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 INTERIM ORDER

Review Issue Date: Thursday, May 14, 2020

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

Appellant(s): CAROLYN PASCOE

Applicant: ANDREW DEANE

Property Address/Description: 347 Cortleigh Blvd.

Committee of Adjustment Case File: 19 121451 NNY 08 MV (A0162/19NY)

TLAB Case File Number: 19 161087 S45 08 TLAB

Decision Order Date: Tuesday, February 18, 2020

DECISION DELIVERED BY Ian James Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a Request for Review (Request/Review) made by and on behalf of Gino de Geso and Silvana Colaveccia (Owners) of a decision of the Toronto Local Appeal Body (TLAB) by Member T. Yao, issued February 18, 2020 (Decision), in respect of 347 Cortleigh Boulevard (subject property).

The Decision allowed the appeal by a neighbour from an approval by the North York Panel of the City of Toronto (City) Committee of Adjustment (COA) approving twelve (12) variances (Application) to permit the construction of a new, three (3) storey dwelling on the subject property.

The Request is to be considered under Rule 31 of the TLAB as it existed after May 6, 2019, when a revised version of the Rules of Practice and Procedure (*Rules*) came into effect.

Administrative Screening was completed by advice provided on March 26, 2020.

This is the preliminary result of Adjudicative Screening under Rule 31.15.

BACKGROUND

In compliance with Rule 31.6, the Request consists of the following documentation to date:

a). Request for Review of the TLAB Decision dated March 19, 2020, consisting of a 76 paragraph written argument, the Decision, case authorities (4) and an affidavit (Request/Review);

b). Affidavit of Antonio Volpentesta (Affiant) dated March 18, 2020, consisting of 24 paragraphs with four (4) Exhibits including two (2) Witness Statements, one being that of the Affiant as the sole professional witness testifying on the appeal Hearing.

c). Appeal Hearing transcript of December 5, 2019 (Transcript T1) at 254 pages.

d). Appeal Hearing transcript of January 30, 2020 (Transcript T2) at 248 pages.

There were no early responses submitted under Rule 31.9.

The TLAB was informed through the Request that, in addition to the Review, the Owners through their counsel have sought leave to appeal the Decision to the Ontario Divisional Court (Court File 129/20). That application forms no part of this consideration.

JURISDICTION

Below are certain of the TLAB *Rules* applicable to a request for review at its early stage:

"Adjudicative Screening by Chair

31.15 The Chair may, on notice to all Parties, propose to dismiss all or part of a Review request without holding a Hearing on the grounds that:

a) the reasons set out in the Review request do not disclose any grounds upon which the TLAB could allow all or part of the requested relief;
b) the Review request is frivolous, vexatious or not commenced in good faith;
c) the Review request is made only for the purpose of delay;
d) the Requesting Party has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;

e) the Requesting Party has not provided written reasons and grounds for the Review request;
f) the Requesting Party has not paid the required fee;
g) the Requesting Party has not complied with the requirements provided pursuant to Rule 31.11(b) within the time period specified in Rule 31.12;
h) the Review request relates to matters or grounds which are outside the jurisdiction of the TLAB; or
i) the submitted Review request could not be processed and the matter was referred, pursuant to Rule 31.13, for adjudicative screening.

Requesting Party may Make Submissions in Screening Process

31.16 A Requesting Party, and any other Party wishing to make written submissions on the Notice of Proposed Dismissal of a Review request, shall File those submissions with the TLAB and Serve all Parties within 10 Days of receiving a Notice of Proposed Dismissal under Rule 31.15.

31.17 Upon receiving written submissions, or, if no written submissions are received pursuant to Rule 31.16, the Chair may dismiss the Review request or make any other order.

Chair may seek Further Submissions, Dismiss, or Direct an Oral Hearing

31.24 Following the timeline for the Service and Filing of any Notice of Response to Review and any Reply to Notice of Response to Review the Chair may do any of the following:

a) seek further written submissions from the Parties;
b) dismiss the Review, with reasons; or
c) direct an oral Hearing before a different TLAB Member and where one or more of the grounds in Rule 31.25 is established, the Member may confirm, vary, suspend or cancel the Final Decision or final order.

Grounds for Review

31.25 In considering whether to grant any remedy or make any other order the TLAB shall consider whether the reasons and evidence provided by the Requesting Party are compelling and demonstrate the TLAB:

a) acted outside of its jurisdiction;
b) violated the rules of natural justice or procedural fairness;
c) made an error of law or fact which would likely have resulted in a different Final Decision or final order;
d) was deprived of new evidence which was not available at the time of the Hearing, but which would likely have resulted in a different Final Decision or final order; or

e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the Final Decision or final order which is the subject of the Review."

CONSIDERATIONS AND COMMENTARY

A) Overview Observations

I have read and re-read the materials recited as a). - d)., under 'Background', above, including in the light of the Decision.

Some general observations on Requests for Review have become instructive to the consideration and conduct of such requests. Those relevant at this stage of the Request are as follows:

It is appropriate to state the circumstances surrounding the purpose and application of *Rule 31*. 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 be given to a decision of the TLAB on any of the grounds recited by *Rule 31.25*.

In reviewing the circumstances of the alleged grounds, it is incumbent upon the reviewer to pay close regard to the Decision and the foundations for decisions upon which a Member can rely. The TLAB 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 deliberative manner, the relevant considerations employed in reaching the outcome. A TLAB decision is to be respected and supported not just for the preparation antecedent a formal Hearing in the receipt and review of filings and the mandatory site attendance, but for the conduct of the Hearing, the receipt and recording of the viva-voce evidence and the experienced, deliberative consideration given thereto, as inherent in decision writing.

The premise of this deliberation is the knowledge that TLAB decisions can have a profound effect on any, or all, of the affairs of: individuals, corporations, the City and the public interest.

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 the assertions made in the Request is the need to give the decision a fair and liberal interpretation and construction consistent with its role but tested against the defined, eligible grounds for its reconsideration.

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. It is often said that decision writing does not require a punctilious review and recital of every fact or kernel of evidence or that every stop on the road to a

conclusion must be wrapped in detailed support. On the other hand, a decision must reflect a suitable basis for its conclusions taking into consideration all relevant considerations, discarding the irrelevant and applying the law and policy made germane to the Tribunal's mandate, including its own deliberations.

With the introduction of the *Rules* revisions effective May 6, 2019, the TLAB instituted the above listed criteria, in *Rule 31.15*, relevant to Adjudicative Screening. It is not, except in circumstances of a dismissal, the purpose of Adjudicative Screening to decide a Request except in the circumstance of a dismissal, in whole or part; it does afford, where one or more of the listed criteria are present, an opportunity to ensure that the Request proceed, if at all, only on matters relevant to the grounds, *Rule 31.25*, also listed above.

Adjudicative Screening by the TLAB is effectively a filter to ensure that any matter only proceed for consideration that is relevant to a review ground and warrants adjudication, i.e., there is not a sufficient basis to dismiss some or all of the Request at the outset.

With that introduction, it is necessary to address all of the content and submissions in support of the Request.

B) Review Grounds Asserted

The Request identifies three (3) grounds under *Rule 31.25* (Review, para.5, 73, 74) upon which it invites the TLAB to order cancellation of the Decision and "that a new hearing be scheduled as soon as possible before a different TLAB member" (Review, para. 6, 75):

1. Excess of jurisdiction (*Rule 31.25 a)*);
2. Violation of the rules of natural justice and procedural fairness (*Rule 31.25 b)*); and
3. Made errors of law and fact such that the TLAB would likely have reached a different decision (*Rule 31.25 c)*).

C) Role of Adjudicative Screening

Each of these alleged grounds is examined in turn within the context above described. Under *Rule 31.15*, preliminary Adjudicative Screening can result in one of at least two sequenced possible outcomes: first, a direction for a *Notice of Proposed Dismissal* with advice on some or all of the alleged grounds; and, second, a determination, following submissions, the basis, if any, upon which a *Notice of Review* can issue. Both of these Notices may be accompanied by reasons.

It is only after the issuance of a *Notice of Review* and the consideration of Responses and Replies, if any, that the options listed in Rule 31.24, above, become available for consideration as the concluding element of Adjudicative Screening. Those options, once chosen, are to be accompanied by reasons arising from a consideration of the submissions received following the *Notice of Review*. Even then, if the remedy of *Rule 31.24 c)* is chosen, the "oral Hearing before a different TLAB Member" is not a *de novo* consideration of the merits and demerits of the Application. Rather, it is an oral

opportunity for the Parties to argue whether a focused Review ground has been established sufficient to warrant the "different TLAB Member" to "confirm, vary, suspend or cancel" the Decision.

In that determination, there may also be circumstances where that Member may wish to draw upon his/her prerogative to order a new *de novo* Hearing on the merits.

D) Alleged Evidence in Support of Grounds

1. Excess of jurisdiction (*Rule 31.25 a)*)

The Request identifies the following support for this ground:

(Note: references in brackets refer to the location of the submission in the Request; where the subject matter of the submission is referenced in the affidavit filed, reference to the Affiant locates the associated affidavit source.)

a. The Decision relies on:
    i. extraneous observations;
    ii. fails to apply the four tests in any coherent or meaningful way (Affiant, para.22a).
    iii. Official Plan and zoning references do not provide any intelligible analysis as to whether the general intent of the requested third storey variance is met (Request, para.25, 28, 30; Affiant, para. 22a), m)).
b. The Decision fails to address the other ten variances (i.e., beyond the request for a third storey); and provides no basis for their rejection (Request, para. 26; Affiant, para. 22b)).
c. The Decision fails to explain why the only expert opinion testimony was ignored, disagreed with, or resulted in inconsistent findings, or was rejected (Request, para. 27; Affiant, para.19, 21, 22c)).
d. The Decision fails to make a determination on Provincial policies and plans (Request, para.29; Affiant, para. 22d)).

2. Violation of the rules of natural justice and procedural fairness (*Rule 31.25 b)*)

The Request identifies the following support for this ground:

a. The Member permitted the opposing Parties to violate the *Rules*:
    i. Witness Statements were inadequate, lacked substantiation and failed to address or identify relevant criteria opinions (Affiant, para. 11);
    ii. Failed to enforce the *Rules* including the introduction of undisclosed materials and opinions in support (Affiant, para. 15, 16, 18);

iii. Afforded wide latitude for non-expert evidence and relied upon it 'without explaining why it was being afforded more weight than unshaken expert evidence' (Request, para. 31, 32, 33, 34).

b. The Member conducted his own review of prior decisions outside of the Hearing:
   i. Referencing *8 Haddington Avenue* without affording the opportunity to address its relevance during the Hearing and without inviting supplementary evidence and submissions 'when it was apparently a significant factor in the Decision' (Request, para. 35, 36, 37, 38, 39; Affiant, para. 22g)).
   ii. Precluding any ability to distinguish *8 Haddington Avenue* given the differing mix of two and three storey dwellings in the neighbourhood relevant to the subject property (Request, para.40).

c. The Member failed to address most of the requested variances (see: above, **1. Excess of Jurisdiction**). The Request further asserts that the Applicant was "entitled to have the evidence of its planner addressed, not completely ignored, failed to be adjudicated upon and then summarily dismissed, without reasons." This is said to amount to "an incomplete fulfillment of the TLAB mandate." This ground is raised as an independent denial of procedural fairness and natural justice (Request, para. 41, 42, 43).

3. Made errors of law and fact such that the TLAB would likely have reached a different decision (*Rule 31.25 c)*)

The Request identifies the following support and allegations under this ground:

a. The Decision applies inappropriate evidentiary weight as between expert and non-expert opinion evidence:
   i. Inappropriately weighing and pejoratively dismissing the Applicant's professional planning opinion evidence by wrongly attributing a recognition "of weakness" and "switching gears" to the professional planner and demonstrating a misunderstanding of the opinions provided (Request, para. 44, 49; Affiant, para.22r)).
   ii. Shows a "consistent pattern" where the Member "ignores or subverts" the planner's evidence and applies "some kind of faulty logic in order to draw the opposite conclusion" from what the evidence actually supports (Review, para. 45).
   iii. Giving "implicit in the language and substance of the Decision" an "undue deference to…non-qualified opinions and the "value judgements" and observations described as "[verging] on planning opinion" and "appears to afford them more credibility than the competing expert evidence…" (Request, para.46, 47, 49; Affiant, para. 22t)).

iv. The Member's agreement with the objector, Sukonick, that the house at 217 Hillhurst Boulevard is "insensitive" and thereby converting lay opinion to constituting a "legal finding" as to what the zoning by-law seeks to prevent, without analysis and contrary to the experts opinion (Request, para. 48; Affiant, para. 22t).

v. By exempting, on page 9 of the Decision, the witness Sukonick, from expert qualifications "for evidence given in response to cross-examination" (Request, para. 50).

b. Errors in the interpretation of the Official Plan and errors of law:
   i. In referring only to policy 4.1.5, the Member "erred in its interpretation" and application to the geographic neighbourhood and "also erred in its consideration of the Official Plan portion of the Four Tests"; and that these errors were "compounded by numerous errors of fact":
      1. By drawing a conclusion, on page 7 of the Decision, inconsistent with the planner's opinion by failing to evaluate that "three storey houses exist in substantial numbers within the neighbourhood," meeting its general intent and purpose (Affiant, para. 22m));
      2. By failing to evaluate, to take evidence out of context and to weigh the immediate area context and the "mix of physical characters" in a manner that supported a contrary finding, opposite the opinion and conclusion of the Applicant's planner (Request, para. 51, 52, 53, 54, 55, 56, 57, 58; Affiant, para.22n)).
   ii. The Member dismissed the planner's opinion on the third storey variance "based on specious logic and the unfounded premise…[of]…attempting to justify the variances based on 'architectural details'" as against the planning opinion evidence "not even acknowledged" based on Official Plan policy that addressed "about how the proposed new dwelling respects and reinforces the existing physical character of the neighbourhood…harmonious with its surroundings" (Request, para. 59, 60; Affiant, para. 22p)).
   iii. There is no analysis of the statutory tests of how the minor and desirable tests are applicable to the third storey, or of <u>any</u> of the other variances, despite the professional evidence of no impacts (Request, para. 61, 62).

c. Errors in fact in the Decision:
   i. Whether or not on the evidence on a proposed flagstone patio adjacent the Pascoe lot has a sub-grade foundation (Request, para.63; Affiant, para. 22e));
   ii. Whether the Decision "fails to acknowledge" that nearby lots contain third storey windows as a material fact relied upon by the planner (Request, para. 64; Affiant, para. 22f));

iii. Whether the proposed roof would be 'highly visible' in respect of habitable space within the roofline and third storey dormer (Request, para. 65; Affiant, para.22h));
iv. Whether the description of 'three-plus storey house' has any zoning foundation or can be considered 'visually imposing' and attributed to the Plans Examiner or Applicant's planner (Request, para. 66; Affiant, para. 22i)).
v. Whether the three storey zoning limitation can be contrasted to a presence ('prevalence') of houses on the subject block containing three storeys (Request, para.67;Affiant, para. 22j));
vi. Whether the comparative massing 'findings' of the proposal vis-à-vis adjacent houses is correct considering height and roof volume (Request, para.68; Affiant, 22k));
vii. Whether the reference to 70 "new and approved" three storey houses in the neighbourhood included existing housing (Request, para.69; Affiant, para.22l));
viii. Whether the statement ('conclusion') "this section of Cortleigh is the highest land on the street, which seems to be an inapt location to seek this variance" incorrectly contradicts the professional planning evidence that it is the topography that influences how building heights are calculated and dictates basement exposure, all "factors that must be considered when evaluating compatibility with the streetscape and impact on adjacent lands" (Request, para. 70; Affiant, para.22o));
ix. Whether the statistics cited on page 8 were discussed or "relevant to any credible analysis in respect of the Four Tests" (Request, para.71; Affiant, para.22q));

The Request asserts that these 'errors', occurring on pages 4 through 8 of the 11 page decision, are inclusive of 'almost the entirety of the reasons'; further, if they had not been made, they would likely have resulted in a different, final decision and order (Request, para. 72, 73; Affiant, para. 23).

E) Decision Overview

The Decision must speak for itself. From the observations as to its consideration above described, it can be observed that:

1. The Member was alert to all the updated variances requested and the applicable policy and statutory tests (Decision, p.2, 3).
2. Only the planner, Mr. Volpentesta, was qualified to give opinion evidence in the area of land use planning (Decision, p.2).
3. The "key variance" and "true issue" identified was whether to give the three storey permission requested (Decision, p.3, 5)
4. The 'proposal' (Application) is examined and described from the perspectives of intended use, porch detail setback, building length, componentry heights, topography, adjacent built form, heights, massing, streetscape, roof design and design character (Decision, p.3-6)

5. The definition and distribution of 'three storey' dwellings was considered: in relation to grade/height measurement; appearance; and as regulated by zoning and was viewed in relation to topography, geographic location and COA decisions, including the immediate neighbourhood. Three storey and three storey 'plus' dwellings were considered on general and specific Official Plan criteria and as to consistency with the prevailing physical character of properties (Decision, p.6, 7, 8).
6. Member's own findings were made, including contrary opinions, on evidence heard or based on the record and cross examination opinion responses, the latter contributing and constituting the professional planning evidence, including:
    a. Massing observations of adjacent buildings (Decision, p.6);
    b. The absence of a 'prevailing pattern' of 'three plus' storey dwellings analogous to the proposed; (Decision, p. 7)
    c. The prevailing character of the broader neighbourhood is two storey dwellings (Decision, p.7);
    d. The planning evidence mapping of three and three plus storey houses included units based on 'architectural details' or 'decoration', including roof dormers that are unrelated to the zoning intent to limit actual third floor habitable space (Decision, p.7, 11);
    e. COA decisions under the new City-wide zoning by-law in number and rate do not lend support for third storey additions over the zoning limit on homes at two stories (Decision, p.8)
    f. Rejecting the suggestion that the intent and purpose of the two storey zone limitation was to establish a threshold to trigger a public process; rather, it is a standard set pursuant to the Official Plan, not simply an 'off-on switch' (Decision, p.8)
    g. Disagreeing that the potential for negative impact on private trees can be left to later assessment by Urban Forestry when the TLAB has a duty to consider the environmental policies of the Official Plan, in this case in the absence of any evidence (Decision, p.9);
    h. Appearances and design of specific properties and their characterization (Decision, p.9, 10, 11).
7. The Member concluded:
    a. The two variances sought to permit a third storey failed to maintain the intent and purpose of the Official Plan and zoning by-law;
    b. The two third storey requested variances are not minor;
    c. Together, the package of 12 variances were not suitable for the appropriate development of the land;
    d. Cumulatively, the 12 variances were found not to respect and reinforce the existing physical character of the

neighbourhood, contrary to the Official Plan (Decision 'Conclusion', p.11).

F) The Transcripts

T1 and T2 constitute the official transcription of the legible portions of the TLAB Digital Audio Recording (DAR) of the two days of Hearing.

There were three witnesses testifying: Mr. Volpentesta, the professional planner called on behalf of the Applicant, and two neighbours, Ms. Pascoe (Appellant) and Mr. Sukonick.

The Adjudicative Screening, and ultimately the Review if it proceeds, can benefit from the Owners' production of the transcript. The TLAB is grateful for this aid.

The transcripts contain the oral record of the two Hearing days, including procedural directions by the Member (T1, p.6), extensive opening remarks on behalf of the Parties (T1, p.15-20; 20-24), Rulings, and lengthy Party submissions (T2, p.213-22; 229-242).

As well, they constitute the formal record of the oral evidence supplied by the witnesses on the matters in issue.

Instructive to the Adjudicative Screening of the Request and particularly the evidence in relation to the three grounds raised are the following excerpts:

1. The acceptance by counsel for the Owners/Applicant on the application of *Rule 12.6*. Mr. Andres had raised oral objections to the Party in opposition, Mr. Sukonick, acting both as a Representative for Ms. Pascoe and then himself giving evidence and having the privilege of making submissions.

   Rule 12.6 provides as follows:

   > "12.6 **A Party** to a Proceeding before the TLAB **may participate fully** in the Proceeding and this includes the following:
   >
   > a) bring, Serve and File Motions;
   >
   > b) **be a witness and call evidence in the Proceeding, provided they comply with all the requirements in Rule 16 pertaining to Parties**;
   >
   > c) **call witnesses in the Proceeding**;
   >
   > d) receive copies of all Documents Served or Filed in the Proceeding;
   >
   > e) **cross-examine witnesses in the Proceeding**;

f) **make submissions in the Proceeding**;

g) participate in any Mediation; and

h) claim costs and be subject to a cost award" (**Emphasis added**)

The Member Ruled on the oral Motion apparently on consent that the entitlements of Rule 12.6 apply to the Party Sukonick, who had not been qualified as an expert. In dismissing the Motion, the Hearing proceeded on the basis that from the outset that the Party Sukonic had the rights permitted by the *Rule* (T1, p.7-15).

2. An admission by the planner that the plans submitted on the Application show a 'foundation wall' below the location of the at-grade rear flagstone patio proposed for the subject property (T1, p.50-52; T2, p.50).
3. A proposal and acceptance by the Parties and the Member that it was not necessary to dwell on the Provincial Policy Statement (PPS) or the Growth Plan for the Greater Golden Horseshoe (Growth Plan) as not being in issue in respect of the variances engaged by the Application (T1, p.76).
4. The withdrawal of the objection by counsel for the Owners against 'trial by ambush'. Counsel had made repeated objections and protested from the outset that those in opposition had been derelict in the identification of issues and evidence in witness statements, had failed to provide filings and then, in the course of giving evidence and in cross examination sought the introduction of photographs and opinions in testimony that had not been previously disclosed. The objection was withdrawn and latitude was afforded lay citizen input (T1, p.92-98).
5. A statement by the planner that, in examining issues of built form, he would "switch gears" and address or examine the matter from a different approach/ perspective (T1, p.106).
6. An acknowledgement by the planner that:
    a. 6% (4%, using the planner's colour chart pre-filed) of the dwellings in the study area constitute examples similar to the Application in respect of demonstrating three levels above a garage visible from the street (T2, p.14-16).
    b. there is no one single example of a 60% coverage in the study area (T2, p.42).
    c. no tree protection zone had been studied for the Pascoe tree and it warrants protection (T2, p.50, 57).
7. Advice to the Member, in a Submissions exchange invited by the Member raising the potential for only a partial Application approval, that it was the Owner's position that the third floor variance permission was desired, that losing the third floor is problematic for the Owners and that the request of the Member was and remained for approval of all of the Application as applied for, adjusted only for the changed variance resulting from a recent plans examination. (T2, p.245-247)

COMMENTARY OBSERVATIONS AND DIRECTION

1. Excess of jurisdiction (*Rule 31.25 a)*) –above.

While there is a clear duty on the Member to consider relevant considerations and discard irrelevant consideration, the Request does not serve to identify the 'extraneous observations' with which it has concerns.

On its face, the Decision recites and concludes on the Four Tests with reference to the variances sought. Of the variances sought, the Decision identifies the permission for a third storey as "key" and the "true issue"; its content focuses primarily on that aspect and concludes, on findings that are clearly stated and ascertainable, that the third storey height variance is not supportable based on all four tests. Pre-eminent in that description is the measure and application of Official Plan and zoning compliance based on the Member's appreciation of the physical character of the neighbourhood, including aspects of height, massing, streetscape, presence of comparables, character and design of nearby residential properties.

Prima facie the Decision references, describes or discusses and makes findings on most, but not all (lot coverage; side main wall height, side yard setback) of the other ten (10) variances, including which tests they fail. The analysis of these variances, however, lacks the detail of specifics of the finding that addresses why the Member found that a third storey fails the four tests.

The Decision addresses the evidence and makes findings on the applicable tests, most completely in respect of the third storey variances. In so doing, it accepts some of the evidence of the professional planner and, by findings, rejects other elements of that evidence. The Member heard the evidence and the admissions, above referenced under *The Transcripts*, of the planner in the transcripts: Items 2, 3 and 6 are examples.

The matters raised in this ground, including the 'coherent' sufficiency of the Member's reasons, require more to be satisfied that the following matters, in substance, warrant a Review:

A. Whether the Applicant can provide through specific identification and use the claimed 'extraneous observations' engaged in by the Member and as having no relevance to the appeal;
B. Whether there is authority for the proposition that it is improper, or an excess of jurisdiction, on being satisfied that the single variances for a third storey - identified by the Applicant as 'desired', 'problematic if not granted' and a 'driver' of all other variances - to find against that component of the Application and then provide for the resolution (refusal) of all others, but curtail the details. That is, to avoid providing specific reasons for their disposition.

Specifically, whether the TLAB can decide an appeal on a fundamental variance put in issue (whether or not acknowledged) and, having determined that, refuse and not resolve any other variances in individual detail?

C. Whether it is a failure of jurisdiction to not recite the planner's evidence, not state the basis of its rejection or to make findings inconsistent with it, if the findings of the Member are clear, relevant to the issues, have a basis in the evidence and are not perverse?

I will direct a ***Notice of Proposed Dismissal*** of this ground, **1. Excess of jurisdiction**, to afford the Requestor an opportunity to further elaborate on the matters identified.

2. Violation of the rules of natural justice and procedural fairness (Rule 31.25 b)) – above

The TLAB was established on the principle that citizens have a full and fair opportunity to voice their opinions to a local appeal body on the remedies sought through statutory appeals. The TLAB *Rules* were crafted, adopted, reviewed and revised, effective May 6, 2019, on this principle and the protections directed by the *Statutory Powers Procedure Act*, the Regulation and the fairness principle.

Even so, neither the *Act* nor the *Rules* necessarily capture all the elements of the common law rules of natural justice or procedural fairness and the right to request a Review may identify, in the context of a decision and order of the TLAB, deficiencies from any source that warrant consideration and relief.

The Request asserts that the Member permitted opposing Parties to violate the *Rules*. The Request does not identify which *Rules* specifically are said to have been transgressed and which are not protected by Member considerations of what is 'fair, just and reasonably necessary' to fully adjudicate an issue.

In this matter, the Applicant did not at any time bring a Motion to Dismiss the appeal on the basis of any of the identifiable grounds for the pursuit of such relief as set out in the *Planning Act* and the *Rules.*

The Applicant did complain, arguably by way of formal Motion, as to inadequacies in the materials, filings and the fulfillment of obligations of those opposed. However, those objections were addressed, argued and resolved by an application of *Rule 12.6* and a Ruling, accompanied later by a consent withdrawal made on behalf of and binding upon the Applicant, as recited above under *The Transcripts,* para.1 and 4.

Those dispositions are not expressly observed, recognized, referenced or challenged in the Request. The Hearing, a full two (2) day Hearing, proceeded on the basis and merits of those dispositions. It is arguable that the Request seeks relief from

those dispositions and the Applicant's own role in them, without either their identification or acknowledgement.

As an issue of procedural fairness, the Member clearly did allow extended evidence both in chief and in cross examination by the Party, Mr. Sukonick, on what a Plans Examiner did or should have done, despite the Member's Ruling that the TLAB would not look behind the content of the Plans Examination result, with the risk of any error being that of the Applicant. The Request does not appear to demonstrate how that particular lenience was problematic or formed any part of the Decision and therefore could be a foundation for a breach of procedural fairness.

Rather, the Request appears to seek to reargue those procedural dispositions. This is in part premised upon a suggestion of some inherent limitation in the Member's ability to consider evidence and make findings on the evidence, or on a requirement to explain why the Member's findings side more with non-expert opinion evidence over the notion that more weight should be afforded unshaken expert evidence.

This challenge may be difficult to assess where a wide evidentiary latitude was available, arguably on consent, and with no maintained objection, except, perhaps, *ex poste facto*.

D. Whether, to pursue these aspects, the Request can identify with specificity the seminal planning opinions or evidence in conflict in the Decision: the factors engaged by the conflicting opinion evidence, expert and lay: the components of law and policy relative to that consideration; whether or not there was any conflicting evidence or observation; how it was stated as relevant or a determinant in the Decision; and why it is that the Member erred in its resolution.

The purpose of a Review is not to re-argue the evidence on a decision of the TLAB that is unfavourable. The Review must identify the natural justice or procedural fairness concern in issue, state and support the principle involved and demonstrate the basis or absence of justification in the circumstances. Some grounds go on to require a demonstration that the presence of the proven point would likely have resulted in a different decision.

The Review also objects to a footnote in the Decision where the Member refers to a TLAB Decision, *8 Haddington Avenue,* apparently not referenced in the oral Hearing or in any of the filings. The Member noted in the Decision that in *8 Haddington Avenue,* another Member had cited the discrete zoning limitation of two (2) storeys and refused its variance in that circumstance.

Members sit on many appeal Hearings and carry a volume of statutory, court and tribunal dispositions with them as is inherent in their responsibilities to treat matters of the public interest with a degree of consistency. Indeed, the TLAB publishes a decisions list and document record of such materials to aid in trial conduct, consistency and ease of reference.

While *8 Haddington Avenue* may well be distinguishable from the subject property on many facts and reasons, including distance and circumstances, more would be required to demonstrate its employment as a 'finding' or an undue influence on the Decision and adverse to the interests of the Applicant. It appears little more than the simple footnote reference acknowledging a TLAB decision that had involved and considered the same discrete zoning performance standard (two storey regulatory height limit) in an earlier decision of the same tribunal.

The Request also asserts that the failure to address most of the requested variances with replicable reasons for their disposition and the failure to give reasons as to why the planner's evidence was not addressed, amounts to a violation of natural justice and procedural fairness, as well as 'jurisdictional' error, above.

On this aspect, although an excerpt is included in the Request, my Review Decision in *65 Tilson Road* is readily distinguishable on its facts and considerations. I found that the Member's reasons, in *65 Tilson Road,* failed entirely to address the 'main issue' (FSI) and proceeded on a subset of irrelevant comparables (focus on semi-detached dwellings) and attributes (design distinctions) that drew the Member away from relevant, replicable reasons in support of that disposition.

In the subject case, the 'main issue', permission for a third storey, has manifestation in several other variances distinguishable from *65 Tilson Road*: lot coverage; building and wall height; building length, depth, setbacks and front portico, all of which can be commonly seen to contribute to massing, streetscape, bulk, and built form considerations. These are largely dependent on topography, a topic of much discussion in the Decision tied, as all these elements are, to Official Plan evaluation criteria.

The argument in *65 Tilson Avenue* of a focused fixation on irrelevant elements not attributable to Official Plan policy considerations is not made in the Request.

Raised under this ground as well, is the lack of in-depth replicable reasons for the consideration and disposition of the 10 variances requested beyond third story permission. Cited in *65 Tilson Avenue,* (TLAB Case File Number: 19 141090 S45 15 TLAB), I wrote the following (p.7,8):

> "I find the failure to address any consideration to the second variance, beyond inferential design values, as to be inappropriate and an incomplete fulfillment of the TLAB mandate. No rational is provided as to why the expert testimony of these subjects was not considered and was disregarded; that much acknowledgement and consideration is owing the Applicant from a trier of fact.
>
> Indeed, the applicable tests are template identified to both variances but are not addressed in any meaningful way that expresses to the Parties the assessment as to why the appeal was dismissed related to their relevance.

> None of these matters warrants a finding as expressed in the grounds as much as they are supportive of the fact that the matter deserves reconsideration. If necessary, I would find that the grounds of the review are established and that an appropriate remedy is warranted.
>
> As the reviewer, I did not hear the evidence and prudence dictates that, in this case, a review of the digital recording is not warranted. It is sufficient that the deficiencies alleged in the Request have sufficient merit to support the relief requested."

In the present case, the 'main issue' is directly addressed as above described. The DAR transcript exists. The variances lacking in description arguably differ from *65 Tilson Avenue* in both the contextual support for the disposition of the main issue and, herein, the apparent position of the Applicant in *Transcript 2.* Namely, that the third storey variance determination was considered the main driver of the Application.

The case authority cited of *Re DeGasperis* (12 M.P.L.R. (4th) 1) in the Request speaks to the need demonstrate and to address reasons in respect of the determination on variances sought "before any application for a variance is **granted**" (*DeGasperis*, para. 11, emphasis added).

The obligation, as stated therein, is that "the Board (sic: OMB/TLAB) was required to consider each variance sought and reach an opinion as to whether or not, either alone or together with the other variances sought…" (DeGasperis, para.15).

The Request asserts a failure to address ten (10) of the variances and a failure to offer up reasons why the planner's opinion advice on them was dismissed, ignored and not adjudicated upon is an incomplete fulfillment of the TLAB mandate.

Pursuit of this ground requires further justification, namely:

E. Whether there is a fundamental right to have all variances addressed to their ultimate consideration in circumstances where the Member has found that the 'main variance' requested is not supportable, does not meet the statutory tests and will not be granted.
F. Whether that right if it exists in paragraph E., preceding, is varied in the circumstance that the Party has asserted that the 'main variance' is the main driver determining the success or failure of all of the Application.
G. Whether there is an independent fundamental right to have the Applicant's professional planning evidence adjudicated upon, with reasons, in all circumstances in which the Decision differs from that evidence and the Application is found not to be granted.

I will direct a ***Notice of Proposed Dismissal*** of this ground, **2. Violation of the rules of natural justice and procedural fairness (*Rule 31.25 b*)**, to afford the Requestor an opportunity to further elaborate on the matters identified.

3. Made errors of law and fact such that the TLAB would likely have reached a different decision (*Rule 31.25 c)*) – above

In administrative law, the weighing of evidence is remitted to the trier of fact. It is that individual who is charged with the broad responsibility to advance the public interest by hearing opinion evidence and applying law and policy and own experience to matters for dispute resolution.

To accomplish that, the Member must be alert to issues, fairly listen to all 'sides' and address issues within the statutory framework within which the appeal is advanced.

In respect of the weighing of evidence in **3 a**., the Request does not assert a lack of attentiveness, any procedural failure in the conduct of a fair Hearing or the contravention of any law or policy. Rather, the Decision is challenged for 'inappropriately weighing' on 'some kind of faulty logic' that "implicitly" pays undue deference to non-qualified opinions and "appears to afford them more credibility than the 'competing' expert evidence."

It is not clear that these criticisms or that the Member's opinion of a photograph of a house as being 'insensitive' to its surroundings constitutes errors of the nature required to be established in the grounds supported by *Rule 31.25 c)*. The matters identified appear as areas of disagreement on the receipt and weighing of evidence as between the Applicant and the Member as referenced in the Decision.

A Member is entitled, on the standard of reasonableness, to draw inferences and conclusions from evidence provided there is some relevant evidence tendered to support the conclusion and the conclusion itself is not perverse. Neither of these latter circumstances were claimed to exist in the Request. Rather, issue was taken against conclusions reached by the Member as reflected in the Decision that were contrary to the opinion advice supplied by the professional planner. Having heard the evidence pro and con and having made his own observations, the Member is entitled to formulate his own opinion on acceptability or disagreement with the professional witness. Without something further in law or principle, that exercise is part of the job function of the TLAB Member. To repeat, that function does not extend to require an elaboration on each detail, formulation or aspect of evidence of every witness along the way provided it is clear that relevant considerations were entertained and irrelevant ones discarded.

It is not appropriate in a Request to raise: vague accusations of 'inappropriate weighing'; general allegations of 'faulty logic'; suppositions as to 'implicit' inferences; or challenge subjective judgements incapable of determinating expert advice; or of 'suspecting' the attribution to a witness of qualifications not supported by any express finding, as a basis to seek to reargue the appeal. It is appropriate to require demonstrable proof of such allegations sufficient to raise their presence on a balance of probability. Moreover, conjectural elements are not a basis to conclude, as one must to find the ground applicable, that their presence, even if found as clearly established, could constitute an error of law or fact that "would likely have reached a different decision."

Pursuit of the ground of applying inappropriate weight requires something further:

H. Whether there was no evidence to support a Member's finding;
I. Whether there are specific examples of expert opinion and judgment provided and rejected adverse to the Applicant upon which neither the Member nor a lay citizen could reasonably be expected to formulate an informed judgement.
J. Whether and where the fairness principle is claimed to be breached.

The Request also asserts, in **3b.,** that the Member committed error in the interpretation and application of the Official Plan. The interpretation of an Official Plan document is correctly stated to be a matter of law. However, the Request challenges not so much the interpretation of the Official Plan, but appears to raise its application based on the evidence before the Member.

There is no dispute raised that the Official Plan is incorrectly referenced or that the section applied is wrong. The disputes identified appear to centre on the differing views expressed on aspects of the descriptive elements of the 'geographic' and 'immediate' neighbourhoods and their attributes. At root, these are the subject matter of the evidence and there is no dispute that the oral evidence from three sources and the Member's own observations all played a role in resolving that description and in formulating the Member's opinion on policy compliance.

This process is the essence of an administrative Hearing.

A Review is not to afford an opportunity to review or recast the evidence; its purpose is to demonstrate on applicable grounds, an objective basis to conclude the presence or absence of a qualifying error.

I have discussed, above, and left open the question as to whether having found not compliance with the general intent and purpose of the Official Plan and zoning by-law, there is still required the obligation that the other variance tests need be addressed in punctilious detail.

The Request asserts, as well, in **3 c**. a litany of listed 'errors of fact' in the Decision, generally asserted which, if not made, could have led to a different decision.

In my view, errors of fact are evidentiary, but once established, must be tied to the Decision elements in a way that support a real prospect of the reversal of some important element or all of the Decision. When so demonstrated, it would be appropriate for such errors of fact to be considered in a formal Review of the Decision. Where the threshold of proof is not reached, the individual or collective use of the alleged errors must be considered in light of the potential of their contribution to the findings of the Decision. The standard the Request must address is not just establish a factual error but also as to whether such would likely result in a different decision.

Item **3c. i.** is answered in *The Transcripts*, clause 2, with the admission that the plans appear to show a sub-grade foundation. In any event, the Member's finding that the TLAB's obligation to address Urban Forestry issues and consequent Official Plan policy consideration was frustrated by the Applicant's lack of evidence on the subject, is a finding that is not challenged in the Request.

It is not appropriate for a Review to be constituted to correct or plead new evidence, unless that ground is raised and supported, which is not the case here.

Item **3c. ii.** objects to an element canvassed in evidence (third storey windows) but not recited by the Member as a material fact.

It is not appropriate for a Review to be advanced for the lack of reference to a matter in evidence that is not referenced in the Decision. This can be especially so where the subject matter is not clearly seminal to the determination made on the Application: not to allow habitable space in a third storey.

Item **3 c. iii**. raises an opinion expressed by the Member (roof visibility) upon which *The Transcripts* identify that extensive conflicting opinion evidence was adduced. The Member concluded with regard to roof lines, pitch and the presence of dormer and a window, that the third storey addition proposed with exposed garage would be 'highly visible'. This appears to be entirely a subjective finding.

It is not appropriate for a Review to be instituted to re-argue the evidence plainly put in dispute at the Hearing and resolved by the Member – as an error of fact.

Item **3 c. iv**. raises the descriptive differential introduced by the Applicant's planner to describe dwellings having the appearance of three and four storeys in height when viewed from the streetscape. This issue was fully canvassed in evidence as demonstrated through *The Transcripts*, filings, photographs and use of language in the Decision. There appeared to be no disagreement that the visibility of a garage level with three storeys above constituted a visually distinctive element. Opinion on the significance of this element clearly differed. The Applicant to date has not clearly identified that any description by the Member of this distinguishing element was attributed to the Plans Examiner or the Applicant's planner in a manner that is instrumental to the Decision to not approve a third storey. The *Transcript* does not appear to confirm such an attribution. There appears to be nothing further to support in the Request, or to represent, that this alleged attribution, if made in error, would have in any material way affected the outcome of the Decision.

Item **3 c.v.** raises the evidentiary consideration of the dwelling unit character of the geographic and the immediate neighbourhood. This issue was fully canvassed in evidence as demonstrated through *The Transcripts*, filings, photographs and use of language in the Decision. The evidence was descriptive of the distinguishing characteristics of two (2) story housing, three (3) storey housing and three plus (3+) dwellings, their empirical numbers, percentages and location. *The Transcripts* evidence includes lengthy, multiple examination and cross-examination exchanges on this descriptive reality and the matter is addressed in several references in the Decision. The Request does not appear to demonstrate that in the Decision an error occurred in the factual recitation of the evidence or the application of this evidence that is outside its relevance as an Official Plan policy criteria element for consideration.

Item **3 c.vi**. raises an impression communicated in the Decision as to distinctions to be drawn by the Application and a rendering of both it and adjacent dwellings. The Member's description in the Decision followed deliberation on the evidence. The Affiant

disagrees with the Member's measures and distinctions, all drawn in both instances from a two-dimensional drawing depicting some aspects of massing.

It is not appropriate for a Review to be instituted to re-argue the evidence, opinion or otherwise, plainly and correctly put in evidence and disputed at the Hearing and resolved by the Member.

Item **3 c.vii**. takes issue with a description in the Decision related to 70 (to wit: "new and approved") three storey dwellings. The evidence as to numbers was supplied by the Applicant's planner and was subject to questioning as to the physical characteristics of the 'three storey' housing. The Request advises that it included, as a character attribute, existing three storey dwellings as an element of area character.

Given no disagreement as to the planner's total unit count and nothing to suggest that the reference "new and approved' did not include existing housing in the category of three storey dwellings, I am unable to see this distinction as anything more than an attempted further clarification of the evidence.

Unless more is forthcoming, it would be a leap into another galaxy to suggest existing housing was not counted in the absolute numbers presented by the planner for the purposes of showing the representation of three storey dwellings in the neighbourhood - later or otherwise to be differently described. Still more is required to suggest the clarification is necessary to avoid an interpretive error that would likely have resulted in a different decision.

Item **3 c. viii.** raises the Member's comment on topography ('highest land on the street, which seems to be an inapt location to seek this (third storey) variance'). The Applicant argues that it is the very fact of this topography that demands, by virtue of two different definitions under zoning for measurement from grade, and gives rise to the height/storey variances.

Respectfully, the Member's comment is insensitive to the days of litigation that preceded the writing of the Decision. It is, however, a cogent observation on a factual reality: the Application seeks a height variance increase under zoning on topography that is the highest in the neighbourhood. It is a tautology that the vast majority of the neighbourhood was built to the zoning standards that defined grade – to either, two, three or three-plus storeys, depending on their circumstances and with relatively few zoning exceptions, as sought.

On the other hand, the Applicant's explanation that it is for the very reason of topography that the height variances are sought, is also equally insensitive to the reality and is disingenuous. It is the issue of a third storey, sought by the Application that is subject to the grade definitions, that has made the topography an issue.

In the circumstances extant, I am not at this point satisfied that there is either a contradiction of the evidence of the planner that is of substance or any error of fact in this exchange that warrants re-consideration in a Review.

Item **3 c. ix**. challenges the Member's access and manipulation of evidence supplied by the Applicant's planner on historical COA records. The Member examined

and provided observations and findings on the number and rate of COA approvals for third storey zoning relief.

These statistics were not accessed nor discussed in the Expert Witness Statement or oral evidence of the planner Volpentesta, although they were part of the Applicant's disclosure.

The Request, with the support of the Affiant, describes these findings on number and rate of applications and other measures initiated by the Member as not being 'relevant to any credible analysis in respect of the Four Tests'.

It is frequently the circumstance that professional planning evidence raises the statistical record of aspects of relevant historical applications, approvals and their manifest physical presence as a relevant consideration to an application in process. This can include numbers, timing and comparative relevance. While statistics are rarely determinative of anything and their manipulation is always subject to proof, they are not foreign to TLAB Hearings. Here, the statistics were made available by the Applicant's planner, but were not presented in the manner brought forward by the Member for their description, use and comment. It is the case that the exercise performed by the Member was not brought to the attention of the Party adversely affected by their use, for challenge, comment or opportunity for contradiction.

That said, it remains for the Request to demonstrate that the measures discussed in the Decision, and that post-dated the oral evidence, was both in error and instrumental in the Decision and how such an error would likely have resulted in a different order on decision.

It is noteworthy that the statistics themselves are not challenged, simply their analytic use and credibility. The Affiant does not particularize the claim for no analytic credibility or relevance.

A Review will not be granted for unsubstantiated criticisms or claims or that do not demonstrate factual or legal error or that does not provide cogent reasons why the complaint, if established, could have resulted in a different order or decision.

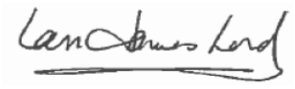
I will direct a ***Notice of Proposed Dismissal*** of this ground, **3. Made errors of law and fact such that the TLAB would likely have reached a different decision (*Rule 31.25 c)*)**, to afford the Requestor an opportunity to further elaborate on the matters identified.

The decision to order a ***Notice of Proposed Dismissal*** is based on the foregoing considerations that I find arise under *Rule 31.15 a), e) and h).*

DECISION AND ORDER

1. TLAB Staff are directed to issue a ***Notice of Proposed Dismissal*** including this Decision and Order attached or referenced as a schedule.

2. If the lettered paragraphs **A** through **J,** above, and any other matters considered appropriate by the Requestor herein are not addressed satisfactorily in the time for response as set out in the *Rules*, or such time as may be reasonably extended on written request, a decision will follow on whether or on what terms a ***Notice of Review*** may issue.
3. Despite the issuance date of this Decision and Order and *Rule 31.16,* the period for response to a ***Notice of Proposed Dismissal*** shall not begin to run until such time as any suspension (currently scheduled to expire May 29, 2020) of TLAB's public business remains in effect.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord