TORONTO

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DECISION AND ORDER

Decision Issue Date Wednesday, January 22, 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): Rob Battista, Olga Fowell Applicant: Michael Foderick
Property Address/Description: 32 Oxton Ave

Committee of Adjustment Case File: 19 116184 STE 12 MV (A0160/19TEY)

TLAB CASE FILE NUMBER: 19 181211 S45 12 TLAB

Request for Review: November 28, 2019

Name	Role	Lawyer
Ankur Bansal	Review Requester	Michael Foderick
City of Toronto	Respondent	Ben Baena

DECISION DELIVERED BY Ted Yao

INTRODUCTION

Ankur Bansal, owner of unit attached on two sides, requests a Review of TLAB Chair Ian Lord's Final Decision of October 29, 2019. He alleges that Mr. Lord:

- failed to conduct a proper settlement hearing; and
- erred in improperly considering a proposed second unit might be rented.

The procedure for a Review is contained in Rule 31; Mr. Bansal's first ground of Review is 31.25(b) (which I will call branch (b), and his second is 31.25(c) (branch (c)), all set out as follows:

> Grounds for Review
>
> 31.25 In considering whether to grant any remedy or make any other order the TLAB shall consider whether the reasons and evidence provided by the Requesting Party are compelling and demonstrate the TLAB:
>
> (b) violated the rules of natural justice or procedural fairness;

(c) made an error of law or fact which would likely have resulted in a different Final Decision or final order;

BACKGROUND

Mr. Bansal sought minor variances to extend the building on 32 Oxton Avenue to the rear and upwards. Number 32 is the second-to-the-end of six attached two storey houses on the north side of Oxton Avenue, a street many thousands use on their commute along Avenue Road. The variances requested included exceedances to building height, main wall height, floor space index, building depth (that is, the distance from the front yard requirement to the rear wall) and rear yard landscaping.

Mr. Lord allowed the last two variances but refused the height and floor space index increases. Thus Mr. Bansal may build a rear addition but is confined to an overall floor space index of 1.0 times the lot coverage instead of 1.27 times the area of the lot, which he had requested. It is likely although I do not know for sure that he cannot build a third floor.

On November 28, 2019, Mr. Bansal's lawyer, Michael Foderick, requested that Mr. Lord's decision be reviewed, and the precise relief he seeks is **a new settlement hearing** rather than a new hearing:

Prior to the TLAB hearing before Mr. Lord, Mr. Bansal had obtained a favourable decision at the Committee of Adjustment but both adjacent neighbours appealed:

- Olga Fowell, owner of 34 Oxton Avenue and represented by lawyer David Bronskill; and
- Rob Battista and Kirsten Piirtoniemi, owners of 30 Oxton Avenue, represented by lawyer Andy Margaritis.

The City elected to become a party. None of lawyers for the neighbours (Messrs. Bronskill and Margaritis) nor Mr. Baena, the City's lawyer, appeared before Mr. Lord. The only persons who did attend were Michael Foderick, (Mr. Bansal's lawyer), Louis Tinker (his planner) and Adam Bander (his architect) and the two neighbours Ms. Fowell and Ms. Piirtoniemi.

By way of opening statement, Mr. Foderick advised Mr. Lord that the plans had been revised to include changes requested by the neighbours. There seems to have been substantial agreement that all were satisfied with the revised plans, but not to the point where formal Minutes of Settlement were executed. Mr. Lord's account of this substantial agreement is contained in paragraph 10 of page 2 of the Decision:

> Mr. Foderick] provided confirmation emails to him [underline in original] from Mr. Bronskill (September 18, 2019) and Mr. Margaritis (September 19, 2019) as to the acceptability of

> the 'revised plans' to their respective clients. In like manner, Mr. Baena [the City's lawyer] advised the same counsel [i.e. Mr. Foderick] (September 20, 2019) that "my planner does not take issue with the revised plans" and inquired as to whether a zoning review had been completed respecting the revised plans.

ANALYSIS, FINDINGS, AND REASONS

Ground 1 (Issues relating to the Settlement Hearing)

Under branch (b), the test is twofold: Mr. Foderick's reasons and evidence must be "compelling" and demonstrate a violation of the rules of natural justice and procedural fairness. Neither test is met.

Was there a formal settlement necessitating a "settlement hearing[1]"?

I don't have to answer this question because in the Review Request, Mr. Foderick indicates that the primary focus of the Request is that that the settlement hearing was allegedly improperly conducted (my wording), not that Mr. Lord erred as to whether there was a formal settlement. Mr. Foderick's Review Request begins:

> The Applicant requests that pursuant to [branch (c)], the Order be set aside and new settlement hearing be scheduled in relation to this matter.

First, I do not believe I have the power to schedule "a new settlement hearing". If proper grounds for review are established, I only have the power to "direct an oral hearing before a different TLAB member" and it is within that member's purview to decide how to conduct that hearing and whether and how to "reset the clock".

It is not surprising that in the absence of Minutes of Settlement, Mr. Lord would wish to enquire the neighbours' perceptions differed from Mr. Foderick's, since they now appeared to be self-represented. Mr. Lord wrote in his decision that they expressed "angst" at having been "forced to settle". He also took notice of Mr. Foderick objection to the neighbours taking a differing position from their lawyers:

> **The response was uncomfortable. Both expressed a degree of angst at having been 'forced to settle'** arising from an inability to retain professional land use planning advice, representations as to the weight of City Staff's position as a 'preapproved', 'prejudged' position, advice received from counsel and being 'handcuffed' by the passage of events. (my bold)
>
> Mr. Foderick properly took exception to the descriptions and spoke in defense of counsel. Neither Party's representative had been sworn or affirmed but spoke extemporaneously and, of course, counsels were not present.

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[1] The convention in the TLAB Rules is that defined terms such as "Person", "serve" and "Hearing" are capitalized. I have not done so in this Decision to improve readability but it becomes necessary to consider this in the analysis of the words settlement Hearing" in Rule 19.3 on page **Error! Reference source not found.Error! Reference source not found.**5.

> The exchange, however, required the Tribunal to be satisfied as to their intentions both in respect of the asserted settlement and the purpose of their presence.
>
> No citizen should be deprived of the opportunity to express their position on a matter before the TLAB.

Although understandably, Mr. Foderick was disappointed that a supposedly unopposed hearing was now less straightforward; nothing changes the statutory duty in s. 45(1) of the Planning Act ". . .if **in the opinion of the committee**", that is, in Mr. Lord's opinion, that the four tests are met.

Settlement hearings may overlap "ordinary" hearings

The Review Request states that Mr. Lord's inquiry was "inappropriate". I disagree. If a party raises a preliminary matter, surely the opposed parties are entitled to comment. The Review Request concludes that Mr. Lord acknowledged there **was** a settlement. In fact, Mr. Lord left himself a bit of wiggle room since he used a double negative[2] that is slightly less categorical. All this is of no consequence, given Mr. Foderick's specification that his "primary focus" is whether the hearing was conducted in accordance with Rule 19 ("Settlement Hearings").

Paragraph 15 of the Review Request quotes Rule 19 in full:

> Settlement before Final Determination
>
> 19.1 The TLAB is committed to encouraging Parties to settle some or all of the issues by informal discussion, Exchange and Mediation.
>
> 19.2 Parties who arrive at a settlement shall Serve the terms of the proposed settlement on all other Parties and Participants and File same with the TLAB at the earliest possible date.
>
> 19.3 The TLAB shall give notice to all Parties and Participants of the date, time and location of the settlement Hearing, <u>and shall thereafter conduct an expedited settlement Hearing on the terms of the proposed settlement. [Mr. Foderick's emphasis}</u>
>
> 19.4 Where no Person at the Hearing opposes the proposed settlement or where the TLAB rejects an objection the TLAB may issue an order giving effect to the settlement and any necessary amendments.

Although Rule 19.3 says the TLAB shall conduct an expedited hearing, no expedited hearing was convened; since the scheduled hearing was a few weeks away. Nor do the Rules contemplate any special type of "settlement hearing"; the word "settlement" in the rule being all lowercase and the word "settlement" not a defined term in the Rules. "Hearing" is capitalized and defined. Mr. Foderick seems to have expected that Mr.

[2] . . .there is no suggestion [that] these parties did not settle with the Applicant [Mr. Bansal] . . ." p. 3 Mr. Lord's decision

Lord's only task was to rubber stamp (my word) the settlement. This is surely incorrect; the TLAB always has the discretion to reject a settlement; even one reduced to written Minutes of Settlement.

Explicit direction by Mr. Lord

Whatever was in the minds of the team retained by Mr. Bansal prior to the hearing is irrelevant, because Mr. Lord made it clear that the normal burden of proof would apply.

> The TLAB was asked by Mr. Foderick whether it required evidence to be heard in support of the settlement and how much. In view of the 'preliminary matters' as above described, the Hearing proceeded on the basis that **the Applicant should demonstrate to the fullest extent possible the opinion evidence in support of the applicable policy and statutory tests**. As such, the Hearing proceeded in the normal course, occupied more than the full day of the sitting and two witnesses were heard from, the Applicant's planner and architect.[3]

This is corroborated in paragraph 20 of Mr. Foderick's Review Request:

> 20 As noted in the affidavit of Louis Tinker, when attempts were made by counsel for the Applicant to initiate an expedited Settlement Hearing, the TLAB responded emphatically that it wanted to instead hear "full evidence." In total, the TLAB heard over 7 hours of evidence and submissions before concluding the day after the end of normal business hours. Furthermore, a number of additional undertakings requiring a significant amount of additional research was requested to be provided afterward (and was) to supplement the oral evidence presented.

Paragraph 18 of Mr. Tinker's affidavit states:

> 18 If I would have known that the hearing would not be conducted as an expedited settlement hearing, I would have prepared differently for the hearing, ready to provide full evidence as if it were a contested hearing. In particular, TLAB requested post-hearing undertakings on matters related to the as-of-right use of the property as a Duplex and policy directions that would permit a secondary suite. This was a line of questioning for which I had not prepared in-depth evidence given the as-of-right permission for such uses.

Conclusion on Ground 1

It must be presumed that:

A. Mr. Tinker had at one stage prepared for a contested hearing; and

B. Once Mr. Foderick was advised by Mr. Lord that the TLAB wished to hear full evidence, Mr. Foderick and Mr. Tinker now needed to demonstrate the

[3] Mr. Lord's decision, page 3, par. 9

planning evidence "to the fullest extent", by refreshing themselves from their prepared materials; and

C. If they were unable to do so, they should have asked for an adjournment.

Indeed, I infer from the seven hour duration of the hearing that A and B is what happened. Not only did Mr. Lord set the ground rules but then afforded them full opportunity to make their case. The TLAB always has full discretion to reject a settlement between parties because this is a long range decision that affects the public not just the parties, as I indicated in the previous section. Mr. Lord also allowed Mr. Tinker to complete evidence that required further research. It seems to me that everything was done to assure a full and fair hearing.

At the end of the day, the TLAB has to be satisfied that the statutory tests are met, and after allowing Mr. Bansal the full opportunity to address the four tests, Mr. Lord decided that for some variances, the tests were not met — a result he had the right to decide.

Basis for Ground 2 (Error of law based on tenure considerations by Mr. Lord)

Mr. Foderick alleges that the Order[4] is based on irrelevant considerations. Paragraphs 32 to 35 all make the same allegations:

> The fact that the building on the Property, once renovated, will include a second rental dwelling unit as opposed to a single family home, is irrelevant. The tenure of the occupants is irrelevant. Duplex is a permitted building type as-of-right in the zone in which the Property is located, as is the addition of a second rental dwelling unit on the Property.

Zoning definition of "duplex"

Before I look at this ground, I wish to set out the definition of "duplex" in Zoning By-law 569-2013:

> (215) Duplex means a building that has two dwelling units, with one dwelling unit entirely or partially above the other. A detached house that has a secondary suite, is not a duplex.

[4] Mr. Foderick says in para 3: "*The **Order** is directly based on irrelevant considerations. Specifically, the **Order** explicitly cites the as-of-right use of the property as a Duplex (the addition of a second rental dwelling unit) as a major factor in its reasoning, which had no relevance to the variances in issue. In doing so the **Order** made an error of law which would likely have resulted in a different decision or order pursuant to [branch (b)] ("Basis for Relief 2')".* (my bold) I am taking Mr. Foderick's second and third references to Mr. Lord's **Order"** as Mr. Lord's "**Decision".** The Order, which is the operative part of the Decision and has its own heading, allows the appeals in part. The **Decision** refers to the whole document, including the **Order.**

> (865) Townhouse means a building that has three or more dwelling units, and no dwelling unit is entirely or partially above another. A detached house or semi-detached house that has one or more secondary suites is not a townhouse.

Since the building would never have three or more dwellings, the words “townhouse”, rowhouse” etc. are being used in their ordinary English and “duplex” in the technical sense. Accordingly, the proposed building is a “duplex” in the above definition. Paragraph 11 of Mr. Tinker’s Witness Statement states that the internal layout would be:

- unit 1: basement and first floor; and
- unit 2: second and third floor.[5]

Accordingly, one unit is entirely or partially above the other, thus bringing the layout within the by-law definition. It then enjoys as-of-right permission, a key argument for Mr. Bansal.

Were these concepts a “major factor”?

Mr. Tinker’s affidavit in support of the Review Request states that tenure should not be “**determinative**”:

> 19.... .The dwelling typology, tenure and internal layout of the building envelope should not be determinative in the context of an as-of-right use of the property.

Mr. Lord uses the same word and I find that there is no substantial difference with Mr. Tinker on this issue:

> I find that the addition of a second unit to the building, defined as Duplex**, is not determinative** of any approval. A second unit is permitted, a Duplex is permitted, and an increase in unit count is consistent with general intensification policy support; one additional unit is worthy of general encouragement. However, a Duplex brings with it some consequences that are unique including the policy and regulatory obligations to ensure a comfortable independent living environment, parking provision and considerations of light, view and privacy. (p. 10)

While the word “tenure” does not appear in Mr. Tinker’s Witness Statement of September 3, 2019, the word “duplex” occurs 14 times. Some examples, with my bolding, are:

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[5] 11. In terms of interior layout, the two residential units would be divided horizontally; one unit is proposed to occupy the basement and the ground floor while the second unit would occupy the second and third floors. Each unit is proposed to contain three bedrooms and two bathrooms. With respect to outdoor space, the unit occupying the basement and ground floors would has access to a rear deck. The second unit, occupying the second and third floors, would benefit from access to a rooftop terrace.

> 32. The addition of second dwelling unit to create a **duplex** is permitted as-of-right by the zoning and is appropriate in the context of a Site fronting onto a major street and within walking distance of major transit station area. (Summary Opinion)
>
> 41. The study area is a residential neighbourhood with a wide range and mix of building types, including detached and semi-detached dwellings, townhouses, **duplexes** and apartment buildings. (Study Area)
>
> 54. I will review the applicable provisions of City-wide Zoning By-law 569-2013, as amended. The Site is zoned R (1.0) with a maximum height of 10 metres. The zoning permits a broad range of residential uses including the proposed **duplex** use. (Review of Planning Policy Framework)
>
> 55. The Site is designated *Neighbourhoods* in the Official Plan, a land use designation that permits lower scale buildings such as detached, semi-detached, **duplexes,** triplexes, townhouses and well as apartments that are no higher than four storeys. (Maintaining the General Intent and Purpose of the Official Plan)
>
> 69. The proposal seeks to increase the allowable maximum building depth for a **duplex** from 14 metres to 15.4 metres. (Building Depth)
>
> 78. The Site is zoned Residential (R) (d1.0) under the City's new comprehensive Zoning By-law 569-2013, as amended. The Residential (R) zone permits a range of residential uses, including single-detached, semi-detached, townhouses, **duplexes,** triplexes, four-plexes and apartment buildings. The Residential zone applies to the primary study area, which reflects the diverse range of residential uses permitted by the By-law. (Maintaining the General Intent and Purpose of the Zoning By-law)
>
> 106. The variance to permit a longer building depth is appropriate and desirable in that it will facilitate the construction of an additional residential unit and will facilitate the conversion of the existing townhouse into a **duplex**, which will add to the residential unit mix of the area. (Desirable and Appropriate for the Development of the Land)

Mr. Foderick amplifies his argument by stating the concept of a second rental unit is "irrelevant", while Mr. Tinker says merely that it is "not determinative": The two seem to be slightly at odds. Mr. Foderick says the issue of second rental unit should not even be considered; Mr. Tinker says the second rental is not the only issue or not the determinative issue but might be a factor. I find that Mr. Tinker's seven quotes indicate a position taken before Mr. Lord that permission for an as-of-right duplex use was intended to be a **key argument** in favour of the variances.

Moreover, second unit policies are not "irrelevant"; they are mandated by the Planning Act, s. 16(3):

> Additional residential unit policies
>
> 16(3) An official plan shall contain policies that authorize the use of additional residential units by authorizing,
>
> (a) the use of two residential units in a detached house, semi-detached house or rowhouse; and

> (b) the use of a residential unit in a building or structure ancillary to a detached house, semi-detached house or rowhouse. 2019, c. 9, Sched. 12, s. 2 (1).

Presumably Mr. Bansal does not propose to live in both units, so one or both would be rental. Thus, there is very little practical difference between “second dwelling unit” or “second rental dwelling unit”. Both phrases are relevant to Mr. Lord’s analysis. Indeed the sentence on page **Error! Bookmark not defined.**[6] shows that he considered rental tenure a **positive** argument for the variances.

The Official Plan directs an inquiry into tenure:

> Specific policies are needed when a particular kind of housing, whether it be type, **tenure** or level of affordability, is not sufficiently supplied by the market to meet demand or maintain diversity in the housing stock. (Building A Successful City, 3.2.1, my bold)

Conclusion for Ground 2

Under branch (c), the test for review to succeed is three fold: in addition to being compelling and resulting in error, the error must be one that would likely have caused a different result. Here, I am not satisfied that any of the branches has been met; the review reasons are not compelling, Mr. Lord did not make an error considering the City’s tenure policies, and even if that part of the discussion is put to one side, he clearly came to his conclusion on considerations other than tenure. He concluded that the proposal was overdevelopment, which he was entitled to find. In other words, if Mr. Lord had refused to consider duplexes and tenure issues, it is not “likely” that it would have changed his conclusions on overdevelopment of the lot and Mr. Bansal’s addition not fitting into its context.

DECISION AND ORDER

The Review Request is dismissed.

X

Ted Yao
Panel Chair, Toronto Local Appeal Body

[6] “A second unit is permitted, a Duplex is permitted, and an increase in unit count is consistent with general intensification policy support; one additional unit is worthy of general encouragement.”