Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, January 07, 2020

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): SOLANGE DESAUTELS

Applicant: MELISSA MANDEL

Property Address/Description: 56 SEYMOUR AVE

Committee of Adjustment Case File Number: 17 259357 STE 30 MV (A1230/17TEY)

TLAB Case File Number: 18 157227 S45 30 TLAB

Decision Order Date: Monday, July 08, 2019

DECISION DELIVERED BY S. TALUKDER

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

1. This is a request for a review (Review Request) by the Applicant, Melissa Mandel, arising from Member S. Makuch's decision of the Toronto Local Appeal Body (TLAB), dated July 8, 2019 (Second Decision). The hearing for the Second Decision was held on May 21, 2019 (Second Hearing).

2. This Review Request is made pursuant to Rule 31. I am satisfied that the parties and the participant have complied with the procedural requirements and deadlines pursuant to this Rule.

3. The Applicant is the owner of the property located at 56 Seymour Avenue (Subject Property). The Appellant, Ms. Solange Desautels, is a neighbour and the owner of the property abutting north of the Subject Property (58 Seymour Avenue). She filed a response to the Applicant's Review Request. The owner of the property to the south of the Subject Property, Ms. Andrea Macecek, a Participant, also filed an affidavit in response to the Applicant's Review Request. The Participant resides at 76 Shudell Avenue.

4. Pursuant to Council's direction to all TLAB Members, I have conducted a site visit of the Subject Property, including the surrounding vicinity.

BACKGROUND

5. This matter has a long procedural history.

6. The Applicant plans to construct a rear two-storey addition with a rear deck. She filed an application for approval of variances at the Committee of Adjustments (COA), which was heard on April 25, 2018. The requested variances were:

   Chapter 10.10.40.40(1)(A), By-law 569-2013
   The maximum permitted floor space index of a detached dwelling is 0.6 times the area of the lot (169.87 m2).
   The altered detached dwelling will have a floor space index equal to 0.71 times the area of the lot (200.89m2).

   Section 6(3) Part I 1, By-law 438-86
   The maximum permitted gross floor area of a detached dwelling is 0.6 times the area of the lot (169.87 m2).
   The altered detached dwelling will have a gross floor are equal to 0.71 times the area of the lot (200.89m2).

7. Essentially, the sole variance requested under the two by-laws is the increase of the GFI/FSI to 0.71 times the area of the lot.

8. The COA, in its decision dated April 25, 2018 (COA Decision), approved the request for variance subject to a standard condition.

9. The Appellant appealed the COA Decision at the TLAB. A hearing was held for this matter on September 5, 2018 (First Hearing). A decision of the TLAB allowing the appeal was issued on October 1, 2018 (First Decision).

10. The Applicant initiated a request for review with respect to the First Decision. Chair Lord reviewed the First Decision. In his decision dated November 28, 2018 (First Review Decision), he directed as follows:

> "The Request for Review by the Applicant submitted October 30, 2018 is granted. A rehearing is directed before a different Member.
>
> As such, the Appeal continues.
>
> The Hearing shall be *de novo*; all file materials shall be brought forward with the exception of the Decision dated October 1, 2018 (18 157227 S45 30 TLAB).
>
> A new Notice of Hearing shall issue at the earliest opportunity; new filings shall be permitted in accordance with the Notice of Hearing."

11. The Second Hearing was held on May 21, 2019 before Member S. Makuch. In the Second Decision, the Member allowed the appeal and refused the variances requested by the Applicant.

12. The Applicant filed a Review Request for the Second Decision which prompted the TLAB to require the Applicant to file a motion for permission to file her Review Request. I presided over the written motion and granted the motion, permitting her to file the Review Request. In my decision dated August 19, 2019 (Motion Decision), I did not consider the merits of the Applicant's Review Request. This current decision considers the merits of the Applicant's Review Request.

JURISDICTION

Below are the TLAB's Rules applicable to a request for review:

31. REVIEW OF ORDER OR DECISION
A Party may Request Review
31.1 A Party may request a review of a Final Decision or order of the Local Appeal Body.

Request does not Operate as a Stay

31.2 A request for a review shall not operate as a stay, unless the Local Appeal Body orders otherwise.

Time Period for Requesting Review
31.3 A Party shall serve on all Parties and File with the Local Appeal Body a request for review within 30 Days of the decision or order, unless the Local Appeal Body directs otherwise.

Contents of 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.

Local Appeal Body may seek Submissions, Direct Motion, Rehear etc.
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.

Grounds for Review

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.

Local Appeal Body Shall Give Procedural Directions
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.

31.9 For the purposes of Rule 31 any decision following a review may not be further reviewed by the Local Appeal Body.

CONSIDERATIONS AND COMMENTARY

Grounds for Review

13. The Applicant, in her Affidavit dated July 16, 2019 (Applicant's Affidavit), provided the following grounds for review:

    1) The Local Appeal Body made factual errors that likely would have resulted in a different decision.

    2) There is new evidence that would have changed the decision.

3) The Local Appeal Body erred in law.

14. When considering these grounds and the information in the Review Request, I must consider whether there is sufficient evidence to show that any of these stated grounds are applicable, and if applicable, whether the error if rectified, would have changed the decision itself.

Documents reviewed for the Review Request

15. The Applicant, Appellant and the Participant, in their affidavits, have all mentioned and commented about the First Decision and the First Review Decision. However, as clearly stated in the First Review Decision, the second hearing was directed to be a *de novo* hearing. This means that the First Hearing and the First Decision are not relevant to the Second Hearing and consequently the Second Decision, as the second hearing was a new hearing. As directed in the First Review Decision, the presiding Member based the Second Decision on the evidence and argument presented at Second Hearing. In the Second Decision, the Member states that:

> "A first TLAB appeal allowed an appeal by a neighbour and denied the variances. A Request for Review ordered a new Hearing which does not include a review of the first TLAB decision or the review order. *This Hearing, therefore, is based entirely on the evidence filed with TLAB and the evidence and argument presented at the May 21, 2019 Hearing.*" (*emphasis added*)

16. Based on the foregoing, I cannot refer to the First Decision or the First Review Decision to contextualize or assess the Second Decision. To do so would defeat the purpose of having a *de novo* hearing following the First Review Decision.

17. I have reviewed the following documents for this Review Request:

    a. COA Decision.

    b. Second Decision.

    c. Applicant's Affidavit.

    d. Affidavit of the Appellant dated July 22, 2019, which is the Appellant's Response to the Review Request (Appellant's Affidavit).

    e. Affidavit of the Participant dated September 19, 2019, which is the Participant's response to the Review Request (Participant's Affidavit).

18. It is not appropriate or relevant to consider the behavior of the Parties and the Participant at the hearing. The Review Request is not the forum to criticize the behavior of the other parties/participants before or at the Second Hearing, nor is it the forum to have a re-argument of the matter in writing. It also does not have any impact on the review decision. As such, I have not considered any portions of the affidavits mentioned above which refer to the behaviour of the Parties as they are not relevant.

Applicant's Submission: Errors Regarding Neighbour Discussions

19. The Applicant in her Review Request stated that the Member found that the "most important" factor in denying the requested variance was that there was "no evidence of an attempt being made to accommodate the neighbours' concern or to seek a design which would lessen the impact on neighbours." The Applicant submits the requirement for a "good faith consultation" with neighbours, as the Member had written in his decision, to be an error of law and fact (paragraphs 2-7 of the Applicant's Affidavit").

20. The Applicant was not accurate when she stated that the requirement for consultation with neighbours was the "most important" factor in denying the requested variance. As noted by the Participant in paragraph 2 of the Participant's Affidavit, and as clearly stated in the Second Decision under the "Evidence" section, the phrase "most importantly" was in reference to evidence that the neighbourhood is comprised of an area of small lots:

> "Most importantly, perhaps, this is an area of small lots where houses are very close to each other and where development will easily affect neighbouring properties. In this case there was no evidence of an attempt being made to accommodate neighbours' concern or to seek a design which would lessen the impact on the neighbours."

21. In the "Analysis, Findings, Reasons" section of the Second Decision, the Member stated that the reason for not approving the requested variance was the following:

> "However, I also find that the density provision in the bylaws is, in part, designed to address situations where, although a development may meet setback and height limitations, that provision can be used to restrict development where there is an adverse impact, in spite of compliance with those limitations. *In this case the proposed addition will have an adverse impact in looming over the property to the south and negatively impacting on the shadow on the property to the north. I therefore conclude, that the variances are not desirable for the appropriate development of the land and thus does not meet that requirement of the Planning Act.*" (*emphasis added*)

22. The Second Decision clearly states that the reason for not approving the density variance, which was the requested variance, did not satisfy the test of whether the variance was desirable for the appropriate development of the land because there was an adverse impact of the proposed development on the properties to the north and south.

23. The Member then continued to comment on the lack of consultation with neighbours. There is no requirement for consultation with neighbours for the variance test under the *Planning Act*. To impose such a requirement is an error of law. Therefore, the Member erred in instituting a requirement for good faith consultation with neighbours. However, in my view, this error if rectified, would not have resulted in a different order or decision. The Second Decision is clear on the reason of not approving the requested variance, which is that the variance did not satisfy one of

the four tests because of its adverse impact on the properties to the north and the south. The lack of consultation was not the adverse impact referred in the Member's decision and the decision did not turn on this.

24. The Applicant submits that no one addressed the issue of consultation to her at the Second Hearing. The Applicant had the opportunity to present her efforts at discussions with her neighbours at the Second Hearing. It is up to the Applicant to provide her best evidence at the Second Hearing and failure to do so is not an error of the TLAB or other parties or participants.

25. Based on the foregoing, I do not find that the Member's error in including the requirement of consultation with neighbours to be significant enough to change the decision. This is because the core of the decision is determined by the adverse effects imposed by the proposed development on to the neighbouring properties, which is one of the four tests to be considered.

Applicant's Submission: Failure to consider specific evidence with respect to properties at the north and at the south

26. The Applicant submits that she is entitled to build "as-of-right" construction which was longer than what was proposed. She states that she is entitled to build the southern wall of the property as an "as-of-right" condition (paragraph 9 of the Applicant's Affidavit). She submitted that the Member erred in not considering the "as-of-right" construction and any impact of this construction on the neighbouring properties.

27. The Second Decision and the COA decision clearly state that the variance requested is for FSI. I refer to the Member's review of the relevant evidence ("Evidence" section):

> "As stated above there was no need for variances respecting performance standards. The proposed addition did not breach any standards which were designed to prevent negative impacts in the rear yards neighbouring properties."

The Member continued in the "Analysis, Findings, Reasons" section in the Second Decision:

> "However, I also find that the density provision in the bylaws is, in part, designed to address situations where, although a development may meet setback and height limitations, that provision can be used to restrict development where there is an adverse impact, in spite of compliance with those limitations."

28. It is evident from the above statements from the Second Decision that the Member had put his mind towards the fact that the proposed development met all other zoning by-law requirements (and therefore, to be "as-of-right" building with respect to some zoning parameters). However, it did not meet the FSI/GFA requirement set out in the zoning by-law, and therefore, effectively limited the size/volume of a building.

29. The Members decision flows from the findings in the "Evidence" section in the Second Decision. Of specific interest is the finding that the Participant's lot was short with a short backyard, with the rear of the Participant's lot facing the south side yard of the Subject Property. The Member analyzed the overall proposed development, which includes the "as-of-right" zoning parameters and the requested variance for FSI/GFA and determined that the impact on both the north and south properties were adverse enough to not meet one of the four tests.

30. The Applicant also takes issue with the Member's finding that the addition would protrude "significantly" beyond the rear wall of her house (paragraphs 16 and 17 of the Applicant's Affidavit) and that the proposed development will "negatively impact on the shadow on the property to the north" (paragraph 19 of the Applicant's Affidavit). The fact that the Applicant did not agree with the Member's finding does not necessarily mean the Member was incorrect and made a wrong decision.

31. It is incumbent on the Member to determine the relative weight of the evidence provided in the hearing with respect to the effect of the proposed development on the Participant's and the Appellant's property. The fact that the Member gave more weight to evidence against the Applicant is not an error as the Member, as the trier of fact, has the authority to do so. The exercise of giving different weight to different evidence is not by itself an error of fact. Consequently, the Member's decision that is grounded on the factual determinations should not be changed.

32. I agree with the Applicant that the Applicant is entitled to rely on the current state of law and is entitled to build an "as-of-right" construction (paragraph 10 of Applicant's Affidavit). The Applicant is free to do so; however, the reason of filing an application at the COA was that the Applicant did not plan to build an "as-of-right" construction, but a construction with mostly "as-of-right" zoning parameters, but required a density variance.

Applicant's Submission: Other errors related to the property to the south

33. The Applicant submitted that the fact that the Participant obtained variance approvals for the rear wall to be built closer to her property and the fact that the Participant had a third storey addition are factors that should be considered in her application for variance approval. The Participant, in paragraphs 14 and 15 of the Participant's Affidavit responded stating that the variances with respect to the rear wall were for approval of a pre-existing condition. The Appellant also provided commentary on this submission in paragraph 3 of the Appellant's Affidavit.

34. The Applicant states in paragraph 15 of the Applicant's Affidavit that "the Member should have considered the whole context, which includes the variances of the Participants, and the impact her renovation has on my property and other Shudell properties." She submits that this failure to consider the Participant's variances is an error in law and unfair.

35. The Applicant is incorrect in her submission. The application before the Member was to consider the variance requests for the Subject Property and not the variances for the Participant's property. Therefore, the impacts of the proposed development on

the neighbouring properties is a relevant consideration. The hearing should not have been a forum to complain about the developments on the Participant's property. It is clear from the response submissions of both the Appellant and the Participant that the Member had the opportunity to hear from all the parties and participants about the 76 Shudell property. The Member is not required to rehash every piece of evidence heard at the hearing in his Decision; he is required to support his decision with relevant evidence. In this circumstance the Member has done so. There is no error in law for the Member to consider 76 Shudell property variances differently than the Applicant would have liked, nor is it unfair.

Applicant's Submission: Errors related to the Appellant's Property to the North

36. The Applicant submitted that new evidence has arisen since the matter was heard. The property at 60 Seymour Avenue was granted an FSI of 0.75 at the COA. The Applicant did not make any further submission on what the effect of this COA decision, if any, should have on her matter. Based on her submissions for the grounds for review, it is likely that she believes that this COA decision would likely have resulted in a different order or decision.

37. There are two errors with this line of reasoning. First, the application for variance for the Subject Property would have been reviewed against the existing physical context of the neighbourhood or the immediate block. The approval of variances after the hearing is not the type of information that falls under TLAB Rule 31.7(d). Applications approved after the hearing are not relevant as the requested variances which are part of these applications do not form part of the existing physical context of the neighbourhood at the time of the Second Hearing.

38. Second, each application must be considered on its own merits. The approval of another application with a higher FSI does not immediately and automatically imply the approval of the variances for the Subject Property. In the Second Decision, the Member had noted in the "Evidence" section:

> "The variances were for an FSI/GFA of 0.71 when the average of such variances granted in the neighbourhood was well above that at 0.94. The Participant had a house on her property with an FSI/GFA of 1.46; over double the density requested."

39. The Member was fully aware that the average of FSI granted in the neighbourhood was above 0.94x lot area. Another example of a COA decision granting an FSI of 0.75 in the neighbourhood by itself is not sufficient to warrant an overturning of the Second Decision.

40. The Applicant makes reference to the decision of *Berg v. Toronto*, 2016, CanLII 30040 that she relied on at the Second Hearing. This is an Ontario Municipal Board (OMB) decision. There is no legal requirement for TLAB, as an administrative tribunal to follow the decision of another administrative tribunal though a tribunal may choose to consider it. The principle of *stare decisis* does not apply to an administrative tribunal unless the decision is from a superior court. The Member is not required to follow or even consider a decision of the OMB (now Local Planning

Appeal Board). It is an expectation that decisions of a tribunal should be consistent with current case law but that does automatically imply that any comment in a decision by a panel member must be considered or adopted by other panel members in their decisions. The submission of the Applicant with respect to paragraph 20 of the Applicant's Affidavit does not have any merit or relevance to this review.

41. Based on the foregoing reasons, I find that the Applicant has not provided sufficient grounds to merit a variation, suspension or cancellation of the Decision.

DECISION AND ORDER

42. The Review Request is denied. The Second Decision dated July 8, 2019 is confirmed.

X 

S. Talukder
Panel Chair, Toronto Local Appeal Body
Signed by: Shaheynoor Talukder