Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, August 06, 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): YEN PING LEUNG

Applicant: KEVIN CHENG

Property Address/Description: 787 DUNDAS ST W

Committee of Adjustment Case File Number: 17 255982 STE 19 MV (A1198/17TEY)

TLAB Case File Number: 18 213028 S45 19 TLAB

Decision Order Date: Thursday, May 30, 2019

DECISION DELIVERED BY Ian James LORD

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for the review (Request) of a decision of the Toronto Local Appeal Body (TLAB) Member Gopikrishna, issued June 26, 2019 (Decision). The Request is made for a review under Rule 31 of the Rules of Practice and Procedure (Rules) of the TLAB, as they then were prior to the May 6, 2019 revisions. The Decision was in respect of 787 Dundas Street West (subject property) wherein the Member dismissed the Applicant/Appellant's appeal from a refusal of two variances under City of Toronto (City) By-law 569-2013. It may be moot that parallel variances were requested for similar relief under By-law 438-86.

BACKGROUND

The Decision succinctly recites the Applicant's objective of the conversion of an existing building "to a hotel, containing six guest suites, and two office units, by constructing a new fire escape structure and stairs…"

It is clear that the requested variance relief relates to the proposed presence and measurements derived 'from the new rear fire escape structure and stairs', and not the hotel use.

It is also clear from the Site Plan accompanying the Application and the appeal, that the existing two storey building and associated front and rear access stairs occupy the entirety of the lot. Only the east side lot line appears to have, as an existing condition, any degree of setback, apart from the stairwell designs and land platforms.

The Member recites the concurrence of the City with the proposal without objection and makes extensive reference to concerns of a neighbour, in proximity, respecting the use and design attributes of the 'new fire escape structure and stairs'.

The only professional land use planning evidence heard was in support of the relief sought on appeal.

The subject property is said to be located in a Mixed Use District (CR), a hotel use is a permitted use and the building exists, subject to renovations for which it is said a building permit has been issued.

The relief sought by the Applications was to permit the 'new fire escape structure and stairs' despite their offence of being in proximity across a lane to a residential district and to the centerline of the lane.

On the evidence recited in the Decision, the fire escape was intended for that 'very specific purpose', that it could be supplemented by a five-foot privacy screen and that the rear façade developments along Dundas Street West reflected the proposal as continuing a 'neighbourhood condition'.

The Case Manager's site conditions map appears to confirm that buildings are constructed from Dundas Street West to their rear property lines and laneway. The residential properties to the south have modest rear yards.

There was no evidence called to the contrary opinion evidence of the accredited witness; however, questions were raised as to potential noise generation, privacy, the potential for overlook and the presence of an exterior 'bell', which, if activated, 'could be heard across the laneway'.

The Member permitted submissions to be made in writing. One neighbour, Mr. Provart, requested conditions should the appeal be allowed, all directed to the avoidance of nuisance.

In repost, the Applicant suggested that the fire escape needed to be designed by an engineer and meet Ontario Building Code and/or Fire Code requirements.

The Member rejected the appeal on all tests, finding that the 'neighbouring conditions 'had not been adequately described in Official Plan terms, that "there are six adjoining overdeveloped properties" for which there had been no evaluation of their "cumulative impact" or the "collective contravention of the By-laws" they represent.

The Member further eschewed the basis for the assessment of no planning impact (no objection) and concluded "there is a significant concern about on-going, adverse impact, which means the test of "minor" is not met".

The Member found the absence of a zoning streetscape analysis and the responsiveness to the design of a 'six-foot privacy screen' to be unsatisfactory, as a design issue, and 'disappointing'. He found the consequential relief to be undesirable.

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

A Review is not the opportunity to reargue a case that should have been made out to the Hearing panel and it is not an open invitation to proffer 'new evidence' that could have been brought forward as a matter of relevance at the Hearing. By the same token, it is the Member that heard the evidence and great deference is owed to that Member except in circumstances where there are of the grounds, above listed, that are made out.

The Request raises five grounds loosely premised on Rule 31.7, above.

It correctly points out "This application only seeks to extend the fire escape stairs, which is lawfully existing as per the issued hotel building permit and previous survey (see: Appendix A", supplied).

I agree that the Decision does not contain express wording as to the focus or of describing the circumstance of the relief requested. This is not necessarily of concern where the reasons for the decision bear direct relevance to the relief requested, are supported by evidence recited as satisfactory to the Member, and considers all relevant considerations while discarding irrelevant matters.

In this regard, the Request challenges this basis and raises the following matters, which I address in turn:

1. **Error of Law #1 and Jurisdiction**

Under this heading, the Request asserts that the Member failed to consider the legal non-conforming use provisions of section 45(2) and 34(9) of the *Planning Act.*

The submission is that the TLAB had jurisdiction to consider the extension and enlargement of the fire escape stairs, as a legal non-conforming use extension in addition to the minor variance relief.

There are several problems with this submission. First, there is no suggestion that relief under these sections of the Act was before the TLAB on the appeal; it is not referenced in the style of cause indicating it was not elected as a

component of the appeal. Moreover, there is nothing to suggest any evidence was called before the Member on this aspect, Finally, there is some doubt as to whether the subject matter of the variances sought would qualify as a matter of protection under these sections. Legal non-conforming use protection extends to the use of a building or structure but not to regulations (performance standards) under zoning, the matter in issue here. Even assuming that a fire escape structure is a 'use' and that the Application could constitute an extension or enlargement of that use, there is no evidence of meeting the qualifying criteria on legal non-conformity nor its continuation.

I find that the raising of a ground of this nature and import, in the absence of any opinion evidence, is insufficient in itself to compel relief.

Even the details of the existing structure and its use are unclear from the Decision and the Request.

2. Error of Law #2: Setback Exemptions and Permitted Encroachments

In this regard, the Request identifies regulatory provisions of By-law 569-2013 pertaining to **'Setback Exemptions from a Lane'** and **'Setback Exemptions for a Side Lot Line'.**

It is stated in the Request that the Decision is silent on these provisions "which were raised throughout the proceeding".

The assertion from the former is that, in the case of the Public Lane setback (Variance #2), no relief is required for the lawfully existing stair and "to any extension above the stairs."

The Request states, in paragraph 27 as follows:

> "27. Strictly falling within these exemptions demonstrates compatibility with (the) Zoning By-law and effectively eliminates the need for variances from the new By-Law 569-2013. Under these exemptions, we would only require variances from the former By-law 486-83."

And, at paragraph 29:

> "29. Rather than refusing the entire application, we request the review of the stair extension with consideration for these exemptions. Such possible consideration could be approving this application with a strict condition that the stairs be built "As-of-Right" within the boundaries and criteria of these Exemptions and Permitted Encroachments."

In my view, the failure to consider a relevant consideration can amount to an error under Rule 31.7 a, b or c. I find no mention in the Decision of any evaluation of these matters of By-law interpretation said to have been placed before the Member.

On the surface, they appear germane. Left unexplained is the status and content of the Examiner's Notice, if any on the Application, and whether the City concurs with the relevance of the submission. As well, there is no statement or evaluation in the Decision as to the status of By-law 486-83 given it being surpassed by the approval, in the main, of By-law 569-2013. Certainly, if no variance is required applicable to By-law 569-2013, the question is begged as to the reasons for its identification in the original relief sought and as a foundation to the appeal.

If the Applicant does not require variances and if By-law 486-83 is no longer in full force and effect, the Decision is inappropriate and needs to be revisited.

In my view, this is not something that can be ascertained in a Review but can be better addressed in a more deliberative forum, with evidence.

3. Error of Fact #1: "Half a Dozen" Adjoining Buildings Overdeveloped and "New Evidence'

In this section, the Request challenges the Member's rationale for disallowing the variances sought based on Official Plan non-conformity tied to area character and the "neighbourhood condition".

The Request introduces significant evidence as to existing conditions, including descriptions, measurements and Committee of Adjustment and building permit plans, - all information that was not placed in evidence before the Member. I do not consider this material to be appropriate for the Review as it was clearly ascertainable before the Hearing and an election made not to present it. It does not meet the test of not being available.

At the same time, I am skeptical that sufficient evidence was tendered to support the Member's conclusions respecting 'overdevelopment' or the finding made of by-law non-compliance. The presence and extent of existing buildings and their lawfulness was not before the Tribunal; their relevance to a stair extension and the contribution to the 'streetscape' of a lane are all elements for which Official Plan policy conformity may have no direct relevance, in the absence of supportive opinion evidence.

Indeed, the Member appears to have reached into the toolkit of irrelevant considerations to draw conclusions on the four tests. The Review raises as a challenge their relevance, accuracy and evidentiary support. The Member extends the representation of nearby properties as being 'overdeveloped' without the benefit of any assessment framework. He then finds fault in there being no information about the impact of the "cumulative overdevelopment on the neighbourhood". Respectfully, there is no alluding to any relevant Official Plan basis for this consideration. The subject property is in a CR designation with generous use and performance standards; moreover, it suggests a burden potentially incapable of assessment.

The Member does not tie a basis for the characterization of 'overdevelopment' to the fact of the existing building on the subject property, or to the fact that the relief

requested pertains to s stairwell, an accessory life safety feature and likely Building Code requirement for a permitted structure/use.

In my view, this topic area raises a failure to consider relevant considerations or a failure to balance the public interests engaged and warrants review. The presumptions of overdevelopment and building illegality made by the Member raises questions of error of fact that could lead to a different conclusion.

I am not convinced that the deference owed to the Member warrants ignoring the absence of evidence to support the conclusion that the intent and purpose of the zoning by-law is not maintained. There is no side yard variance sought and no assessment of the separation distance implied by the lane, rear yards or the accessory structure of a fire escape in the context of the existing building and fire escape. Rather, there was opinion evidence as to its suitability and compatibility subject to design constraints, a supported condition and inferential additional direction available to the Member to ensure even greater compatibility on the advice of the neighbour, Mr. Provart.

In a similar vein, in the absence of any foundation for 'undue adverse impact' (the normal expression of the variance test), there appears no support for the Member's supposition of 'on-going, adverse impact' arising from the planner's comment that the adjacent property is owned by the Applicant and has no complaints.

I fail to see how the absence of a complaint, even if arising through the silence of common ownership, can amount to an actual, real, undue adverse 'impact', one that possesses an individuality of its own and is sufficient to warrant intervention.

4. Violated the Rules of Natural Justice and Procedural Fairness

This ground raises a concern for procedural directions given during the course of the Hearing and to events that preceded the actual Hearing, including the withdrawal from settlement discussions.

In my view, nothing in Paragraphs 37-40 raises even the semblance of a ground under this head of review. The procedures invoked were accepted by the Parties and complied with to the fullest extent of their effort, without any circumscription.

Matters of procedure are for the Member to determine and there is nothing in the Decision or the Request that suggests anything other than an equal opportunity was granted to all.

5. Public Interest and Remedies

In this section, the Request adds no new grounds for a Review but simply reasserts a willingness to afford protection to adjacent neighbours by way of design practices and a privacy screening effort. Whether these 'public interest' protections can be further enhanced by conditions was simply not addressed by the Member. They could well be matters for additional relief.

Otherwise, they are a re-argument of points made previously and re-requested in paragraph 43, to impose conditions.

DIRECTION

I have considered the Request in light of the Decision. A question is raised as to whether relief in the nature of that sought by the variances is actually required. Clearly, the Member refused the relief and if that stands it is said to interfere with the ability to achieve the necessary building permission for the proposed use, a permitted use. The Member said nothing about interfering with a permitted use. The City took no real position on the Request. The Member did not address potentially germane curative provisions in the By-law or the consequence of the final approval, with exceptions, of By-law 568-2013. In my view, these considerations deserve to be addressed and this requires an opportunity for their consideration.

If no relief is required, the Applicant is in a position whereby the appeal could be withdrawn. The Decision could be an impediment to even that circumstance, if it is proven. But more than that, I find the Decision lacks the substance on an evidentiary foundation of relevant considerations on the matter as reported by the Member. It is arguable that extraneous use considerations and inapplicable policies may have been applied to a structure in a lane condition that may not be appropriate.

Moreover, the Decision does not deal with the mitigating suggestions made in good faith by Mr. John Provart, a Party, whose concerns seem appropriately and properly focused on addressing potential nuisance matters arising from the potential for an annoying use of the only matter in issue, the reconstructed fire escape stairwell.

While the Request addresses these complaints and suggestions in some detail, the Member's dismissal, in my view, left them unaddressed and unevaluated. This does not relieve the TLAB from an original consideration of their merit and weight, in balancing the relief requested, in the appeal.

Given the stairs proximity to the lane and rear yards of residential properties, there is an apparent need for attention, more than that which has been focused to date. The suggestion of an engineering design and consultation with Toronto Fire and the Ontario Building Code would appear to be beneficial with a view to minimizing potential conflicts.

I am satisfied that sufficient issues have been raised to constitute an error of fact or law that warrant a further consideration.

DECISION AND ORDER

The Decision is suspended.

The Appellant is to consider a stairwell design (rear fire escape structure and stairs) in consultation with the Fire and Building officials in the City supported by an engineering design.

The design is to incorporate as many features as are necessary to function for life safety, Ontario Building Code and City Fire and Building Department regulation purposes while incorporating features, internal and external to the building, to avoid external nuisance and occupants use other than for building exit purposes in emergency circumstances ('Design Direction').

The design is to be provided to the Party, Mr. John Provart, for his review, consideration and input as may be forthcoming.

If a suitable design plan can be settled satisfactory to the City Fire and Building Departments, Director level, the design is to be submitted for a new, separate Plans Review Examination as to any necessary variances.

If the foregoing is completed within six (6) months of the date of issuance of this Review, or earlier, the TLAB on request will provide a Motion Hearing date and a Notice of Hearing before a Member appointed by the Vice Chair, written or oral as may appear appropriate to the TLAB, for the purpose of determining whether the suspension should be lifted and the Decision confirmed, varied, cancelled or a different determination reached.

For greater certainty, the Motion, if convened, shall have for its consideration:

1. The result of the Design Direction as above provided, if any;
2. The Plans Review Examination and resultant variances, if any;
3. The position of the Parties, whether expressed through consent filings, mediation, written or oral evidence;
4. Opinion evidence on any variances requested, or the need therefore;
5. The full jurisdiction to finally determine the matter.

In the event a Motion Hearing is not requested within the time period above identified, or any permitted extension, the Decision shall be confirmed.

If there are difficulties in implementing this disposition, if there is a request for mediation or if there is the necessity to request a summons to witness, the TLAB may be addressed with Notice to the Parties and to the City, care of the City Solicitor.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord