Participant Statement is equivalent to an Expert's Witness Statement Form 14 and that there has been substantial compliance with TLAB Rule 16.7. I also concur that under TLAB Rule 2.9 and s. 28 of the *Statutory Powers and Procedure Act*, substantial compliance with a rule is sufficient.

As to the Affiant's assertion that Member Yao "*used Mr. Goodman's evidence against the evidence presented by Mr. Cieciura, and misstated Mr. Cieciura's evidence on page 9 and 10 of his Decision"* (Affidavit, p. 6), the presentation of opinion evidence is weighted by the presiding Member in a hearing and one can be preferred to the other in arriving at a decision.

I disagree with the Affiant that the Member misstated Mr. Cieciura's evidence; the Member simply provided his interpretation of the evidence of the planner as it relates to the existing neighbourhood character.

With respect to Mr. Godley, I do not find that the Member incorrectly allowed him to be qualified and to provide opinion evidence as a "local expert" as the Affiant asserts. Member Yao, in his January 23, 2019 Decision (Exhibit C, p. 5), clarified that *"…he (Mr. Godley) could give limited opinion evidence, subject to weight."* I find that this acknowledgement by the presiding Member functions as a caveat indicating that the witness' evidence would be considered with the discretion of the trier of facts.

I accept that Mr. Godley was never qualified to give expert testimony on land use planning matters. I find the Member was consistent on the definition of the weight preference to be given an expert on the matters within their discipline and field of expertise, by study or experience. The description the Member gave Mr. Godley suggests he was not so qualified.

The TLAB has, time and again, been called upon to recognize 'local knowledge experts'. While not recognized in the Rules then applicable to the Hearing, it is clear that Mr. Godley did demonstrate knowledge on the subject matter for which he was qualified, and the Member so found.

While a citizen is not precluded from having opinions including on matters of land use planning and urban design, it is for the Member, the gatekeeper of qualifications, credibility assessment, and the weighing of opinions to sort distinctions in the evidence. The TLAB has developed a practice of providing some leniency to the application of its Rules in the interest not just of hearing from engaged citizenry, but also to ask questions and to give evidence, opinion and factual.

The matter of weight given to the opinion evidence, without notice, is also a matter of discretion to be afforded to the Member, although that discretion is not completely unrestricted. As a matter of principle, the Member is open to accept 'qualified' lay citizen evidence over that of a qualified practicing professional in circumstances where the justification of that decision is clearly articulated, as it was in this proceeding.

Therefore, I find no error or ground established on the issues of 'qualification', 'admitting evidence', and prejudice experienced by the Applicant resulting from this decision.

3. Independence of the TLAB Member

The Affiant asserts that the Member incorrectly characterized his relationship with and duty to Toronto City Council as a Member of the TLAB, implying that he is somehow "answerable" (Affiant's word) to Council and is not an 'independent' Member. The Affiant asserts, therefore, that the Member was unable to 'administer a fair hearing' and arrive at an independent decision.

There is no specific reference in the Affidavit to a particular statement in the Decision in this regard, although I believe this refers to the following paragraph on page 29 (Exhibit C) where Member Yao wrote:

> "I am appointed by Toronto Council which expects me to administer a process which is accessible to ordinary residents. A person like Mr. Godley, who has studied and thought about urban design, surely has information to assist me; indeed, in my experience, urban design is under-represented in the various viewpoints brought to the table. But neither a qualified expert or non-expert witness can usurp the ultimate question that Council asks the TLAB to answer and it is through this lens that I received the evidence of Mr. Godley."

While I concur with the Affiant's statement that, *"as part of his duties as a Member, Mr. Yao is required to evaluate the merits of a proposal for consent and minor (sic) variances against the legislation"*, I do not agree with the Affiant's interpretation of Member Yao's statement, above. I find no evidence that the Member was anything but independent in this matter. I am satisfied that he conducted a fair and transparent Hearing arriving at a judicious decision, and I take particular umbrage with the Affiant's inference at paragraph 13 in the Affidavit that if Member Yao cannot be independent he should not be a TLAB Member.

4. Deficiencies in Decision

The Affiant asserts that the Member 'misunderstood', misinterpreted' and/or 'made up' his own evidence during the Hearing and in his Decision. I address each of these assertions briefly, below.

i. The Affidavit refers to page 11 of the Decision and a discussion regarding photo 3. The Affiant suggests that Member Yao compared the layout of the lot and the house in the photo to the proposed development and that *"the Member went on*
to discuss the 'measurements' of the house in picture 3, and, ultimately, made a decision based on this made-up information."

In fact, the 'measurements' that Member Yao compared were similar variances and the Member simply made a visual assessment of side yard setback describing it as "generous" to the abutting neighbour. I find nothing onerous in such an informal description of a side yard condition, an assessment often made by Members purely on an observational basis.

ii. The Affiant submits that the Member misunderstood the evidence relating to 'Affordability and Accessibility' and concluded that affordability and accessibility are a vitally important piece of any proposal. In this regard, the Member's statement in the Decision (at p. 7) is highlighted, *"…part of the intensification debate is the encouragement of rental or affordable, which this is not. Another part is accessibility, which is so important that it is in the preamble in 51(24) [Planning Act]:..."*

If one reads the remainder of the paragraph containing the above referenced but abbreviated quote highlighted by the Affiant, the Member was assessing the debate amongst the Applicant's planner (Mr. Cieciura), the Appellant and Mr. Godley regarding the planner's assertion as to how the proposed development addressed the issue of accessibility as it relates to supporting the intensification policies in the provincial policies and the OP.

In the end, as is his prerogative, Member Yao preferred the opinion of Mr. Godley that *"the 'gentle intensification' proposed by Ms. Deo is but one factor in the Official Plan. It can be neutralized by finding that the physical form fails to respect and reinforce the existing physical character of the neighbourhood."* I find this to be a cogent and appropriate statement and assessment relative to the statutory tests of the *Planning Act and* part of the evaluation by a Tribunal Member of the merits an application required by the legislation.

iii. The Affiant asserts that the Member 'misinterpreted' Mr. Cieciura's evidence suggesting that the planner was attempting to "justify" the approvals (consent and variances). Again, I find little evidence of this in the Decision; rather, the Member is simply stating his interpretation of the evidence being provided and there is no attempt to disparage the planner. The philosopher Thomas Aquinas wrote, *"…those whose opinions we share and those whose opinions we reject; both have labored in the search for the truth, and both have helped us find it."*

I am satisfied that the Member duly considered and appropriately weighed the evidence heard from Mr. Cieciura and gave it due consideration in evaluating the applications before him.

5. Heritage Neighbourhood Confusion

The Affiant asserts that the Member incorrectly misunderstood the evidence presented by the Appellant relative to the *'Mimico 20/20'* document and the neighbourhood in which the subject property is located as being a potential Cultural Heritage District. The Affidavit states that the document was never given status at the Hearing, and the Applicant had no opportunity to verify the document's contents or authenticity through a cross examination of the author. The submission is that the Member should not have given any weight to the document.

Member Yao addresses this matter on page 16 of his Decision (Exhibit C, p. 16). The analysis includes a footnote explaining that *Mimico 20/20* is an evaluation of the Built Heritage Resources within the one block section abutting Lakeshore Avenue from Park Lawn to roughly Royal York road and he provides a brief historical chronology of the neighbourhood within which the subject property is situated.

He notes that the streetscape from 20 Stanley to 39 Albert Street, which he deduces includes this pocket of Stanley Avenue, is one of the five streetscapes identified in the document, worthy of consideration as Cultural Heritage Landscapes or Potential Cultural Heritage Districts (PCHDs*) "due to their cohesive character and level of integrity."*

Member Yao further suggested that this streetscape is identified in the document as 'ticking' (his word) three criteria used to indicate significant PCHDs: design, historical theme; and environmental/context attributes. As a result, he suggested that *Mimico 20/20* actually imagines that "the neighbourhood includes 'sub neighbourhoods', as a potential Cultural heritage District." (Exhibit C, p.40),such as this section of Stanley and Albert Streets.

In reading the Decision, I am satisfied that the presiding Member understood the status of *Mimico 20/20* in that it was not an official City Council policy document and Council had not taken steps to designate the neighbourhood in question under the *Ontario Heritage Act.* This latter point was confirmed in the Affidavit in paragraph 17 (on page 9). However, Ms. Sheasby-Coleman did provide written confirmation during the Hearing that the document *'Mimico-by-the-Lake Secondary Plan*' was adopted by Council in July 2013.

I find nothing in the Decision to suggest that the Member construed the document to be anything other than an initiative of City Planning staff as part of a planning study of the Mimico neighbourhood including an inventory and analysis of built form in the neighbourhood. The preservation of heritage resources is clearly set out both in the PPS and the Growth Plan as well as the OP and is an acknowledged policy consideration. Cultural heritage considerations should not be discounted even when there is no formal designation.

I find that the Applicant was fully aware that this document might be raised by Appellant and every opportunity was afforded to her by the presiding Member to challenge its significance to and standing as part of this proceeding.

While I agree with the Affiant that the document was on the Member's 'radar' (my word), so to speak, I am not prepared to make a determination as to the weight it was given by the Member. However, I am satisfied that it was one of many pieces of evidence that contributed to the Member's finding as expressed under 'Conclusions' section in the Decision (Exhibit C, p. 20). There, he wrote that the *"proposal fails the*

(sic) the "respect and reinforce the existing physical character of the neighbourhood" test, in light of the detailed built form analysis. This finding is supported by a comprehensive analysis of social, economic, urban design, natural environment and heritage conservation actors", but was not the determining factor.

Based on the foregoing reasons, I find that the Request does not meet the relevance or threshold required under Rule 31 for relief. There is no convincing proof that the Member misunderstood, misinterpreted or wrongly admitted evidence wrongly qualified experts or, for that matter, 'made up' information.

In the result, I disagree with the Requestor's conclusion that the decision arrived at by Member Yao would have been 'impossible' (his word) to arrive at if the Member had relied on the only expert evidence presented at the Hearing. This predisposes that the Member "made an error in law or fact **which would likely have resulted** in a different order or decision." This standard implies that the reviewer must not only be apprised by the Review Request of a law or factual mater of significance but also be satisfied that if an error occurred it would likely have led to a different decision. That threshold is not met in this matter.

As a result, I see no need for further submissions or a further consideration by way of a new hearing to dispose of the Request.

DECISION AND ORDER

The Request for Review is dismissed; the Decision is confirmed.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body