

# FURTHER SUPPLEMENTARY REVIEW REQUEST AND NOTICE OF AMENDING DECISION AND ORDER

**Review Issue Date** Tuesday, April 07, 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): YASSER PHILOBES

Applicant: ARMANDO BARBINI PLANNING & PERMIT SERVICES

Property Address/Description: 116 BRIAR HILL AVE

Committee of Adjustment Case File Number: 17 118467 NNY 16 CO, 17 118476 NNY 16 MV, 17 118478 NNY 16 MV, 17 273928 000 00 OA, 17 273944 000 00 OA, 17 273952 000 00 OA

TLAB Case File Number: 17 274122 S53 16 TLAB, 17 274139 S45 16 TLAB, 17 274147 S45 16 TLAB

**Hearing date:** May 14, August 27 and 28 and September 28, 2018

**REVIEW DECISIONS DELIVERED BY** Ian James LORD

## INTRODUCTION AND BACKGROUND

This matter involves a request brought by way of a Motion (Form 7) with supporting affidavit (Form 10), both dated March 18, 2020 (Motion), for relief required to enable the implementation of conditions of approval in respect of prior decisions of the Toronto Local Appeal Body (TLAB).

An application for consent to sever 116 Briar Hill Avenue (subject property) into two (2) lots, with associated variance requests, was brought in 2017 and refused by the

Committee of Adjustment (COA) for the City of Toronto (City). Appeals from that decision had the following decision record from the TLAB:

- |          |   |
|----------|---|
| 18/10/31 | Member Burton allowed the appeals subject to conditions (Decision);   |
| 19/01/08 | Chair Lord confirmed but suspended the Decision subject to time-limited conditions (Review Request Order);  |
| 19/03/19 | Chair Lord accepted proposed revisions and released the suspension, allowed the Review in part and varied the Decision, subject to conditions (Supplementary Review Request Order). |

The Motion requests an allowance of further time to complete the conditions proven to be outstanding resulting from events alleged to be outside the control of the Applicant/Appellant.

At the request of the moving Party, consideration of this matter occurred on written submissions.

The following documentary record was available for the consideration of the Motion:

1. The Motion Record dated March 18, 2020, inclusive of the above-noted dispositions, the Notice of Motion (Form 7, 31 paragraphs) and supporting Affidavit of Franco Romano, land use planner, sworn March 18, 2020, with five attachments (Submission).
2. The Response to Motion (using Form 10, 20 paragraphs with attachments) dated March 26, 2020 (Reply).
3. The Reply to Response to Motion (Form 9, 12 paragraphs with attachments) dated March 30, 2020 (Response).

## **MATTERS IN ISSUE**

Two (2) preliminary matters are present for consideration:

- a) Whether a motion is allowable under the circumstances;
- b) Whether, if allowed, it is suitable for adjudication in writing.

The primary matter, however, is the requested relief to amend the original application and the ensuing conditions of severance approval in the chain of the Decision, Review Request Order and the Supplementary Review Request Order with the consequent result of extending the time to complete the conditions of approval.

The consent itself and its certificate have not been given as the engaged approval agencies are not or cannot be satisfied that the conditions have been fulfilled.

A revised final order of the TLAB and notice thereof is requested to permit those circumstances for the completion of the conditions to be fulfilled.

As an additional factor, the TLAB suspended all Hearing events between March 16, 2020, and May 27, 2020, with the exception of written and consent matters not involving attendances. By Ontario Regulation 73/20 and pursuant to an emergency declared on March 17, 2020, the Government of Ontario ordered that, retroactive to March 16, 2020, any limitation period or provision establishing any period of time within which a step must be taken shall, at the discretion of the tribunal, be suspended for the duration of the emergency.

## **JURISDICTION**

The Applicant/Appellant cites in the Notice of Motion several of the Rules of Practice and Procedure (Rules) of the TLAB in support of the requested relief:

Motion, Part 3, paragraph 1, Rules: 2.3; 30.1; 31.1; and 31.6(d); and paragraph 2, Rules 4.4 and 31.3.

The Rules applicable to this matter are the Rules in effect prior to May 6, 2019, by virtue of the date of issuance of the TLAB Notice of hearing preceding that date.

Jurisdiction under the Rules stems from the *Statutory Power Procedures Act*, R.S.O., c. C 22, Ontario Regulation 552/06, the constitution of the TLAB pursuant to the *City of Toronto Act, 2006*, S.O. 2006, c. 11, *Schedule A* and the power to impose conditions under sections 45 and 53 of the *Planning Act*, R.S.O. 1990, c. P13, as amended.

## **EVIDENCE**

The Submission focuses on the consent conditions related to trees (Numbers 3 and 4) required to be addressed 'prior to the issuance of a building permit', as the cause for delay in permitting the Applicant/Appellant to perfect the land division approval by obtaining the requisite Certificate, for registration.

Mr. Romano's Affidavit attests to significant efforts made, commencing in November of 2018, by the Applicant/Appellant to satisfy the City Urban Forestry's conditions of approval (Submission, paras. 6-15). It is stated that the issue of a City-owned tree, a 'Freeman Maple', diameter of 23 cm, is at the heart of the delay.

In short, he describes a litany of efforts resulting in the decision to retain the tree by re-routing driveway access potentially engaging both parcels created by consent. That re-routing and consequent site plan revision requires the evaluation of City authorities, including the Transportation Services Division/Right-of-Way Management and its satisfaction respecting the proposed curb cut and driveway alignment, to satisfy the conditions of approval.

The Applicant/Appellant is working to a time line believed to be one year running from the date of the Supplementary Review Request Order, namely, March 19, 2020.

The passage of time in the consideration of options, the subsequent refusal of Council to permit the injury or removal of the tree (Affidavit, Schedule 'D' (October 2, 2019)), the retainer of arborist Judith S. Wright to conduct further analyses of options, and the Covid-19 crisis local to the City have all contributed, it is said, to the timeliness of decision making.

The Covid-19 aspect is addressed in the Submission (para. 15) and, more fully, in the response. The Submission requests an amendment to the Decision (para. 23) to address the conditions and timeline for expiry of the consent approval.

The Submission and the Romano Affidavit suggest it is appropriate to address the delay in this manner by revised conditions rather than finding the appeal period has expired and the process must restart afresh. It suggests that successive Hearings and Reviews on the same subject matter is not in the public interest (para.22).

Several Rules of the TLAB and two case authorities are cited in support of the relief sought.

In his affidavit sworn March 18, 2020, Mr. Romano makes the following salient points:

“24. On this basis, it would be appropriate for the TLAB to extend the timeframe for satisfying the consent conditions. If the TLAB deems it appropriate, I would recommend the addition of a further condition of consent approval, which provides: a. The owner shall obtain approval from the City’s Transportation Services and Right-of-Way Management Department with respect to the final location of the curb cut and the alignment of the proposed driveways within the City’s right-of-way.

Mr. Romano provided a consolidated List of revised conditions as Exhibit E to his affidavit. These are included as **Attachment A** hereto.

The Motion was sworn and filed one day prior to the expiry of one-year from the date of the Supplementary Review Request Order.

The Affidavit and Motion make the additional point that the extension request is warranted to avoid the “inefficient use of private and public resources” that would be necessary for a re-application for severance. The matter was heard by the TLAB over four (4) days and has been the subject of extensive reviews.

There is little dispute as to Mr. Romano’s elaborate and factual recitation of events. There is, however, disagreement as to the “appropriateness” of a time extension (Reply, para.3). The respondent, Ms. Sue Ann Fox, requests that the consent lapse and that that should ‘trigger a new proceeding with involvement by the community’.

She points to three failings by the Applicant/Appellant: a failure to meet the tree conditions of approval; to do within the one year timeframe; and, by asking for a revision to the site plan (and perhaps building plan for the easterly unit), the inability to construct “substantially in accordance with” the pre-filed plans.

Ms. Fox, in a specific, articulate and well-presented Reply, requests that the Submission be considered ‘out-of-time’ under TLAB Rule 31.1, that no extension be granted on the premise that the drafters of the Rule never contemplated that a request for (further) review “could occur one-year following a Decision, including following a review” (para. 4d.).

She asserts a lack of diligence and engagement throughout and that the extension of time request should have been made in a more timely manner ‘during the one-year period’ (Reply, para.6), particularly given an awareness of the tree condition since 2017 (Reply, para. 7).

Ms. Fox also raised the prospect that more than the site plan could may? have to be changed as a result of a proposed driveway re-design - to save the tree for which Council refused a removal permit. She identified the prospect that the east lot dwelling may have to be reconfigured to accommodate a west side driveway re-alignment, all as cited in para. 17 of the Submission. If so, there is uncertainty as to whether additional variances might be triggered.

She sought to distinguish the case authorities identified in the Submission as not being on the point of the request within.

In the Reply, the Applicant/Appellant says that the client focused on the most onerous condition first commencing work in November 2018 following the release of the Decision (Reply, para.3). That effort included an unsuccessful effort before Council to achieve a permit for tree removal and, ultimately, seeking solutions from an arborist on retention, currently underway via a re-aligned driveway access (Reply, para, 4,5).

In support, an Attached Appendix 2 confirms Ms. Fox’s assertion that the plans may change, and construction cannot meet the condition of substantial compliance with plans attached to the Decision and Supplementary Review Decision (Reply, para.7).

The Reply asserts that Conditions 3 and 4 to the consent approval are more properly conditions of variance approval as they pertain to building permit issuance causing 'pragmatic difficulties' such as the potential delay in public processes, not land division (Reply, para.4).

Much of the Reply also addressed the Emergency Declaration and Order contained in Ont.Reg. 73/20. It suggests that given the suspension contained therein, the TLAB could withhold a decision ("hold this Motion in abeyance") on the Submission until after the expiry of the emergency period. In this way, further advancement might be forthcoming on the support of Urban Forestry and the Transportation Services Divisions of the City, and submit new plans to be filed 'only if necessary'(Reply, para.9, 10) to address the "substantially in accordance" constraint raised by Ms. Fox.

## **ANALYSIS, FINDINGS, REASONS**

Rule 31 of the TLAB's Rules provides, as it then existed, a complete code for the consideration of Review Requests. The consideration by way of review was granted; the result of the Review Request Order and the Supplementary Review Request Order was a confirmation of the initial Decision and a direction to the Applicant for design improvements. In the result, the Applicant's response was accepted and there ensued a period a compliance with the conditions of severance and variance approval with the lifting of the suspension.

I am satisfied from the exposition of the filed submissions that this effort was pursued in good faith and with relative, if leisurely dispatch. It is also clear that unforeseen intervening events, the tree preservation concerns of the Ward Councilor as ratified by City Council, rendered the intended compliance stream to be unmanageable, from the time perspective contemplated.

An alternative route, involving tree preservation, is underway which may prove satisfactory to all concerned.

It is appropriate to support that effort rather than requiring the heavy machinery of re-application on a matter that has already been decided. If the solution is proven acceptable, the approvals as granted can come to fruition with a modest change in driveway alignment, to the site plan.

Even where the east house proposed requires revision, substituted plans can be accommodated as the main issues of severance, by-law standards and a diversified façade design have been decided.

If the Applicant is unsuccessful, meaning to be subjected to revised plans that require additional or revised variances, the Applicant will have to address a future for the subject property at that time.

I see little merit in the extended references to the applicability of many of the TLAB Rules or the case authorities. I agree with Ms. Fox that they are not squarely on point.

I consider the Submission, the Response and the Reply as falling entirely under the purview of the review request as originally initiated and as it continues to be addressed.

Rule 31 does not permit motions under the Motion Rule except with the leave of the TLAB by the reviewer.

It is argued that the time has now expired for the completion of conditions as per the date set emanating from the Supplementary Review Request Order.

Again, Rule 31 permits for relief by the TLAB and the reviewer, where circumstances warrant, on the late filing of a review request. In this case, the request for reconsideration under the circumstances occurred one day prior to the expiry of the period of one-year from the Supplementary Review Request Order, even if it is held to be of reference. Ont.Reg. 73/20 is said to extend even that period.

To the extent necessary, I am prepared to grant relief and an extension, if required, under both circumstances; for amended filings and for requested variation to the Review Request Orders. In my view, where the matter arising is an implementing condition of approval whereby the public regulatory review process as to land division and regulations have been satisfied, it is simply not in the public interest to require restarting the heavy machinery of re-application, public meetings, repeated expenses and the prospect of appeals. These serve to the disadvantage and inconvenience of the public, the Applicant and the adjudicative process. TLAB decisions are deserving of finality.

On the preliminary matters, I find that an extension of the period to institute a request for amendment is warranted, appropriate and allowed.

I find the matter to be capable of being addressed, on apparent consent, by written submissions and worthy of adjudicative resolution.

I permit consideration of a request to re-open the Review Request and to consider, by way of written materials, the extension of relief required as if the matter is addressed and resolved effective March 18, 2020, the date of its institution.

Under the Rules of the TLAB as they existed prior to May 6, 2019, there were no limitation periods applicable to the conduct of the Submission, Reply or Response involving the application of O. Reg. 73/20. I see no need to address the discretion in the Tribunal to address any suspension of any step that must be taken, as there are none, in this circumstance under Rule 31.

I find that a proper evidentiary basis is made out to address a solution that does not further frustrate the considerable efforts of the players to date to resolve the Applications.

I accept also the Applicant/Appellant's assertion that Conditions 3 and 4 of the Conditions of Severance Approval are better attached as Conditions of Variance Approval. Indeed, since the rendering of the Decision, the TLAB Practice Direction 1 has been revised to reflect the transfer and that conditions not related to the severance be best considered under the condition granting authority given in the variance application powers under section 45 of the *Planning Act*.

The TLAB appreciates the timely consideration of the Parties in responding.

These determinations are made on the basis of no compelling basis having been made out to not consider the relief in the circumstances; this determination, I find, falls within the discretion of the Tribunal as expressly provided by Rule 31. It is considered in a manner, by written submissions, which have provided a full opportunity to interested persons to comment and provide input to the TLAB in the consideration of the substantive relief requested.

That participation has been fully considered. It is timely, well-reasoned and relevant.

It is appropriate to add the additional condition of variance approval requested. As well, in order to consolidate the now three expressions of disposition of this review request, it is appropriate to update the dispositions, i.e., to confirm the lifting of the suspension, to vary the Decision where so determined and to confirm its other aspects.


## **DECISION AND ORDER**

1. The Supplementary Review Request Order and the Decision are amended by adding to the plans the driveway configuration plan accepted by the City Engineering Services Division in consultation with the City Urban Forestry Division, such plan to be filed by the Applicant with the TLAB forthwith upon such approval and such plan to prevail over any drawings hereinbefore required to the contrary and to form part of this Decision and Order.
2. Paragraph 1 and **ATTACHMENTS 2, 3 and 4** of the Decision are confirmed subject to the following.
3. The **ATTACHMENT 1: CONDITIONS OF CONSENT** to the Decision are amended by the removal therefrom of paragraphs 3 and 4 and as provided in clause 4, following. The said paragraphs 3 and 4 are added to the **Revised Conditions of Minor Variance Approval** established in the Supplementary Review Request Order, all as hereinafter provided in clause 6.



4. The Supplementary Review Request Order and the Decision is further amended and varied by the replacement of **ATTACHMENT 1** to the Decision with **Attachment A** hereto: '**Revised Conditions of Consent Approval**'.
5. For greater clarity, it is intended that the timeframe identified in paragraph 5 of **Attachment A** hereto commences with the Review Issue Date of this Decision and Order.
6. The Supplementary Review Request Order is amended and varied by the replacement of Paragraph a) thereof with **Attachment B** hereto, '**Revised Conditions of Variance Approval**'.
7. In all other respects, the Decision as so varied by the Supplementary Review Request Decision and this Decision and Order is confirmed.

If difficulties arise in the implementation of this Decision and Order, the TLAB may be spoken to.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord

## **Attachment A**

### **116 Briar Hill Avenue – Revised Conditions of Consent Approval**

1. Confirmation of payment of outstanding taxes to the satisfaction of Revenue Services Division, Finance Department.
2. Municipal numbers for the subject lots indicated on the applicable Registered Plan of Survey shall be assigned to the satisfaction of Survey and Mapping Services, Technical Services.
3. Two copies of the registered reference plan of survey integrated with the Ontario Coordinate System and listing the Parts and their respective areas, shall be filed with City Surveyor, Survey & Mapping, and Technical Services.
4. Three copies of the registered reference plan of survey satisfying the requirements of the City Surveyor, shall be filed with the Committee of Adjustment.

5. Within ONE YEAR of the date of the giving of this notice of decision, the applicant shall comply with the above-noted conditions and prepare for electronic submission to the Deputy Secretary-Treasurer, the Certificate of Official, Form 2 or 4, O. Reg. 197/96, referencing either subsection 50(3) or (5) or subsection 53(42) of the Planning Act, as it pertains to the conveyed land and/or consent transaction

## **Attachment B**

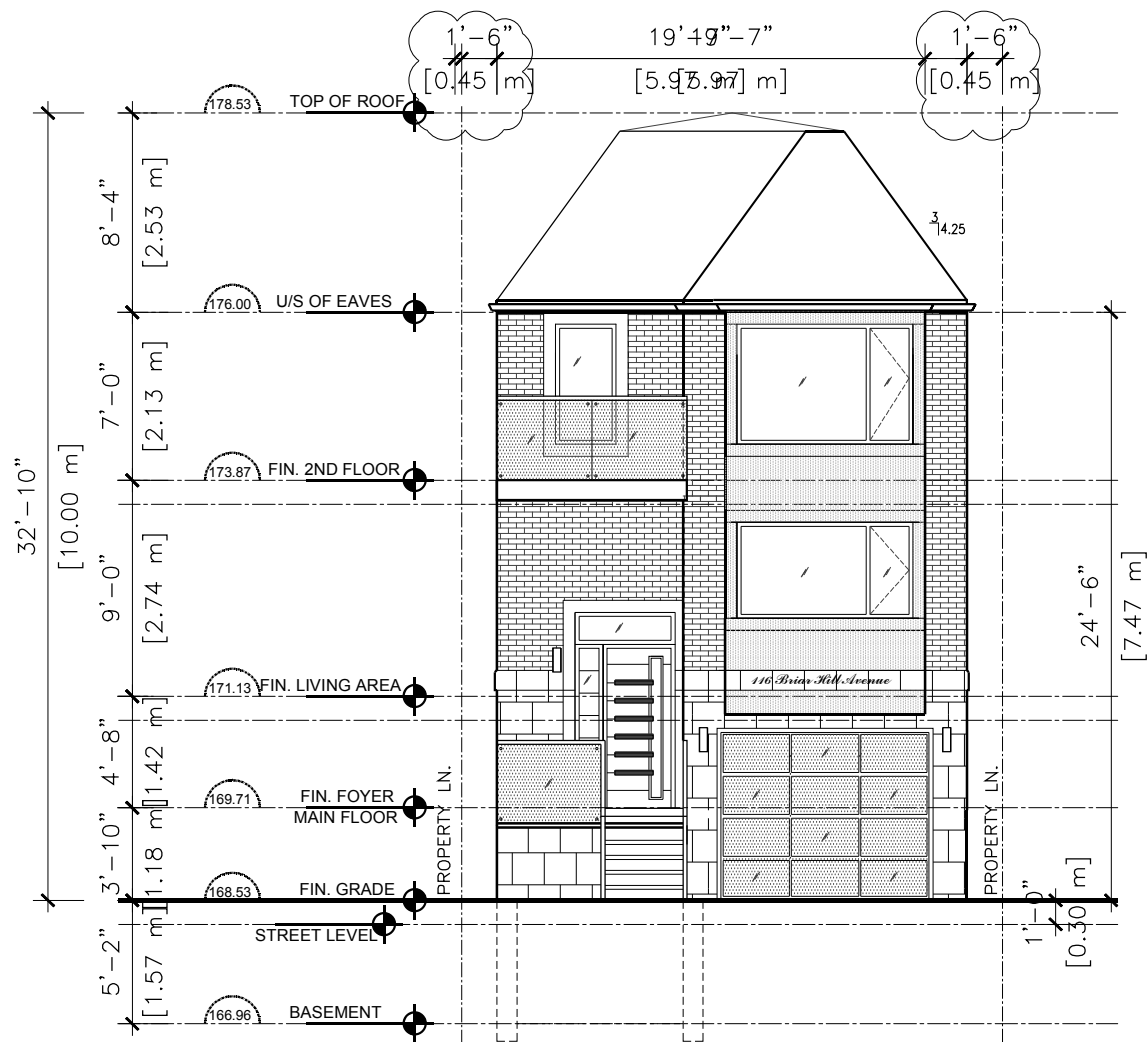
### **Revised Conditions of Variance Approval**

1. The proposed dwellings shall be constructed substantially in accordance with the Site Plans, Rear Elevations, East Elevations, and West Elevations dated December 19, 2017, and the Front Elevations dated December 19, 2017 (Lot 1) and January 6, 2019 (Lot 2), all prepared by Giancarlo Garofalo Architect and attached as Attachment 4 to the Decision. Attachment 4 to the Decision, including all references thereto in paragraphs 1 through 4 of the Decision, is revised and replaced by the drawing identified as **APPENDIX A** to the Supplementary Review Request Order, attached hereto, and the same is varied to the extent necessary by replacing elevation Drawing A16 therein dated 2017/12/19 by the said drawing, **APPENDIX A**, applicable to Part 2 and issued 2019/01/06, and, FURTHER AND FOR greater specificity as to the materials and roof treatment on the façade only applicable to both Lots 1 and 2, and their differentiation, the rendering identified as **APPENDIX B** to the Supplementary Review Request Order, attached hereto, is provided.
2. Construction is to be substantially in accordance with the plans, drawings and perspectives identified in condition 1, above.
3. Any other variances that may appear on these plans or that are ordered by paragraph 1 of this further amended Decision and Order that are not listed in this decision are not authorized.
4. For a one family detached dwelling, the elevation of the lowest point of an opening to an area that may be used for parking or storage of a vehicle located inside or abutting the dwelling shall be higher than the elevation of the street the lot abuts measured at its centerline directly across from the driveway leading to the parking space.
5. The Site Plan shall indicate the existing light standard and its relocation to the satisfaction of Toronto Hydro.
6. The proposed driveways shall be constructed with permeable pavers.

7. A fence shall not be installed along the common lot line between Part 1 (West Lot) and Part 2 (East Lot) along the length of the dwellings constructed on those lots, in order to enhance access to the rear yards.
8. No water will be permitted to drain from the roof of Lot 1 onto 122 Briar Hill Avenue.
9. No water will be permitted to drain from the roof of Lot 2 onto 112 Briar Hill Avenue.
10. The Applicant shall comply with the City of Toronto Municipal Code Chapter 813, Article II (Private Trees) and Article III (City-Owned Trees).
11. The owner shall obtain approval from the City's Transportation Services and Right-of-Way Management Department with respect to the final location of the curb cut and the alignment of the consolidated driveway within the City's right-of-way.
12. Prior to the issuance of a building permit, the applicant shall satisfy all conditions concerning City owned trees, to the satisfaction of the Director, Parks, Forestry & Recreation, Urban Forestry Services.
13. Where no street trees exist, the owner shall provide payment in an amount to cover the cost of planting a street tree abutting each new lot created, to the satisfaction of the General Manager, Parks, Forestry and Recreation.

APPENDIX A

LOT 2



**A**  
A16 **FRONT ELEVATION**  
SCALE : 1/8" = 1'-0"

THE GENERAL CONTRACTOR SHALL REPORT AND VERIFY ALL DIMENSIONS AND REPORT ERRORS AND OMISSIONS TO THE ARCHITECT. DRAWINGS MUST NOT BE SCALED.

THIS DRAWING SHALL NOT BE USED FOR CONSTRUCTION PURPOSES UNLESS COUNTERSIGNED BY: \_\_\_\_\_



GIANCARLO GAROFALO ARCHITECT  
 943 ST. CLAIR AVE. WEST  
 TORONTO, ON. M6C 1C7  
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Title:  
**116 BRIAR HILL AVE.  
TORONTO**

Sheet Title:  
**FRONT ELEVATION**

No.	Revision	Date
6	Issued for Review-revised	2017/04/26
7	Issued for CoA-Revised	2017/08/10
8	Issued for CoA-Revised	2017/11/10
9	Issued for review	2017/12/19
10	Issued for review	2019/01/06

Drawn:  
H.P.  
Checked:  
G.G.  
Date:  
NOV 2016

Scale:  
  
Dwg. No.  
**A16**

**APPENDIX B**

