TORONTO

Toronto Local Appeal Body

40 Orchard View Blvd, Suite 253
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

REVIEW REQUEST ORDER

Review Issue Date: Thursday, May 14, 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): Adelino Lopes

Applicant: Manny Marcos

Property Address/Description: 135 John St

Committee of Adjustment Case File Number: 17 250374 WET 11 CO (B0093/17EYK), 17 250382 WET 11 MV (A0899/17EYK), 17 250383 WET 11 MV (A0900/17EYK)

TLAB Case File Number: 18 128861 S53 11 TLAB, 18 128863 S45 11 TLAB, 18 128864 S45 11 TLAB

Decision Order Date: Monday, December 16, 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 Adelino Lopes and Catherine Travers (Applicant) of Member S. Makuch's decision of the Toronto Local Appeal Body (TLAB), dated December 16, 2019 (Decision). The Applicant is the owner of the property located at 135 John Street (Subject Property), which was the subject of the TLAB appeal. The appeal hearing for this matter was held over four days between October 31, 2018 and August 22, 2019.

2. The Applicant had filed a proposal with the Committee of Adjustment (CoA) to sever the Subject Property into two lots and build a two-storey house in each lot, which required approval of variances as well. The proposal was denied by the CoA and the Applicant appealed before the TLAB. During the course of the hearing, the Applicant had amended the proposal such that the list of variances requested at the

TLAB hearing was different than the list before the CoA. The TLAB dismissed the appeal.

3. This Review Request is made pursuant to Rule 31 of TLAB's Rules of Practice and Procedure (Rules), effective date May 3, 2017. These Rules have been amended since the appeal was initiated. However, the updated version of the Rules is not applicable, as the appeal before the TLAB was made prior to the amendment. As such, the Rules effective May 3, 2017 will be relied on for the purposes of this review.

4. The City of Toronto (City), a party to the appeal, filed a response to the Review Request, which was followed by the Applicant's own reply to the City's response along with supplementary submissions provided by the Applicant.

JURISDICTION

Below are the Rules applicable to a request for review of a TLAB decision:

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.

Fee for Filing of Review

31.5 A Party requesting a review shall, at the same time as filing a request for review, pay to the Local Appeal Body the required fee.

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

Documents reviewed for the Review Request

5. I have reviewed the following documents:

    a. TLAB's Decision for the Subject Property.

    b. The Applicant's Submissions for Review dated January 15, 2020, filed by Ms. Amber Stewart, counsel for the Applicant (Applicant's Submissions).

    c. Affidavit of Franco Romano dated January 15, 2020 (Mr. Romano's Affidavit), which is part of the Applicant's Review Request.

    d. City's Written Submissions in response to the Review Request (City's Submissions).

    e. Affidavit of Mr. Alan Young dated February 12, 2020 (Mr. Young's Affidavit), which is part of the City's response to the Review Request.

    f. Affidavit of Dr. Max Dida dated February 12, 2020 (Dr. Dida's Affidavit), which is part of the City's response to the Review Request.

    g. Transcript excerpts from the hearing for *27 Thirty Ninth Street*, of the direct, re-direct and cross examination of Mr. Dida (Transcript).

    h. The Applicant's supplementary submissions dated January 23, 2020 (Applicant's Supplementary Submissions).

    i. The Applicant's reply submission dated February 18, 2020 (Applicant's Reply).

6. I also reviewed Mr. Romano's expert witness statement (Mr. Romano's Witness Statement) and Mr. Young's expert witness statement (Mr. Young's Witness Statement) that was filed for the hearing. Mr. Romano's Witness Statement included the original and amended arborist reports by Kent Nielsen. I reviewed these documents because the Applicant and the City have referred to these documents in their submissions or in the filed affidavits.

7. From my review, some portions of Mr. Romano's Affidavit and the submissions made by the Applicant can be characterized as an attempt to reargue the matter, which was noted in the City's Submissions (para. 3). While it may be difficult for parties to avoid the opportunity of re-arguing the matter when filing for or responding to a request for a review of a decision, it is essential for the Member conducting a review to identify and not be influenced by such submissions by any party. A request for review is not a second opportunity for a hearing on the merits.

<u>*Grounds for Review*</u>

8. The Applicant submitted the following grounds for review (Applicant's Submissions, para. 4):

> "e) The TLAB 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.
>
> d) The TLAB was 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.
>
> c) As a result, the TLAB made an error of law or fact which would likely have resulted in a different order or decision.
>
> b) The TLAB violated the rules of natural justice and procedural fairness, by providing insufficient reasons in support of the Decision to refuse the applications."

9. Grounds 1, 2 and 3 are related to the Applicant's Submissions that the report by the City's Parks, Forestry and Recreation, named "Tree Protection through the Committee of Adjustments" dated December 13, 2017 and an associated PowerPoint deck (collectively referred in this decision as Tree Protection Staff Report) should have been tendered as evidence at the hearing. The Applicant submits that Dr. Dida's evidence on this report would have assisted the Member to reach a different decision.

10. The Applicant's counsel, Ms. Stewart, was not aware of the Tree Protection Staff Report during the hearing. She only became aware of this report during a different hearing for the property at *27 Thirty Ninth Street*, which was held after the hearing for the Subject Property. Dr. Dida was cross-examined on this report during that hearing. The Applicant characterizes Dr. Dida's testimony and this Tree Protection Staff Report as new evidence.

11. The relief being sought is the following (Applicant's Submissions, p. 1):

    a. The Decision is set aside and the severance application approved with an opportunity for the Applicants to review the built form, if the Member considering the Review Request deems necessary.

    b. In the alternative, a new hearing is ordered before a different Member.

<u>*Can the Transcript be considered as evidence for the Review Request?*</u>

12. The Applicant submitted that Dr. Dida's oral testimony (as transcribed in the Transcript), which refers to the Tree Protection Staff Report, is new evidence and contradicts Dr. Dida's evidence at the hearing with respect to the as-of-right building envelope.

13. The City consented to the filing of this Transcript.

14. Notwithstanding the City's consent, it is necessary to consider whether the Transcript of witness testimony from a different hearing for a different property, which was held after the hearing for the Subject Property was completed, can be considered as "new evidence" pursuant to Rule 31.7.

15. The admissibility of evidence is governed by the *Statutory Powers Procedure Act,* RSO 1990, c S.22 (*SPPA)*. Pursuant to subsection 15(1) of the *SPPA*, the TLAB may admit any document as evidence at a hearing if it is relevant to the subject-matter of the proceeding and may make decisions based on such evidence. However, this section does not directly consider transcripts from another hearing that was held after the subject hearing, for the obvious reason that such evidence would not have existed at the time of the subject hearing.

16. Other relevant sections from the *SPPA* are subsections 15.1(1) and (2), which state:

> **Use of previously admitted evidence**
> 15.1 (1) The tribunal may treat previously admitted evidence as if it had been admitted in a proceeding before the tribunal, if the parties to the proceeding consent.
>
> **Definition**
> (2) In subsection (1),
>
> "previously admitted evidence" means evidence that was admitted, before the hearing of the proceeding referred to in that subsection, in any other proceeding before a court or tribunal, whether in or outside Ontario.

17. These sections of the *SPPA*, though informative, do not directly address the admission of a transcript from a subsequently held hearing. However, sections 15 and 15.1 of the *SPPA* in my view provide an administrative tribunal, such as TLAB, with significant flexibility for considering what can be admitted as evidence, provided that such evidence is relevant to the subject-matter and not unduly repetitious.

18. Based on my review of the Transcript and the Applicant's Submissions, including considering the City has consented to the admission of the Transcript, I am satisfied that the Transcript can be filed for consideration as to whether it is new evidence which was not available at the time of the hearing for the Subject Site, for the purposes of this review, under Rule 31.7.

Is Dr. Dida's testimony and the Tree Protection Staff Report new evidence that can satisfy the grounds for review under Rule 31.7(d)?

19. Rule 31.7 (d) states that one of the grounds for review is that the TLAB has been 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 (emphasis added). This Rule is similar to the test for admission of fresh evidence set out by the Supreme Court of Canada in *671122 Ontario Ltd. V. Sagaz Industries 2001 SCC 59*. The City provided a summary of the test in its Submissions, which I will not repeat in this decision.

