**Toronto Local Appeal Body**

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# REVIEW REQUEST ORDER

**Review Issue Date:** Tuesday, February 18, 2020

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), and Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): MOHAMMAD KAZEMZADEH

Applicant: PMP DESIGN GROUP

Property Address/Description: 223-225 NORTHWOOD DR

Committee of Adjustment Case File Number: 18 133777 NNY 24 CO, 18 133796 NNY 24 MV, 18 133784 NNY 24 CO, 18 133806 NNY 24 MV, 18 163907 NNY 24 MV

TLAB Case File Number: 18 244693 S45 24 TLAB, 18 244695 S53 24 TLAB, 18 244696 S45 24 TLAB, 18 244697 S45 24 TLAB, 18 244698 S53 24 TLAB

**Decision Order Date:** Wednesday, September 11, 2019

**DECISION DELIVERED BY D. Lombardi**

## REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request/Request for Review) under Rule 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB) made by Mohammad Kazemzadeh, the Appellant and a Party to the above referenced matter (Requestor), in respect of 223 and 225 Northwood Drive (subject properties), in the City of Toronto (City).

The Requestor was represented at the Hearing by his solicitor, Martin Mazierski.

Testimony at the appeal Hearing was provided by Ms. Ghyslaine Berger, a resident at 631 Conacher Drive and a Party, as well as the Requestor's expert planning witness, Theodore Cieciura.

The Request is supported by two separate Affidavits; the first sworn by the Appellant, Mr. Kazemzadeh, and the second sworn by Mr. Cieciura, both dated October 10, 2019.

Mr. Kazemzadeh and his wife are the Owners of the subject properties, and Mr. Cieciura is a Registered Professional Planner who acted for the Appellant and provided land use planning opinion evidence at the hearing of the appeal.

The submissions (Submissions) filed as part of the Request included a well-prepared 'Factum' of some 67 paragraphs attached to Mr. Kazemzadehs' Affidavit. Also included are the following decisions submitted for guidance: Ontario Superior Court of Justice (*Maple v. Service, 2008 CarswellOnt 897, [2008] O.J. No. 693, 164 A.C.W.S. (3d) 67*), *Polsinelli v Toronto (City), 2019 CarswellOnt 8979, 485 Ridelle Avenue (OMB);* and *ATA Architects Inc., Re, CarswellOnt 13148, 2 O.M.T.R. 167, 9 Thirty Eighth St. (TLAB).*

There were no other Party or Participant submissions on the Review; City Planning staff were not present on the appeal of the original relief requested. While City Legal Counsel (Roman Ivanov) elected Party status and participated in the appeal Decision, counsel declined to call evidence although the City did cross-examine the other witnesses in the appeal Hearing.

The City did not participate in the Review and there were no submissions received by the TLAB from any other Parties or Participants.

The Request relates to a decision of the TLAB by Member S. Gopikrishna issued on September 11, 2019 (Decision) in respect of an appeal heard on June 4th and June 5th, 2019 in which the Member refused two severance and three variance applications related to the subject property.

The Request asks that the Tribunal vary the Decision and allow the appeal with respect to all five applications, or, alternatively, suspend or cancel the Decision and direct an oral Hearing dealing with the applications, on such terms and conditions that the TLAB directs, before a different TLAB Member.

The Request is considered under Rule 31 as it existed prior to May 6, 2019 (former Rules) as the matter itself originated before that date with a Notice of Hearing issued January 2, 2019.

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

## BACKGROUND

This matter was heard over two consecutive days: June 4th and June 5th, 2019. It involved a request to sever the rear portions of the existing lots at 223 (Part A) and 225 (Part C) Northwood Drive for the purpose of lot additions to create one new lot facing Conacher Drive (Part B).

The proposal also included the construction of a new single detached dwelling on the newly created lot (Part B) and a new single detached dwelling on the retained lands at 223 Northwood Drive (Part A). Additionally, the Appellant requires new variances for the existing dwelling on 225 Northwood Drive (Part C) as a result of the re-positioning of the rear (southern) lot boundary.

The Requestor (Mr. Kazemzadeh) asserts, in paragraph 20 of his Affidavit, that Member Gopikrishna's Decision refusing the two severances and corresponding variance applications is based on his conclusion that the proposed severances were problematic when analyzed under two of the subheadings of s. 51(24) of the *Planning Act (Act)* that a Tribunal Member is to have regard for when making a decision regarding a consent to sever:

i. *51(24)(c): conformity to the Official Plan and specifically Policies 3.4.1 and 4.1.5; and*
ii. *51(24)(f): dimensions and shapes of the proposed lots*

Furthermore, the Requestor submits that Member Gopikrishna, in the '**Analysis, Finding, Reasons'** section of his Decision, did not deal with the variances under s.45(1) of the Act directly, even though they were discussed under the **'Evidence'** section in the Decision, on the basis that *"if the consent fails, then the variances fail automatically"* (p. 19 of the Decision).

The Review Request is premised on the ground that the Panel Member:

- *Made errors of law or fact, likely to have resulted in a different order or decision*.

While both Messrs. Kazemzadeh and Cieciura submitted separate Affidavits, they are essentially similar in scope and content, and support each other. Therefore, for the purposes of this decision, when referring to an 'Affidavit' it will generally mean that of the Requestor's, Mr. Kazemzadeh, unless otherwise noted.

The bulk of the Affidavits support the essential nature of the Review Request.

**Section 51(24)(c) – Whether the Plan Conforms to the Official Plan and Adjacent Plans of Subdivision, If Any**

1. *Tree for Unit Trade-Off and the Use of "Hypothetical"* (pages 18-21 of the Decision). In this recitation, the Requestor asserts that Member Gopikrishna, on several occasions in his Decision, refers to *"the existing secondary unit"* and a *"walkout apartment"* in the dwelling at 225 Northwood Drive (Part C). In addressing the issue of whether the proposal represents a modest form of intensification of the properties, the Member, in the Decision, stated that *"Mr. Cieciura agree with Mr. Ivanov's suggestion that the intention of creating more residential units could be met even if there was no severance and the secondary suite was allowed to exist"* (p. 18).

   He then concludes that "*three families can be accommodated in the existing two houses, if the* ***walkout apartment*** *(my emphasis) in Part C were retained."*

Furthermore, at page 21 of the Decision, the Member writes "*This analysis makes me question the compatibility of the proposal with Policy 3.4.1 of the Official Plan, because mature trees have to be cut down, without an appreciable increase in the number of families that can be housed."*

The Affiant asserts that Member Gopikrishna's reference to an existing basement apartment in the dwelling on Part C is an error of fact since there is no existing basement apartment in the home. He further contends that this 'fact' is supported by the plans pre-filed with the TLAB and presented at the appeal proceedings (identified as Tab 5-15 in Exhibit 1 marked for evidence at the Hearing). The interior floor plans, and specifically those for the dwelling on Part C, confirm that there are no doors or walls internally separating the basement from the above grade floor area of the home.

The Requestor attests to this and the fact that there is no intention of creating one in the subject proposal in his Affidavit. Mr. Cieciura corroborates this in his Affidavit, attesting that he did not confirm that a basement unit exists as member Gopikrishna suggests in the Decision.

The Requestor argues that it was during cross-examination of Mr. Cieciura that the City solicitor advanced a 'hypothetical' scenario in which he suggested that modest intensification of the properties could be achieved by a 'prospective basement apartment' in the dwelling at 225 Northwood Drive and that such a unit could benefit from the existing 'basement walkout' which is an existing condition.

The Appellant intends to eliminate the walkout as part of the proposal in order to increase rear yard amenity space as per a recommendation from City Planning staff.

He asserts that Member Gopikrishna 'misinterpreted' (his word) the hypothetical scenario advanced by Mr. Ivanov and accepted it as a statement of fact. The Member then assigned this hypothetical proposal the same weight as if it were a fact, instead of discounting it. He submits that this an error and, in combination with the other errors, undermined the weight the Member ultimately assigned to the opinion evidence of the expert witness, Mr. Cieciura, which the Affiant contends was based on based on actual facts.

This alleged error in fact, he posits, forms part of the basis for the Member's view, as stated in his Decision (p. 21), that *"this analysis makes me question the compatibility of the proposal with Section 3.4.1 of the Official Plan, because mature trees have to be cut down, without an appreciable increase in the number of families that can be housed."*

In the Factum, Mr. Mazierski argues that the use of hypotheticals should not be given undue weight relative to the opinion evidence provided by Mr. Cieciura and cites the TLAB decision *Re ATA Architects Inc., 2018 CarswellOnt 13138 (TLAB)* for guidance. In that decision, Chair Lord wrote at paragraph 282 that *"while hypotheticals can be useful to expose implications of scenarios, they are not substitutes for direct evaluation or opinion evidence."*

2. *Number of Trees to be Removed (pages 18-20)* - Here, and specifically on page 18, the Requestor highlights Member Gopikrishna's evaluation of Mr. Cieciura's cross-examination and states that the witness *"agreed that a total of 13 trees would have to be removed."*

   The Member further alludes to this on page 20 of the Decision under **'Analysis, Findings, Reasons'** where he stated, *"to facilitate the construction of the three houses, 13-14 trees, including two mature Norway Maple trees, would have to be cut down."*

   Mr. Mazierski asserts that the need to remove 13-14 trees in order to accommodate the proposal and the statement attributed to Mr. Cieciura by Member Gopikrishna essentially agreeing to this, are errors of fact. He suggests that the only materials referenced during the proceedings came from the City's Urban Forestry staff who identified only two mature Norway Maples trees as requiring removal. He furthermore submits that the only reference to '13-14 trees' came from Mr. Ivanov during his cross-examination of Mr. Cieciura.

   The Requestor asserts that Mr. Cieciura merely attempted to offer an admittedly rudimentary inventory of trees located within an area defined by Mr. Ivanov, upon being asked to do so by the City solicitor. He did not, however, provide a definitive answer as to whether, or how many of those trees might be impacted by the proposed development.

   In his Affidavit, Mr. Cieciura confirms this and submits that he did not have enough information or expertise to address that issue.

   Furthermore, Mr. Mazierski notes that neither the City nor Ms. Berger called any expert evidence to establish the need to remove any trees beyond the two healthy trees noted in the report prepared by Urban Forestry.

3. *Substandard vs. Standard Lots as a Neighbourhood Condition (OP Policy 4.1.5)* – The Requestor asserts that Mr. Cieciura, in his cross-examination, addressed his 'Lot Analysis Map' (identified as Exhibit 2, p. 45 in the Hearing) and highlighted 5 substandard lots under the 'neighbourhood condition' (meaning lots with an area below the minimum lot area prescribed by the zoning by-law) in the geographical neighbourhood.

   However, in discussing the 'neighbourhood condition' on page 21 of his Decision, and despite Mr. Cieciura's analysis and assertion of the presence of at least five other substandard lots, Member Gopikrishna seemed to discount these examples and concluded that, *"the lots in other examples of the 'neighbourhood condition' are not substandard lots, but standard lots."*

   With this determination, the Member subsequently made the following finding, "*The proposal does not satisfy Policy 4.1.5 of the Official Plan, which emphasizes that 'Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular: b) size and configuration of lots'."*

The Requestor asserts that the Member's statement that the other lots aligned in accordance with the 'neighbourhood condition' are standard lots is an error of fact. He submits that there are clearly existing substandard lots, as identified by Mr. Cieciura, that are aligned in accordance with the 'neighbourhood condition' that form part of the existing physical character of the neighbourhood.

4. *Static but Not Stable (OP Policy 4.1.5)* – On page 20 of the Decision, the Member concludes that *"this Study Area may be stable, but it is static, as opposed to being stable but not static. Based on this conclusion, I question if the Neighbourhood Policies can be applied to this proposal, let alone satisfied, since the community does not satisfy the assumption of 'stable but not static'."*

   The Requestor submits that Member's position as to whether the neighbourhood is 'static' is premised on the moderate number of severances approved over the 10-year period as highlighted by Mr. Cieciura in his evidentiary material. The belief that the Official Plan's *Neighbourhoods* policies might not apply on these grounds is an error of law.

   He argues that the OP outlines the City's planning views on how land should be used and that if an OP objective is not currently being met by virtue of a moderate number of severance applications by private third parties, it would not negate the impact of the OP's policies when evaluating a planning application that is considered in conformity to the OP.

   Th Requestor, however, does acknowledge in the Factum that this particular error of law is unlikely to have led Member Gopikrishna to a different decision than the one that would have been made but for the error. It is, nevertheless, highlighted as a precautionary measure by the Requestor, who wishes to dispel *"any notion about this proposal not being governed by the Official Plan"* (Affidavit of Mr. Kazemzadeh, para.56).

**Section 51(24)(F) – The Dimension and Shapes of the Proposed Lots**

1. *Symmetry of the Lots (pages 21-22)* – On pagers 21- 22 in the Decision, Member Gopikrishna elaborates at length on the differentiation between the terms 'similarity' and 'symmetry' in the context of the wording of s. 51(24)(f) of the *Planning Act.* That subsection of the *Act* states that *"regard shall be had, among other matters…to, (f) the dimensions and shapes of the proposed lots."*

   In noting the importance of both the dimensions and shapes of the proposed lots he states that *"while 'similarity' restricts itself to a discussion of shape without reference to size, 'symmetry' requires that both the shapes and sizes of the objects being compared to (sic) be identical (his emphasis)to each other."*

   The Requestor notes that nowhere in the *Planning Act* is there a reference to the terms *'symmetrical'* or *'identical'* or, for that matter, is there a strict requirement to unequivocally adhere to either of those standards. He submits that the direction is merely to have a general 'regard' for the dimensions and shapes of any lots being proposed.

In analysing the lots resulting from the proposed severances with this perspective, he asserts that the Member refused the applications on the grounds that the lots do not meet this *"strict, non-existing standard*" (Affidavit, para. 61). He also submits that although Member Gopikrishna is correct in noting that both the shapes and dimensions of the proposed lots matter, reading the word *"'symmetry' into the standard, which then leads him to read the word 'identical' into the standard, is an error of law"* (Mr. Kazemzadeh's Affidavit, para. 58).

2. *The Perception of Lot Size from the Street (p. 22)* – The Requestor questions the Member's conclusion, found on page 22 of the Decision, that *"the tests about lot sizes does not consider perception as criterion for decision-making."* This follows Mr. Cieciura's *prima facie* opinion evidence that while both an aerial view of the lots (where the difference would be palpable) and the view from the street are important elements of assessment of the dimensions (size) of the lots being created, the lots, and specifically the compliant lot frontages, would not be discernable from the street.

In the Affidavit, the Requestor asserts that Member Gopikrishna's decision to 'discount' (his word) the importance of the perception of lot size from the perspective of the street view is an error of law. Furthermore, he suggests that it is also not consistent with the evaluation made by the former OMB in *'Polsinelli'* in which the Panel Member wrote, at paragraph 20 in that decision, that

> *"The width of the front of the lot (frontage) is of particular importance because it forms part of the streetscape and, more broadly, the built environment that is typically perceived by the public."*

## 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

It is clear on the documents filed at the Hearing that Mr. Cieciura presented to the Member oral submissions and professional research as evidence in support of the applications and the appeals. It is also clear that the very subjects upon which the Member made his determinations and that are contested were matters that were raised in the proceedings and discussed.

The Request specifically cites as the basis for consideration paragraph 31.7 (c) and is sufficiently clear as to the associated allegations so as to permit this to be considered given the grounds for review, above recited.

At the outset, as has become the custom, it is appropriate to state the circumstances surrounding the purpose and application of Rule 31 as it above appears. These comments are general propositions to be kept in the mind of the reviewer so as

to ensure that the purpose of the Rule is not redrafted to something different than its public interest objective: to enable a sober second consideration to a decision of the TLAB on any of the grounds recited by the Rule.

In reviewing the circumstances of the alleged grounds, it is incumbent upon the reviewer to have regard to the Decision and the foundations for decisions upon which the Member can rely. The Tribunal generally employs a template format to the delivery of its decisions, designed to ensure that the Member is prompted to review, describe and state, in a logical and deliberate manner, the relative considerations employed in reaching the outcome.

A Review Request right is not afforded as an opportunity to re-litigate or re-argue a point that was made out but was not favourably received, in the Decision, affecting a Party.

Fundamental to assessing, for Review purposes, the assertions made in the Request is the need to give the Decision a fair and liberal interpretation and construction consistent with its role. A decision must project a determination on matters put to it in a fair, deliberative and reasonable manner, as can be best expressed using clear language. Members' expressions will differ in that regard and what is delivered by one may not be suitable for another.

Conversely, a decision must reflect a suitable basis for the conclusions arrived at by the Member taking into consideration relevant matters, discarding the irrelevant and without foundation and applying the law and policy made germane to the tribunal's mandate, including its own deliberations.

It is with these considerations in mind that I have read and reread the Member's Decision and reviewed the recordings of the proceedings.

I note that in this matter, Member Gopikrishna found the demonstrable stability of the neighbourhood, coupled with the descriptive lot size and shape characteristics of the local neighbourhood that he found compelling, warranted not supporting the proposed severance applications on appeal.

Notionally, these are evidentiary matters subject to determination of weight and policy direction. At issue is their relevance, the assertion of unfounded assumptions made by the Member contrary to the evidence provided and whether the Member properly assessed the proposal relative to the two subheadings of s.51(24) of the *Planning Act* resulting in his assessment that the severances were problematic.

The Member holds the responsibility to consider the evidence provided, determine its relevance, afford it the weight considered appropriate, and draw conclusions based on the larger considerations of administrative policy.

To meet the threshold for a Review under Rule 31, the Requestor must satisfy the Tribunal that there were significant errors made on the evidence heard, in this case presented to be of fact. Further, that had the errors not been made, a different decision likely would have resulted.

The Requestor and the Submissions filed with the Review Request suggest and infer that the Member did not properly understand the evidence submitted or fully comprehend the *viva voce* evidence provided by Mr. Cieciura. Furthermore, the Requestor suggests that the Member also improperly considered policy direction or failed to interpret the relevant and existing policy implications of the Official Plan correctly as they applied to the severance application at hand.

The Requestor asserts in the Submissions that as a result of the Member's considerations, he did not attribute sufficient weight to Mr. Cieciura's evidence and submissions.

I address, individually, the grounds raised in the Requestor's Affidavit.

The first two grounds raised by the Requestor, above recited, were analyzed by the Member under the subheading of s. 51(24)(c) of the *Act*. They relate to the alleged existence of a basement apartment in the existing dwelling on the property at 225 Northwood Drive (Part C), its contribution to the modest intensification of the property without the need for the requested severances, and the impact of the overall proposal on existing trees.

I review these first two grounds together as they are somewhat interrelated.

The matter of whether a basement apartment or suite exists in the dwelling at 225 Northwood Drive and the question of how many trees will be impacted by the subject proposal are extremely relevant to the Member's analysis of the compatibility of the proposal and the application of OP Policy 3.4.1.

The Member alludes to this consideration on page 20 of his Decision, where he wrote that *"there is an interesting scenario, with a nexus to the OP, that emerged through the examination in chief and cross examination."* He is referring to presentation of evidence by Mr. Cieciura.

In the next paragraph, Member Gopikrishna further expounds on this policy relationship where he writes:

> *"Building three houses on the three lots to be created, prima facie, should house more families than the existing two houses. However, as demonstrated through the cross-examination, three families can be accommodated in the existing two houses, if the* ***walkout apartment in Part C were retained*** *(my emphasis). However, to facilitate the construction of three houses, 13-14 trees, including two mature Norway Maple trees, would have to be cut down."*

He then concludes his analysis on page 21 of the Decision, where he states *"This analysis makes me question the compatibility of the proposal with Section 3.4.1 of the Official Plan, because mature trees have to be cut down, without an appreciable increase in the number of families that can be housed."*

The Requestor, who currently resides in the existing dwelling on Part C, has attested to the fact that there is no basement apartment in the home and there is no intention of creating one in the proposal before the TLAB.

The alleged existence of a basement apartment may have arisen from a 'hypothetical' scenario raised by Mr. Ivanov and put to Mr. Cieciura during cross-examination and may have been misinterpreted by the Member as 'existing'. As illustrated by the drawings submitted and presented at the Hearing (highlighted as Exhibit 1 at the Hearing), the plans show no evidence of doors or walls separating the basement from the remainder of the main internal living area that would suggest a separate residential unit, or the inclusion of a kitchen in that space.

The plans do, however, indicate that the existence of a 'basement walkout' from the dwelling on Part C which the Owner has agreed to eliminate as part of the proposal on recommendation of City Planning staff. In cross-examination, Mr. Ivanov suggested the following hypothetical situation to Mr. Cieciura; that intensification could be achieved without the requested severances by a prospective basement apartment being created in the dwelling and that the utility of this 'speculative' unit would benefit from the retention of the existing basement walkout.

In his Affidavit, Mr. Cieciura attests that he did not confirm the existence of a basement apartment but simply acknowledged during cross-examination by the City's solicitor, that intensification could hypothetically be achieved by adding a secondary suite to the dwelling on Part C. After listening to the recording of the proceedings and reading the materials pre-filed with the TLAB, I can find no evidence to contradict Mr. Cieciura's attestation.

I agree with the Requestor that the Member may have misconstrued the verbal interaction between Mr. Ivanov and the witness relative to the hypothetical scenario put to Mr. Cieciura. The hypothetical introduced by the City was promoted in response to prior statistical evidence provided by Mr. Cieciura that the neighbourhood had lost approximately 15 residential units over time and that the proposed severances would, in some way, address this loss with an additional, new residential dwelling.

This misunderstanding is somewhat amplified on page 18 of the Decision, under the heading 'Evidence', where Member Gopikrishna seems to confirm, erroneously, the presence of *"the existing secondary unit."* More importantly, he makes the following additional mistaken interpretation:

> *"It was then agreed that while the proposal was compatible with the concept of modest intensification, and that building something with a higher FSI pointed in the direction of modest intensification, the same aim could be met through allowing the* ***existing secondary unit*** *(my emphasis) to remain."*

I believe the Member's misunderstanding of the use of the hypothetical scenario occurred at this point in the proceeding because he was now conflating conjecture and alternative approaches to the modest intensification of the existing properties. This appears to be further confirmed in the Decision when the Member asserts, on page 18, that *"Mr. Cieciura agreed with Mr. Ivanov's suggestion that the intention of creating more residential units could be met even if there was no severance and* ***the secondary suite was allowed to exist*** *(again, my emphasis)."*

The discussion related to the issue of additional residential units on the subject properties appears to have informed the Member's view and resulted in his determination that mature trees have to be removed *"without an appreciable increase in the number of families that can be housed"* as a result of the proposal.

I agree with the Requestor that it appears the Member gave this hypothetical the same weight as a fact and undue weight relative to the factually based opinion evidence proffered by Mr. Cieciura. I also find support for the precedent found in *RE ATA Architects Inc.* which establishes the principle that direct evaluation of actual facts should be given materially more weight than any hypothetical, including those put to an expert witness.

With respect to the question of the number of trees impacted by the requested severances and the corresponding construction of the proposed dwellings on the newly created lots, I find no evidence to support the Member's conclusion from Mr. Cieciura's evidence that 13-14 trees would require removal.

Member Gopikrishna makes this assertion numerous times in the Decision: on page 18, under the heading of **'Evidence**' he discusses the cross-examination of the witness by the City and intimates that Mr. Cieciura agreed that 13-14 trees had to be removed; and again on page 20, under the heading '**Analysis, Findings, Reasons**' where he states that *"to facilitate the construction of three houses, 13-14 trees, including two Norway Maple trees, would have to be cut down."*

I note that there is an error in the latter statement, above, attributable to the Member in that only two new dwellings are being proposed by the Mr. Kazemzadeh as part of the Applications; the dwelling on 225 Northwood Drive (Part C) is existing and the variances required are due to the re-positioning of the rear (southern) lot boundary.

The only evidence referenced during the two Hearing days regarding the impact of the proposed Applications on trees related to comments from Urban Forestry to the COA, dated September 27, 2018 (found on pages 80-81 of Exhibit 1). In those comments, Urban Forestry staff state that the approval of the requested severances, if built upon, would require the removal of two healthy, privately-owned Norway Maple trees. There were no additional trees identified as being impacted by the proposal nor did Urban Forestry highlight injury to any other healthy protected trees on the property.

It appears that the reference to the possibility of the need to remove the '13-14 trees' originated with Mr. Ivanov when probing Mr. Cieciura regarding the proposed development and applicability of the Environmental Policies in Section 3.4 of the OP. Mr. Cieciura was asked if he agreed with the statement *"that this area has lots of trees"* to which he answered "no" (Decision, p. 18). When asked by the City solicitor to assess the number of trees in the *'area'* to which the solicitor was referring, Mr. Cieciura provided what I would term as an informal, speculative tree inventory and noted the existence of some 13 to 14 trees. When further queried as to how many of those trees would need to be removed as a result of the proposal, Mr. Cieciura was reluctant to do so.

I have found no evidence in either the materials filed with respect to the subject Applications or the *viva voce* evidence of Mr. Cieciura to confirm Member Gopikrishna's statement on page 18 of the Decision that upon being asked by Mr. Ivanov *"if a total of 13 trees had to be removed to make the proposal happen, to which the latter (Mr. Cieciura) agreed."*

Mr. Cieciura attested to this fact in his October 10, 2019 Affidavit stating that he did not make the statement, above cited, attributed to him by the Member.

I agree with the Requestor that Mr. Cieciura did not have sufficient information or expertise to verify whether any other trees would be impacted by the proposal, despite repeated attempts by the City solicitor to elicit such a determination. Furthermore, I find that he was not in a position to address the issue of impact of the proposal on existing trees beyond the two trees noted in Urban Forestry's comments and was reluctant to do so during the proceedings.

If the City wanted to establish the fact that the Applications would result in the removal of more than the two trees identified by Urban Forestry, then the City should have called their own forestry expert to provide such evidence with requisite cross-examination by the other Parties. I agree with the Requestor that neither the City nor the other Party, Ms. Berger, put forth any expert evidence to establish the need to remove any additional trees other than the two identified in the report prepared by Urban Forestry.

With respect to the third ground for review, dealing with the issue of substandard-sized lots and the 'neighbourhood condition', the Requestor asserts that the Member erred in discounting the examples of substandard lots highlighted by Mr. Cieciura.

In the Decision, Member Gopikrishna identifies the 'neighbourhood condition' as *"two houses facing a street, while the house whose side flanks the back yard of the aforementioned two houses faces a perpendicular street."* Referring to his Lot Area Analysis Map (found on p. 45 of Exhibit 2 presented at the Hearing), Mr. Cieciura illustrated examples of similar 'substandard lot' conditions within the neighbourhood as proposed by the Owner.

The Member chooses not to agree with the Applicant's contention that the proposal does indeed reproduce a 'neighbourhood condition' as he expresses on page 21 of the Decision. There, he concludes that the evidence submitted by the Applicant's expert witness results in *"my questioning the 'fit' between the proposal and what exists today in the community, because what is proposed may mimic the shape and geometry of the latter, but does not manifest the latter."* On this basis, he found that the proposal did not satisfy OP Policy 4.1.5(b) and that the Applications did not respect and reinforce the existing physical character of the neighbourhood.

I would suggest that the assessment as to whether the lots to be created are reflective of the neighbourhood condition and form part of the existing physical character of the neighbourhood is the prerogative of the presiding Member to decide based on the evidence heard.

However, I agree with the Requestor that the Member's assertion that there are no other substandard lots that are aligned in accordance with the neighbourhood condition was not borne out by the evidence presented by Mr. Cieciura. The five examples of substandard lots highlighted by Mr. Cieciura from his analysis – 36 Urbandale Avenue situated behind the rear yards of 127 and 129 Maxome Avenue, where none of the lots comply with the minimum lot area under the zoning by-law, and 143 Maxome Avenue situated behind 220 and 223 Ruth Avenue, where the latter two lots are substandard – although reflective of a very small sample size, are by their very definition clearly examples of existing substandard lots.

The fourth ground introduced by the Requestor and outlined at paragraph 53 of the Factum relates to the Member's assessment of the Study Area and whether it is considered 'stable but not static' as found in the wording in the explanatory portion of the OP respecting changes to established neighbourhoods; that section of the OP suggests that none is to be frozen in time, though change is to be gradual.

The Member concluded in the Decision that the Study Area may be stable *"but it is static"* since there have only been a moderate number (eight in total) of consents approved by the COA over the previous 10-year period. As a result, he states on page 20 that *"Based on this conclusion, I question if the Neighbourhoods policies can be applied to this proposal, let alone satisfied, since the community does not satisfy the assumption of 'stable but static'."*

Although the Requestor asserts that this is an error of law he nevertheless acknowledges (at paragraph 56 in the Factum) that this error is unlikely to have led the Member to a different decision than the one that would have been made but for the error. As a result, this review ground is not addressed in any detail as it has been highlighted and introduced by the Requestor as a 'precautionary measure' (his words) to dispel any notions that the proposal has not had regard for the relevant policies of the OP.

With respect to the two grounds identified by the Requestor in his Review Request under s.51(24)(f) of the *Act*, I will first deal with the issue of the Member's analysis of the proposed dimensions and shapes of the lots to be created. This subsection directs that in considering a draft plan of subdivision regard shall be had, among other matters, to "(f) the dimensions and shapes of the proposed lots."

On page 21 of the Decision, Member Gopikrishna is alert to this consideration in reviewing the proposal before the Tribunal, noting that the Applicant has asserted that the proposed severances would reproduce the lot patterns that currently exist on Northwood Drive, across from the subject properties, and on Conacher.

Further down on the same page, the Member concludes after considering the relevant subsection of the Act, above recited, the following:

> *"if the severance applications were approved, the resulting lots would be geometrically speaking, "similar" to each other, but not "symmetric", because of the lot size. While "similarity" restricts itself to a discussion of shape without reference to size, "symmetry" requires that both shapes, and sizes of the objects*

*being compared to be identical to each other. The emphasis on "shape sizes AND lots" (my emphasis on "AND") in Section 51(24), manifests itself in symmetry as opposed to similarity."*

The Requestor submits that although the Member was correct in identifying that both the shapes and dimensions of the lots "matter" (the Requestors term), Member Gopikrishna's decision to read the word 'symmetry' into the standard, and then to introduce the word 'identical' into the standard is an error of law.

There is no wording in the *Planning Act*, provincial policy or the Official Plan that references a standard for lot dimensions and shapes to be 'symmetrical' or 'identical' or a direction that requires a strict requirement to unequivocally adhere to either of those two standards. The direction is that when considering the creation of new lots, "regard" shall be had to the size and shape of the proposed lots.

At a more granular level, the OP addresses development criteria in *Neighbourhoods* in Section 4.1, and in Policy 4.1.5 it directs that development will *"respect and reinforce the existing physical character of the neighbourhood considering (b) prevailing size and configuration of lots."* The word 'prevailing' has been added and policy wording amended through the approval of OPA 320.

Respecting the existing physical character does not mean replicating what is there and that the evaluation process cannot be reduced to a purely mathematical exercise which is essentially what I believe the Member attempted to do. While prevailing will mean 'most frequently occurring' for the purposes of this policy, the OP recognizes that some geographic neighbourhoods contain a mix of physical characteristics, including lot sizes and dimensions.

In such cases, the direction to respect and reinforce the prevailing physical character does not preclude development that is not the most frequently occurring but does exist within the geographic area. Provided that the characteristics of the proposed development are materially consistent with the physical character of the geographic neighbourhood.

In the matter at hand, I agree with the Requestor that the Member has subjected the lots to be created by the proposed severances to a very stringent non-existing standard that requires the lot dimensions and shapes to be 'symmetrical' and not simply 'similar'. The Member then imposes the standard of no symmetry to determine that the proposed lots fail under s. 51(24)(f) of the *Act* and therefore refuses to grant the severances.

Finally, at paragraph 63 in the Factum, the Requestor raises the Member's conclusions regarding the issue of the perception of lot sizes from the street as an error of law. In addressing Mr. Cieciura's opinion evidence that the dimensions (size) of the proposed lots would not be discernable from the street since the lot frontages for all three lots would be by-law compliant, the Member wrote that *"The test about lot sizes does not consider perception as criterion for decision-making and consequently confirms my concerns about the lot size being distinctly different from what exist on the ground"* (Decision, p. 22).

The Member also wrote that *"the Appellants did concede, in response to a question, that the aerial view of the lots (where the difference would be palpable), should be given more weight, than the view from the street."* In his Affidavit, Mr. Cieciura submits that the Member discounted his opinion that while an aerial view of the lots has relevance, the perception of lot size from the street view is an important perspective as well.

The Requestor asserts that the position the Member took in this regard in outlined in the Decision in the context of s. 51(24)(f) is an error of law and is inconsistent with the decision in *'Polsinelli'*. At paragraphs 19 and 20 in that LPAT decision, which dealt with an appeal of a COA refusal of an application to sever the property at 485 Ridelle Avenue and corresponding variances required to construct two dwellings, Member Krzeczunowicz addressed the issue of lot characteristics as follows:

> *"We need not be concerned with the proposed lot shapes and configuration…Consideration of the size and dimensions of the lots engages their area, depth and width. The width of the front of the lot (frontage) is of particular importance because it forms part of the streetscape and, more broadly, the built environment that is typically perceived by the public."*

The Requestor asserts that the Member's discounting of the perception of lot size, whether aerial or from street view, as a criterion for decision-making in determining the test of whether the proposal satisfies s. 51(24)(f) is an error. As such, it led the Member directly to conclude that the subject proposal (severances) *"does not have the ability to satisfy component (f) of S.51(24)"* (Decision, p. 22).

While I agree that 'perception' is not alluded to in the statutory tests it is, nevertheless, relevant in arriving at a determination of whether the new lots will 'fit' and respect and reinforce the existing physical character of the neighbourhood. The characteristics of lots such as frontage and width are noticeable as one walks the street and the impact of lot sizes and dimensions on the resulting built form and setbacks – even if these elements comply with zoning standards – could be viewed as contributing to a redevelopment that is decidedly uncharacteristic of the neighbourhood.

Member Gopikrishna may have appeared to discount perception as a criterion for the test of lot size, however, he nevertheless does acknowledge that it is pertinent to his decision-making. This is evident at page 22 in the Decision where he wrote that "*The concern about the lot size is reinforced by the Appellants' argument…This argument rests on the perception of the lot sizes, as opposed to the real size of the lots themselves."*

In his concluding remarks he states that this "…*consequently confirms my concerns about the lot size being distinctly different from what exists on the ground."*

Therefore, I find that the Member followed the same reasoning approach as was employed in 'Polsinelli" and, in my view, adopted a consistency that was appropriate.

## DIRECTION (IF APPLICABLE)

Under the jurisdiction afforded in the former Rules, a Request for Review can be dismissed or addressed under any of the relief heading listed in Rule 31.6. The Requestor requests that the TLAB vary the decision and allow the appeal with respect to the five Applications or, alternatively, requests that the Tribunal suspend or cancel the Decision and direct an oral hearing dealing with all of the Applications before a different TLAB Member.

In this circumstance, I find that Member's Decision on the merits was based on erroneous and flawed analysis and conclusions, he may have misconstrued facts, conflated hypothetical scenarios and made 'incorrect' (as opposed to different) interpretations of the evidence. I find that the Request does meet the relevance or threshold required under Rule 31 for relief and that there are compelling grounds that have been made out that there appear to have been errors of fact or law which would likely have resulted in a different order or decision.

Consequently, and pursuant to the discretion allowed a Member by TLAB Rule 31.6(c), I find sufficient basis to direct a rehearing of the appeal in its entirety without any terms or conditions that might be seen or construed as influencing its determination. It will be a *de novo* Hearing, but with the learning curve of history, and it is to be before a different Member than has been engaged in respect of the subject properties to date.

Nothing in this determination is to be read or suggest any particular final outcome on the merits of the appeal.

## DECISION AND ORDER

1. The Request is granted, the Decision is cancelled and the TLAB, at the earliest opportunity available, shall schedule a two-day Hearing on the appeal before a different Member than engaged to date.

2. The TLAB staff is directed to issue and post a Notice of Hearing schedule indicating the new Hearing dates and requisite exchange dates.

3. If there are any difficulties the TLAB may be spoken to.

X 

D. Lombardi
Panel Chair, Toronto Local Appeal Body