20. The TLAB has its own rules for admission of new evidence which is similar to the common law test established by the Supreme Court of Canada. Rule 31.7(d) clearly outlines the test a reviewer must follow to determine whether the Applicant's submission of new evidence can be accepted on review:

    a. First, Dr. Dida’s testimony (and the Tree Protection Staff Report) must be new evidence which was not available at the time of the hearing.

    b. Second, if either Dr. Dida’s testimony or the Tree Protection Staff Report is new evidence, whether admission of this evidence would likely have resulted in a different order or decision.

21. I will first address the Tree Protection Staff Report and whether it can be considered as new evidence under Rule 31.7(d). This report is part of Dr. Dida’s oral testimony, which the Applicant submits as new evidence (para. 18 of Applicant’s Submissions). This report is connected to part of Dr. Dida’s testimony during cross-examination (for the TLAB hearing of the property at *27 Thirty Ninth Street*). That Hearing remains incomplete and no disposition has been rendered.

22. The Tree Protection Staff Report was submitted as an exhibit to Mr. Romano’s Affidavit. The report itself is dated December 13, 2017 and the slide deck is dated February 23, 2018. The report and the slide deck are publicly available and easily accessible online.

23. The purpose of this Report is stated in the Summary section on page one of the report. The purpose is to respond to the motion adopted by the City Council in December 2016 meetings, requesting that the General Manager of Parks, Forestry and Recreation to undertake a review of the CoA’s consent and minor variance review processes as it relates to tree protection. There are several portions of this report and the slide deck that are relevant to this Review Decision. I will address these portions later in my decision.

24. The Applicant submitted that Ms. Stewart was not aware of the Tree Protection Staff Report and only became aware of this report in the later hearing for the property at *27 Thirty Ninth Street*. The Applicant’s Submissions state at paragraphs 14 and 15:

    > 14. Although this evidence was in the public realm at the time of the 135 John St. hearing, it was not known to Mr. Romano or Ms. Stewart. It is not reasonable to expect that Mr. Romano or Ms. Stewart could be aware of each and every report that is presented to Council.

15. However, this Report was known to the City, and was not disclosed or referred to by Dr. Dida. In our respectful submission, Dr. Dida's objection to the proposed removal of the Silver Maple Tree, premised upon the assertion that the as-of-right building envelope was irrelevant, amounts to false and misleading evidence. Dr. Dida's opinion was not consistent with the stated practice of Urban Forestry, nor the adopted Council direction to consider the as-of-right building envelope in a Committee of Adjustment application.

25. The importance of tree preservation in this matter can be found in the Decision, where the Member wrote that one of the matters at issue was whether the proposed development conforms to the Official Plan (OP) requirements of s. 3.4.1(d) regarding tree preservation (page 3 of the Decision). The Member further stated in "Analysis, Findings, Reasons" that policy 3.1.2.1(d) of the Official Plan requires attempts to preserve the existing mature trees and incorporate them in landscaping designs (p. 6 of the Decision).

26. Based on my review, the Tree Protection Staff Report is not new evidence that can satisfy the test set out in Rule 31.7(d). The Tree Protection Staff report fails the first part of the test.

27. I adopt and agree with the following submissions provided in paragraph 12 of the City's Submissions:

> Parties are expected to place the whole of their case before the decision maker at the time of the initial hearing. It is further expected that legal counsel, before presenting their case to the trier of fact, has prepared, done their research and has strategized about the evidence they present and the evidence they elicit from a witness. These are fundamental expectations at an adversarial proceeding such as the TLAB.

28. I want to emphasize that documentation that was available to the public and available online, but which was not known to a party's counsel or witness, cannot be characterized as new evidence for the purposes of a review. It is a party's responsibility in preparing for a case to consider all evidence it intends to tender at a hearing along with considering all sources for this evidence. The TLAB would be breaching well-established evidentiary and procedural rules for adversarial proceedings if it considers a report that is publicly available as new evidence.

29. The Applicant characterizes Dr. Dida's testimony during the *27 Thirty Ninth Street* hearing as new evidence. It is an obvious conclusion that this testimony was not available at the time of the hearing for the Subject Property as this testimony was provided after the subject hearing concluded. However, that does not necessarily make either the Transcript itself or the Tree Protection Staff Report.) "new" evidence.

30. In the Applicant's Supplementary Submissions, the Applicant repeatedly emphasizes the similarity between the applications for the Subject Property and *27 Thirty Ninth Street.* This being both applications involving consent and variances. Given such similarity, the information provided by Dr. Dida during cross-examination for the *27*

Thirty Ninth Street hearing could have been elicited by Ms. Stewart during the cross-examination of Dr. Dida for this hearing if Ms. Stewart was aware of the Tree Protection Staff Report. Based on the City's Submissions, Dr. Dida was cross-examined on March 28, 2019.

31. Dr. Dida's testimony is viewed by the Applicant as new and unavailable at the hearing for the Subject Property is an outcome of the Applicant's lack of knowledge or awareness of the publicly available Tree Protection Staff Report.

32. While it is not necessary to address the second branch of the test for Rule 37.1(d), I believe further elaboration can help, especially, with my discussion later regarding misleading evidence.

33. The Applicant also does not satisfy the second branch of the test set out in Rule 31.7(d) for either the Tree Protection Staff Report or Dr. Dida's oral testimony with respect of the *27 Thirty Ninth Street* hearing. This branch of the test necessitates a detailed review of the Tree Protection Staff Report and Dr. Dida's testimony.

34. The Applicant's Submissions with respect to the substantive aspect of the Tree Protection Staff Report is that Dr. Dida's testimony during the hearing for the Subject Property was inconsistent with this report. The Applicant further states that during cross-examination at the hearing for *27 Thirty Ninth Street*, Dr. Dida confirmed that:

> "…it is Urban Forestry's policy and current practice, that with or without a Committee application, tree removal would be authorized by Urban Forestry if the location of a privately protected tree is within a compliant building envelope. Further, Dr. Dida indicated in that hearing that he was not provided with the compliant building envelope as part of the consent and variance applications. He stated that if he had been provided with the as-of-right building envelope, "we" (presumably Urban Forestry) would not have objected to the removal of the tree in question" (Applicant's Submissions, para. 17).

35. Mr. Romano stated in his affidavit that he had testified at the hearing that a tree (Tree 2) on the property was located well within the as-of-right building envelope, and therefore, that proposed removal of this tree is an acceptable impact that conforms with the policy intent in the OP (paragraph 11 of Mr. Romano's Affidavit). He further stated that Dr. Dida's oral testimony on January 10, 2020 for *27 Thirty Ninth Street* corroborated his opinion evidence provided for the Decision hearing for the Subject Property. Namely, that the as-of-right building envelope is a relevant consideration when a tree proposed for removal is within the as-of-right building envelope (Mr. Romano's Affidavit, paras. 26, 27 and 31).

36. In response to these submissions, Dr. Dida in his affidavit, stated that in a matter which requires consent to sever and variance requests, there is no as-of-right building envelope. Paragraphs 9 to 11 of his affidavit state that:

> 9. In all instances where applicants are seeking a consent to sever that impacts a bylaw protected tree, Urban Forestry would object to the application,

consistent with the Municipal Code Chapter 813 - Trees ("Tree By-law") and the related December 13, 2017 Staff Report to City Council (the "Staff Report").

10. Section 813-11 of the Tree By-law, it defines as of right as "development that complies with the Ontario Building Code, local zoning by-laws and other applicable law and is permitted without further approval by City Planning. [Added 2015-12-10 by By-law No. 1327-2015]". While I am not an expert in determining whether a proposed development complies with Ontario Building Code and local zoning by laws or whether it could be permitted without further approval by City Planning, it is plain that if the matters is in front of TLAB to make a planning decision, it therefore requires further permissions to be authorized and is not as of right.

11. Further, since the lots are not created there is no as of right building envelope on a lot to be severed, and therefore the practice of Urban Forestry is to object to the removal of the tree, which is consistent with my evidence at both the hearings at *135 John St* and for *27 Thirty Ninth Street*."

37. The Tree Protection Staff Report is a 10-page document. On page 4, this report states:

Urban Forestry does not require property owners to build less than allowed by local zoning, also known as "as-of-right" development, even if there are by-law protected trees that would be impacted by the development. Section 813-18(10) of the Private Tree By-law allows for issuance of permits to injure or destroy trees where development is permitted as-of-right. In these cases, Urban Forestry attempts to achieve a net benefit to the natural environment through replacement planting and establishing tree protection for the remaining trees on site.

38. On page 7 of this report, there is an entry regarding applications in which consent and variances directly impact private protected tree(s). The report states as follows:

3. Applications in which a consent and variances directly impact private protected tree(s)

Description: A development that requires a consent to sever as well as minor variances is proposed where there is a healthy tree on the owner's property that is protected by Municipal Code Chapter 813, Trees. The tree will be impacted by the portion of development that is permitted by the severance and minor variances.

Example: A large existing lot that currently has a small house on it will be severed and redeveloped with two houses. One of the new houses will be situated where a healthy privately-owned tree is located.

Current Practice: Urban Forestry objects to the Committee of Adjustment and requests denial of the application and forwards its comments regarding this to the

Committee of Adjustment. If the variances are granted despite Urban Forestry's objections, Urban Forestry would authorize removal of the tree by permit with applicable replanting conditions. Urban Forestry may also request deferral of the application if impacts are not clear.

39. The slide deck contains three scenarios. Scenario 1 has a diagram of a single lot with an as-of-right allowance demarcated by a red dashed line. The tree to be removed is within this as-of-right building envelope. The slide states that "with or without a minor variance, tree removal would be authorized." The second Scenario deals with a private tree to be removed outside the as-of-right allowance. In this case, the Urban Forestry will object to the removal and request denial of a minor variance. Neither of these two scenarios deal with an application for consent to sever. Scenario 3 deal with the circumstances where consent to sever directly impacts City trees and is not relevant in this matter.

40. There is no indication in the Tree Protection Staff Report (including the slide deck), that this report recognizes an as-of-right building envelope in situations where applications before the CoA (or TLAB) deal with consents to severe and variance approvals. Scenarios 1 and 2 deal with single lots and there is no indication that they are appropriate for consent applications as well. The applications for consent and variances for the Subject Property fall within the entry on page 7 of the Report.

41. In the Transcript, Dr. Dida acknowledged the importance of the as-of-right building envelope. It appears from reading the Transcript that Dr. Dida acknowledged that Urban Forestry recognizes as-of-right building envelopes for consent and variance applications as well. The Applicant submits that the City did not respond to the admission of the importance of the as-of-right building envelope in their response to the Review Request (Applicant' Reply, paras. 12-14). I find that Dr. Dida clarified his position clearly in his affidavit and that further elaboration by the City is not required.

42. Dr. Dida's oral testimony is not inconsistent with Urban Forestry's position set out in the Tree Protection Staff Report. I find that there is a discrepancy on how Dr. Dida refers to an as-of-right building envelope and how the Applicant characterizes an as-of-right building envelope in applications that include requests both consent and minor variance. Dr. Dida stated that Urban Forestry considers the consent and variance applications together. In such applications, there is no as-of-right building envelope which would have existed for single unsevered lots (such as Scenario 1 in the PowerPoint Deck) because there is a request for the severance of land. The Applicant considers that the as-of-right building envelope of an unsevered lot is important in applications for consent to severe and variance for that lot.

43. The Member, in his Decision, acknowledged that Mr. Romano provided evidence that it was not reasonable to save the tree as it was in the as-of-right location for a dwelling if the lot was not severed (p. 7 of the Decision). The Tree Protection Staff Report or Dr. Dida's testimony regarding his admission of the significance of as-of-right building envelope would not likely have changed the outcome of the Decision. It is the Member's role to analyze all evidence for his Decision, and in this case, the Member already considered the as-of-right building envelope. The crux giving rise to

this issue is that the Applicant's Counsel and expert witness were not aware of the publicly available Tree Protection Staff Report. If this evidence was of importance, it was not available to the Member because the Applicant's lack of knowledge or awareness of this Report.

44. The Applicant referred to an email from Ms. Stewart to Mr. Muscat dated October 29, 2018 in the Applicant's Reply. In this email, Ms. Stewart referred to an attached site plan of the lot that shows the as-of-right building envelope of the lot. She mentioned that it was her understanding that Urban Forestry did not typically object to a removal of a tree if it is in the compliant building envelope. This indicates that Ms. Stewart was aware of some policy of Urban Forestry with respect to an as-of-right footprint. It was not new information to Ms. Stewart that Urban Forestry did not object to tree removal within the as-of-right building envelope.

Did the witness Dr. Dida provide misleading evidence?

45. The Applicant submitted that the City and Dr. Dida's failure to disclose and refer the Tree Protection Staff Report was misleading to the TLAB Member in the Subject Property's hearings (Applicant's Submissions, paras. 15 and 20). The Applicant further submits that given that the issue of the proposed tree removal played a fundamental role in the Decision to refuse the applications, the Member would have likely reached a different outcome if the best evidence had been provided to him. The Applicant also submitted that it should not be incumbent upon an Applicant to produce evidence of the internal policies of a City Department when these policies were well known to the witness testifying.

46. A claim that a party and their witness or counsel provided misleading evidence to the TLAB is a serious allegation.

47. Lawyers have an obligation to uphold the principles of the legal profession, including practicing their profession with honesty and integrity. They have obligations to assist a court or a tribunal in the administration of justice. Counsel (and expert witnesses) appearing before the TLAB have obligations towards the TLAB, which include providing fulsome disclosure of evidence that the parties intend to rely on and to promote the truth-seeking function of a hearing.

48. An expert witness has the obligation to be truthful, provide full disclosure and assist the TLAB in its resolution of the matter before it. Such a witness is required to sign an Acknowledgement of Expert's Duty which specifies the obligations of the witness towards TLAB.

49. Among these obligations that rest on a lawyer or an expert appearing before a tribunal, there is no expectation or requirement that they must assist the opposing party in preparing for their case. In an adversarial hearing, each party is expected to prepare for their own case. I do not see any evidence to suggest that Dr. Dida or the

City misled the TLAB by filing the Tree Protection Staff Report or knowingly failed, altered or otherwise referenced incorrectly departmental practices or policies.

50. Based on the foregoing, the Applicant has not established the grounds for review stated in Rule 37.1(c), (d) and (e) with respect to new evidence or misleading TLAB.

Other Errors in Law with respect to the silver maple tree (Tree 2)

51. The Applicant submits that the Member erred in law when he stated that there was no attempt to develop a proposal that would protect that tree (Decision, page 6):

> With respect to the preservation of the silver maple I find there has been no attempt to develop a proposal that would protect that tree. Policy 3.1.2.1(d) of the Official Plan requires that a criterion for evaluating development is an attempt to preserve existing mature trees wherever possible and incorporating them into landscaping designs. There was no convincing evidence from an architect or arborist that an attempt had been made to design a dwelling which would preserve the tree or that an attempt was made to incorporate the tree into a landscape design. The evidence was that the existing dwelling had to be destroyed and a new building could be constructed as of right where the tree was located. However, there was no persuasive evidence that the existing house had to be demolished, as Mr. Romano is not qualified to give evidence as an architect or engineer, and there were no plans presented to construct one new dwelling on the existing lot.

52. The Applicant submitted that this is an error in law because the Member imported a new test to determine a consent and/or minor variance application that required the design of a dwelling which would preserve a tree or incorporate the tree into a landscape design. The Applicant further submitted that the TLAB imported a requirement that the Applicant must demonstrate that the existing house had to be demolished.

53. I do not agree with the Applicant's submissions with respect to the Member's analysis. The Member considered OP policy 3.1.2.1(d), which states:

> "1. New development will be located and organized to fit with its existing and/or planned context. It will frame and support adjacent streets, parks and open spaces to improve the safety, pedestrian interest and casual views to these spaces from the development by:
>
> …
>
> d) preserving existing mature trees wherever possible and incorporating them into landscaping designs."

54. The Member did not import a new test, but simply made a commentary on his analysis based on the evidence and the referred policy. Further, the Member's decision does not indicate a new requirement to demonstrate the need to demolish the existing house. This issue of demolishment was something that was before the Member during the hearing, as discussed by both Mr. Romano and Mr. Young, in their affidavits.

55. One of the Applicant's concerns is that the Member did not recount Mr. Romano's evidence in detail with respect to the silver maple tree (Applicant's submissions, paras. 8-11, 27). The Member does not need to fully recount all the evidence before him, but the Member needs to support his reason based on the evidence before him that he considers material and relevant.

56. In this case, the Member specifically referred to OP 3.1.2.1(d), which he considered was not satisfied by the evidence before him. The Applicant is required to establish compliance with all applicable OP policies and failure to meet one policy is sufficient to deny the applications for consent and variance. Discussion of the other OP policies would have added depth to the Decision; however, in a situation where an application is denied on the non-compliance of one policy, discussion of other policies is not critical. Contrary to the Applicant's Submissions, the Member did consider the as-of-right building envelope, which he referred to in the last paragraph of the "Evidence" section (Decision, p. 6) and in the third paragraph of "Analysis, Findings and Reasons" section (Decision, p. 6).

Did the Decision include analysis of evidence and sufficient reasons to support the Decision?

57. The Applicant submitted that the Member did not provide sufficient reasons to support his decision to accept Mr. Young's evidence over Mr. Romano and his conclusion regarding inappropriateness of integral garages. The other issues in the Decision, related to providing reasons for the Decision, are listed in paragraph 29 of the Applicant's Submissions. The Applicant submitted that the insufficient reasons violated the rules of natural justice and procedural fairness.

58. A Decision does is not required be lengthy or detail every shred of evidence heard in the course of the hearing. The Decision, however, must provide reasons of why the decision-maker chose the testimony of one witness over the other. The Applicant provided extensive review of other review decisions of the TLAB (Applicant's Submissions, paras. 26 -28). I will not repeat or summarize these decisions, but I agree with the relevance of the Applicant's review.

59. The Applicant stated that the Decision did not refer to Mr. Romano's evidence in detail. For example, the lot study statistical evidence, the photographs and other evidence put forward by Mr. Romano was not addressed in the Decision (Applicant's Submissions para. 29(b), (c), (f), (h)). A detailed regurgitation of the evidence of either Mr. Romano or Mr. Young is not needed.

60. The Member laid out a summary of the evidence of both the expert witnesses in his decision. The Member's conclusion was that the lot size, width and FSI did not meet the general intent of policy 4.5 of the OP. Further, the integral garages in the neighbourhood were not appropriate for the development of the land as required by the *Planning Act.* He based this conclusion on a comparison of the two planner's evidence. He accepted Mr. Young's evidence over Mr. Romano, which as the trier of fact, the Member has full authority to do so.

61. The Member supported his conclusion by stating that:

> "Given the clear difference of opinion between the two planners my site and neighbourhood visit to this area was critical. I found the area to be one of stately traditional homes with few integral garages and few narrow homes on narrow lots. Its character I find is very much in keeping with the description given by Mr. Young."

62. The Applicant submitted that this statement gives the impression that the entirety of the case was decided based on the Member's site visit. I do not agree with the Applicant's Submission. There were two main reasons for denying the applications. One reason being the issue of tree removal. However, I agree that that the Member supported Mr. Young's evidence based on his own observation during his site visit. The Applicant further submitted that the word "stately traditional homes" convey that the Member's own impression of the character of the neighbourhood.

63. A site visit is conducted by a Member without the presence of any party. This site visit and the encapsulated area for the visit is at the Member's discretion. The purpose is to benefit the Member with a general appreciation of the context of the physical characteristics of the property and the neighbourhood. It is not necessary to conduct the site visit before the hearing. For a hearing occurring over multiple non-consecutive days, the Member may conduct multiple site visits. If a Member notes some peculiarity or observation on a site visit that is in direct contradiction to specific evidence, an obligation may arise to raise and identify the discrepancy and hear any description or explanation. In this way the Member's observations can be addressed by the parties. However, mere concurrence with one descriptive view expressed in generalities over another does not rise to this level of expectation; the hearing is not an iterative process engaging the Member in a debate with a witness on general observations. Site visits are information gathering process often made without reference to the details of an application or appeal.

64. I find the Member appropriately conducted his site visit and, in his Decision,, made a general observation and an expression of a preference arising from the detailed study of the attributes of two study areas, as presented and supported by the two planners. The Member, as the trier of fact, has the authority to do so.

65. The Applicant submitted that the reference to "width" in the Decision to be ambiguous. The specific words used in the Decision are "width and "wider". When reviewing these words in the context of the whole Decision, it is clear to me that the word "width" refers to the lot frontage. The Decision refers to lot frontage as one of

the matters at issue. The Decision then refers to Mr. Young's area with larger lots with wider frontages. In the "Analysis, Findings, Reasons", the Decision refers to the area that has wider frontages than those proposed and therefore the width (along with lot size and FSI), did not meet the general intent of s. 4.5 of the OP.

66. The Applicant mentioned there was no discussion of OPA 320 other than that there is no weight afforded to the issue of OPA 320 and that there was no mention of provincial policy in the Decision (Applicant's Submissions, para. 29 (a) and (i)). The Member stated that:

> "Other issues were also raised such as heritage conservation, precedent and the application of OPA 320. I find that these other issues were not determinative and did not assist in my evaluation of the consent or variances. Similarly, I do not need to address conformity to the Growth Plan or consistency with the Provincial Policy Statement (Decision, p. 3)."

67. I do not find that these submissions by the Applicant have any merit. It is apparent on the face of the Decision that the Member was alert to their consideration and made a finding thereon. The obligation of a hearing officer is to consider relevant considerations and discard the irrelevant or uncontested, where agreeable.

68. Mr. Romano opined that the applications were consistent with the 2014 Provincial Policy Statement and conformed with the 2017 Growth Plan for the Greater Golden Horseshoe (Mr. Romano's Witness Statement, p. 24 -27). Mr. Young opined that the removal of the silver maple tree in the rear yard of the subject property would not be supportive of the 2014 Provincial Policy Statement policies relating to green infrastructure (Mr. Young's Witness Statement, paras. 4.1 – 4.10). For many applications in Toronto, the provincial policies do not significantly contribute towards the legal analysis of the tests for consent and variances. TLAB decisions generally have a statement stating the same, which is similar to the Decision being reviewed. In any event, the challenge to consistency with the Provincial Policy Statement was found in favour of the Applicant and cannot therefore constitute a basis for review.

69. Mr. Romano gave a detailed explanation of OPA 320 in his Witness Statement (Mr. Romano's Witness Statement, paras. 33-39). He then concluded that the proposal for the Subject Property conformed with OPA 320 and met its general intent and purpose. Mr. Young stated that as OPA 320 was under appeal, he did not consider it for his analysis or his opinion (Mr. Young's Witness Statement, paras. 5, 19). Given that OPA 320 was under appeal at the time the applications were filed with the CoA, it was not necessary for the Member to consider OPA 320, as it was not determinative. A detailed explanation of these issues would have made the Decision longer but would not necessarily add any significant substance to the reasons in the Decision. There is no finding to suggest a different result might have evolved.

Conclusion

70. Based on my review, I do not find that the Applicant has established any concerns regarding procedural fairness with respect to the portion of the Decision that dealt with lot size, lot frontage, FSI and integral garages (area character). The Decision was also denied for another distinct issue – the issue of the silver maple tree that is located on the as-of-right envelope of a building that can be built on the Subject Property without the need for any variances. I have found no error in the receipt or application of that evidence, independent of and including consideration of the transcript issue.

71. The Applicant has not satisfied me as to the stated grounds for review for these distinct issues.

DECISION AND ORDER

72. The Review Request is denied. The Decision dated December 16, 2019 is confirmed.

X

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