Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Thursday, June 04, 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): FARAHNAZ AGHA MOHAMMADI

Applicant: ALI SHAKERI

Property Address/Description: 574 HILLSDALE AVE E

Committee of Adjustment Case File Number: 18 272932 NNY 15 MV (A0001/19TEY)

TLAB Case File Number: 19 122500 S45 15 TLAB

Decision Order Date: Friday, May 22, 2020

DECISION DELIVERED BY D. Lombardi

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a Request for Review (Request/Review) made by Joanne Rigny (Requestor) of a decision of the Toronto Local Appeal Body (TLAB) by Member J. Leung, issued March 6, 2020 (Decision), in respect of 574 Hillsdale Avenue East (subject property).

The Decision allowed the appeal, subject to conditions, by Farahnaz Agha Mohammadi (Appellant) from a decision of the North York District Panel of the City of Toronto (City) Committee of Adjustment (COA) to permit nine (9) variances in order to construct a new detached residential dwelling on the subject property.

The TLAB recently (May 6, 2019) adopted revised TLAB Rules of Practice and Procedure (new Rules). The new Rules were perfected following a lengthy public consultation process, and those Rules now apply to all proceedings brought before the TLAB after May 6th. As the subject application was commenced prior to the May 6th date, above noted, this Review Request is being conducted under the regulations of the previous iteration of the Rules in place at the time the original appeal application was submitted to the TLAB by the Applicant.

The Request consists of an affidavit (Form 10), sworn by Ms. Rigny, dated April 7, 2020. Attached to the affidavit is a four-page Summary Statement (Submission) prepared by Ms. Rigny, consisting of some sixteen paragraphs, that summarizes the reasons and grounds for requesting the Review.

In response, Ms. Amber Stewart, Amber Stewart Law, the Appellant's solicitor in the matter, filed a rather extensive thirty-nine (39) page Response to Request to Review the Decision (Response), which included six Appendices. Three of the Appendices include the following case law for guidance: *Sibboney, Re*, 127 Summerhill Avenue, 2013 CarswellOnt 582, Ontario Municipal Board PL120033 (***Sibboney***); *Jankovic, Re*, 93 Bocastle Ave., 2013 CarswellOnt 5029, Ontario Municipal Board PL130069 (***Jankovic***); and, *Pacheco, Re,* 44 Ranwood Dr., 2018 CarswellOnt 1551, TLAB Case File No. 17 209369 S.45 11 TLAB (***Pacheco***).

Additionally, an affidavit (Form 10), dated April 23, 2020, was filed by Jonathan Benczkowski, a land use planner and the Appellant's expert witness in the subject proceedings. That Affidavit consists of two Exhibits, including an email chain of correspondence with the City of Toronto Building Department.

The documents, above cited, were served on the Requestor and the Parties to the Decision.

No other contributions concerning the Request were received by the TLAB.

Service is a condition precedent to a validly constituted Request, but only on the Parties (Rule 31.3). There is no obligation on a Party or Participant to respond to a Review. However, by service, all Parties and Participants are on Notice that the Decision has been challenged. The Rules do not prohibit the right to contribute to that consideration. Nevertheless, it is to be noted that, because of the initial election made, a Participant cannot initiate a Review, as a Participant enjoys only prescribed and limited privileges within the Rules of the TLAB, at the original Hearing.

I am of the view that the Request was commenced in proper form accompanied by the requisite documentation. Ms. Rigny filed her Review Request with the TLAB on April 7, 2020 and acknowledged in the accompanying email that Request was *"a couple of days late."* She apologized for the dilatory filing, noting that *"the unprecedented times that we are living in I was delayed in obtaining a notary public signature for the affidavit due to the order of mandatory quarantine because of a recent overseas trip."* (Ms. Rigny's April 7, 2019 email to the TLAB)

TLAB Rule 31.3 (old Rules) requires that "A Party shall serve on all Parties and File with the TLAB a request for review within 30 Days of the decision or order, unless the TLAB directs otherwise."

I note for the record that in the matter at hand TLAB staff initially undertook an erroneous administrative screening of the Request mistakenly identifying it as a matter to be undertaken under the new Rules. In doing so, staff determined that the submission was incomplete as per new Rule 31.10 (c). Consequently, TLAB staff issued a Notice of Non-compliance on April 30, 2020, in which the Requestor was advised that

the Review Request was not being processed because *"The request in question is incomplete,"* and directed the Requestor to consult the Rules of Practice and Procedure for the proper contents of a Review Request.

Following several email exchanges between the TLAB and Ms. Rigny, the situation was eventually rectified, with staff acknowledging that the Review Request was, in fact, to be reviewed under the old Rules and, as such, was deemed to have been perfected.

Regarding the issue of the tardiness of the filing as per Rule 31.3, effective as of March 16, 2020, the TLAB ordered a cessation of all Hearing events and the suspension of filing timelines, with limited exceptions, pursuant to Ontario Regulations 73/20. This interval, in effect a 'Suspension Period', reflected the widespread concern for the 'COVID-19' virus, evident across the world and in the City. That Suspension Period has subsequently been extended by the TLAB to July 3, 2020.

Given that the filing of the subject Review Request fell within this Suspension Period, the Request was processed administratively and forwarded for the conduct of the review to this Member.

In the circumstances, to the extent necessary, I find the filing of the Request is in order and is accepted.

The grounds for relief and the available remedies under Rule 31.6 are below recited under 'Jurisdiction'.

BACKGROUND

The Decision records that the matter was heard over three Hearing days: July 19, 2019; November 18, 2019; and January 29, 2020. In attendance were the Applicant/ Appellant, a land use planner as an expert witness to provide professional opinion evidence in support of the appeal, and two principal Parties (Ms. Rigny and Mr. Al Kivi), both in opposition to the appeal.

The appeal involved a request to permit 9 variances (8 from the new comprehensive Zoning By-law No. 569-2013 and one from the former Zoning By-law 438-86) in order to construct a new detached dwelling on the subject property. At that time, the variances requested were for the following:

1. Chapter 10.10.40.10.(2), By-law No. 569-2013 The maximum permitted height of all exterior main wall is 7.00m. The proposed height of the front exterior main wall is 7.50m.

2. Chapter 10.10.40.10.(2), By-law No. 569-2013 The maximum permitted height of all exterior main wall is 7.00m. The proposed height of the rear exterior main wall is 7.50m.

3. Chapter 10.10.40.10.(2), By-law No. 569-2013 The maximum permitted height of all side exterior main walls facing a side lot line is 7.00m. The proposed height of the side exterior main walls facing a side lot line is 7.50m.

4. Chapter 10.10.40.30.(1)(A), By-law No. 569-2013 The maximum permitted building depth is 17.00m. The proposed building depth is 19.80m.

5. Chapter 10.10.40.40.(1), By-law No. 569-2013 The maximum permitted floor space index is 0.60 times the lot area. The proposed floor space index is 0.82 times the lot area.

6. Chapter 10.10.40.70.(3)(A)(i), By-law No. 569-2013 The minimum required side yard setback is 0.90m. The proposed west side yard setback is 0.45m with a wall containing an opening (window).

7. Chapter 10.5.50.10.(1)(A), By-law No. 569-2013 On a lot with a detached house, with a lot frontage less than 6.0 metres, the front yard, excluding a permitted driveway or permitted parking pad, must be landscaping: In this case, the entire front yard (26.6m² excluding a permitted encroachment) is required to be landscaping. The proposed landscaping area is 12.0m² which includes a parking pad, which is not permitted.

8. Chapter 10.5.80.10.(3), By-law No. 569-2013 A parking space may not be located in a front yard or a side yard abutting a street. One proposed parking space is located in the front yard abutting a street.

9. Section 4(4)(B), By-law No. 438-86 The by-law requires one (1) parking space to be provided (one for each dwelling unit) on the lot, located behind the front main wall or at the rear of the building. There are no parking spaces proposed behind the front main wall or rear of the building.

The application was heard by the COA on February 21, 2019 and refused, and the Appellant filed an appeal with the TLAB. As part of the subject appeal, and prior to the Hearing, the Appellant revised variances #1-5, above recited, reducing the overall building footprint for the proposal as well as the height of the proposed exterior main walls. In addition, the floor space index was also reduced from 0.82 times the area of the lot to 0.784x.

In effect, the Appellant elected to revise the proposal prior to the hearing of the appeal in order to further reduce the perceived impact of the house design as it related to the neighbouring property at 576 Hillsdale Avenue East, owned by Ms. Rigny. The Appellant submitted a set of revised drawings to reflect the changes above noted.

At the outset of the Hearing on Hearing Day 1 (July 19, 2019), the presiding Member dealt with several matters. The first matter involved several late requests for Party status, including from Ty Bertrand, a new resident to the neighbourhood who had elected Participant status prior to the Hearing. In ruling on this matter, Member Leung provided verbal direction that because Mr. Bertrand had only recently moved into the neighbourhood his status would remain as a Participant.

The second matter related to an issue raised by Mr. Kivi, a member of the South Eglinton Ratepayers and Residents Association (SERRA) and a Party to the proceedings. He proposed that the TLAB consider adjourning the proceedings to a later date due to these late requests and submissions.

Additionally, he submitted that the Appellant had not followed the TLAB Rules since the revised proposal had been submitted as a late filing as part of the Witness Statement submissions on behalf of the Applicant/Appellant. He argued that this could prejudice the participation of the opposing Parties, noting he had not had time to adequately prepare for the Hearing.

Ms. Rigny requested a dismissal of the appeal as she contended there are no legitimate planning grounds to proceed to an appeal Hearing. Nevertheless, after further consideration, she agreed to an adjournment of the matter as suggested by Mr. Kivi and to not pursue her original request for dismissal.

After careful consideration, Member Leung agreed to adjourn the matter to November 18, 2019 (Hearing Day 2) which would allow the Parties to carefully review the revisions promulgated by the Appellant, above recited, and to reconsider their positions.

As to the issue of a revised proposal and the notice requirements under the *Planning Act* (s. 45(18.1.1), Member Leung addressed this matter with an oral ruling at the Hearing which he subsequently memorialized in his Decision. He expressly acknowledged that the revised proposal could be accepted for consideration by the TLAB and wrote, on page 9 of the Decision:

> *"The Tribunal further finds that the revised proposal can be accepted for consideration by the TLAB and that, in accordance with established practices of previous Tribunal decisions, finds that the public interest is not compromised…it can be summarized that the overall size, scale, and intensity reduction of the proposal would lessen the impact at the neighbourhood level so re-notification (under s.45 (18.1) would not be pertinent...I find these changes to be within the spirit of s. 45(18.1.1) of the Act and no further notice is required"*

The third matter related to an issue raised by Ms. Rigny at the outset of Hearing Day 2 and one which continues to be integral to the Review Request filed and that is before the Tribunal. She asserted at the Hearing that the variances requested by the Appellant and as defined by the City Building Department were "inaccurate." (her word)

She contends that the lot frontage requirements are not met with respect to the proposal and that, as she interprets it, the redevelopment of the subject property as proposed by the Appellant, is not possible (p. 5, Decision).

In addition, and following Ms. Rigny's contention, Mr. Kivi further asserted that he had been engaged in discussions with senior Building Department staff regarding what

he believes were inconsistencies in the interpretation of the Zoning By-law regarding the subject Application by zoning examiners.

In response, Member Leung concluded the following on page 5 of the Decision:

"…I am obligated to accept the interpretation of municipal staff on planning and building matters, on prima facie review, as accurate. The Tribunal would not typically engage in direct scrutiny of municipal processes and procedures. Ultimately, the applicant bears the responsibility for a complete application."

The issue of the interpretation of the Zoning By-law as it relates to the requested variances is paramount to Ms. Rigny's Review Request and is addressed in greater detail below, in the 'Considerations and Commentary' section of this decision. However, simply put, Member Leung accepted the evidence presented by the Appellant in the form of a Notice from the Zoning Examiner regarding the subject property and was satisfied that no other variances were missing or required.

As a result, he proceeded to hear the appeal and issued a 12-page Decision on March 6, 2020 allowing the appeal and granting the variances requested, subject to four defined conditions.

JURISDICTION

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

"**31.4** A Party requesting a review shall do so in writing by way an Affidavit which provides:

a) the reasons for the request;

b) the grounds for the request;

c) any new evidence supporting the request; and

d) any applicable Rules or law supporting the request.

31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:

a) seek written submissions from the Parties on the issue raised in the request;

b) grant or direct a Motion to argue the issue raised in the request;

c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or

d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

a) acted outside of its jurisdiction;

b) violated the rules of natural justice and procedural fairness;

c) made an error of law or fact which would likely have resulted in a different order or decision;

d) been deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision; or

e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

31.8 Where the Local Appeal Body seeks written submissions from the Parties or grants or directs a Motion to argue a request for review the Local Appeal Body shall give the Parties procedural directions relating to the content, timing and form of any submissions, Motion materials or Hearing to be conducted."

CONSIDERATIONS AND COMMENTARY

The Request for Review is encapsulated on page 2 of the Requestor's Summary, in an explanation of the reasons for the Request. The Request asks that the final Decision of Member Leung be reviewed on the following two grounds as set out in the Affidavit, above noted:

"That the Panel Member charged with adjudicating the case (TLAB Case File Number: 19 122500 S45 15) 'erred procedurally' in allowing the hearing of the appeal of the Committee of Adjustment Case File: 18 272932 NNY 15 MV and in basing its decision on an incomplete set of facts"; and

"That the TLAB Panel also erred in law in allowing the appeal in that the consideration of the omitted variance respecting the minimum lot frontage would have impacted the determination of this case."

Ms. Rigny requests a reversal of the TLAB Decision of Member Leung, dated March 6, 2020. Additionally, she asks for a rehearing of the variance application as denied by the COA and subsequently overturned on appeal by the TLAB to include consideration of the *"non-compliance of the minimum lot frontage of the subject property required by By-law 569-2013."* (Email dated May 6, 2020 to the TLAB)

On consideration of these reasons and grounds, and after an extensive review of the filings and submissions in this matter, I find that Ms. Rigny is attempting to re-argue

the evidence and to restate arguments previously made during the Hearing and decided by the presiding Member in his Decision.

I believe this is done in the hope that the reviewer may arrive at a different conclusion which I find somewhat disrespectful. To do so would disrespect the discretion afforded the hearing officer of the first instance and, applied here, would do so in the absence of a qualifying ground that is compelling.

At the forefront of that rationale promulgated by the Requestor in her Summary and Affidavit is the allegation that *"the City of Toronto and the presiding Member, in his Decision, erred in their interpretation of Zoning By-law 569-2013."* Ms. Rigny submits the following grounds for this allegation, as outlined in her Submission:

- *The subject property is zoned R (d0.6X930) pursuant to By-law 569-2013.*
- *The X930 suffix to this category stipulates that the minimum lot frontage.*
- *The subject property exists with a lot frontage of 5.18 m.*
- *Section 10.5.30.21 of By-law 569-2013 provides legal relief for existing lots with less lot frontage than stipulated under the performance requirements thereof.*

Ms. Rigny goes on to quote subsections (1), (2) and (3) of s. 10.5.30.21 of the By-law and asserts that the City and the TLAB have misinterpreted provisions of the By-law to suggest that on a 'vacant' lawfully existing lot, only a detached house may be constructed and only if the lot frontage is 6.0m.

In essence, Ms. Rigny's submission is that once the existing dwelling that exists on the subject property is demolished in order to make way for the proposed new dwelling, the lot would then become 'vacant' and would 'lose' the benefit of being a lawfully existing lot. She interprets the operation of the provisions in the sections of the By-law as precluding the construction of a new, replacement dwelling on the subject property, and that only a 'renovation' of the existing dwelling is permitted.

Furthermore, she concludes that the nature of the required variance to the minimum lot frontage *"would require a zoning by-law amendment thereby eradicating the panel's ruling."* (p. 2, May 6, 2019 email)

In paragraph I, on page 3, of her Summary, Ms. Rigny submits that *"unfettered reliance on the interpretation of the City of Toronto Building Department's zoning review is* ***reckless*** *(my emphasis) in the face of the reading of the provisions of Zoning By-law 569-2013."* She submits that the *"issue to be resolved is whether the subject property is technically a Vacant Lawfully Existing Lot within the meaning of Section 10.5.30.21(3) of By-law 569-2013."*

She asserts in her Summary that the presiding Member: i) erred procedurally in allowing the hearing of the appeal; ii) based his decision on an incomplete set of facts; and, iii) also erred in law in allowing the appeal by not in considering the omitted variance respecting the minimum lot frontage which she submits would have impacted the determination of this case.

She then provides an interpretation of the By-law and submits that if 50% or more of the main walls of the first storey of the existing dwelling are removed the subject property becomes a 'vacant lawfully existing lot'. At that point, she asserts that *"Clearly the intention of s. 10.5.30.21 of the By-Law is to encourage additions or extensions to lawfully existing buildings on lawfully existing lots…"* (p. 4, Summary)

The fact is that the subject property is not 'vacant'; it is a lawfully existing lot with a 5.18 m frontage, and currently contains an existing detached dwelling, which the Appellant is related to have established quite forcefully at the Hearing. The Requestor asserts in her Affidavit that once the existing dwelling is demolished the lot would then become 'vacant' and would 'lose' the benefit of being a "lawfully existing lot."

Furthermore, she believes that Zoning By-law 569-2013 includes (in summary) that:

- An Area-specific Exception 930(B) provides that the minimum lot frontage for a lot with a detached house is 7.5 m.
- The existing lot is 5.18 m wide and is considered a lawfully existing lot under s. 10.5.30.21.(1).
- Section 10.5.30.21.(3) provides that on a 'vacant' lawfully existing lot, only a detached house may be constructed and only if the lot frontage is 6.0 m.

More importantly, she argues that the TLAB and the City have 'misinterpreted' (her word) the above provisions. Therefore, Ms. Rigny believes that the operation of these provisions would preclude the construction of a new replacement dwelling on the subject property, and that only a renovation should be permitted.

I must concur with the Appellant and agree that Ms. Rigny's Review Request is unfounded for two very convincing and persuasive reasons. First, the TLAB was not required to interpret the zoning by-law provisions that the Requestor has raised because a variance was not sought from the provisions, above identified by Ms. Rigny.

There is no variance requested to lot frontage.

The second reason is that I find the Requestor's interpretation of the provisions of the By-law to have not been established to my satisfaction. The Appellant has asserted, and I agree on the evidence referenced by the Member that the interpretation espoused by Ms. Rigny was raised directly with the City's Building Department prior to the Hearing. The City had confirmed that the provisions of the Zoning By-law did not apply in the matter at hand because the subject property is an existing lot with an existing detached dwelling that is proposed to be replaced.

Furthermore, prior to the commencement of Hearing Day 1 (July 19, 2019), Ms. Rigny raised a preliminary Motion with the presiding Member addressing her concerns regarding her interpretation of the zoning provisions related to the subject property. I note that the same issue was also raised by the Requestor and Mr. Kivi (SERRA) in evidence on Hearing Day 2.

It is clear the presiding Member made a ruling in this regard which he memorialized in his Decision, on page 5. There, he wrote:

> *"On the 2nd day of hearings, opposing Party Ms. Rigny commented that she believed that the variances as defined by the Building Department were inaccurate. She had engaged both the appellant and the Building staff but no alteration to the variance requests have been made. She contends that the lot frontage requirements are not met with respect to this proposal. As such, she believes that, as she interprets it, the redevelopment of the lot is not possible."*

Additionally, Member Leung wrote on the same page that: *"Mr. Kivi of SERRA asserted that he has been engaged in discussions with senior Building staff regarding what, he believes, are inconsistencies in the interpretation of the Zoning By-law by zoning examiners."*

The Member ultimately agreed with the interpretation provided by the City Building Department and he responded with the following ruling: *"I am obliged to accept the interpretation of municipal staff on planning and building matters, on prima facie review, as accurate. The Tribunal would not typically engage in direct scrutiny of municipal processes and procedures. Ultimately, the applicant bears the responsibility for a complete application."* (p. 5, Decision)

The fact of the matter is that nine variances were requested by the Applicant in this appeal and the requested variances were identified by the City in two separate Zoning Notices presented at the Hearing. The first Zoning Notice was issued on December 27, 2018, in respect of the original proposal, and was included as Tab 2 of Exhibit 2 at the Hearing. It is attached as Appendix 1 to Ms. Stewart's Response to the Review Request.

The second Zoning Notice was issued on November 13, 2019, in respect of the revised proposal and was marked as Exhibit 5 at the Hearing. It is also attached to the Ms. Stewart's Response as Appendix 2.

Neither Notice issued for the subject Application identified a variance requirement to Exception R 930(B) or to 10.5.30.21.(3).

In his Affidavit, on page 2, Mr. Benczkowski confirms that Ms. Rigny raised the issue of a misinterpretation of the Zoning By-law in an email to the TLAB dated August 11, 2019, with an attached letter dated August 9, 2019. That letter was carbon copied to the Appellant and his solicitor, Ms. Stewart. In that letter, Ms. Rigny set out her interpretation of the provisions in question and asserted to the TLAB that a 'technical issue' existed with respect to the Application regarding the provisions of the By-law. She requested that the TLAB *"request a review of the provisions of By-law 569-2013 and an interpretation thereof from the 'City Solicitor's office' for their legal findings."*

On August 29, 2019, Ms. Rigny wrote to Ms. Stewart and, in response to Ms. Stewart's advice that she was seeking clarification from the zoning examiner because of her letter of August 9th, Ms. Rigny wrote the following:

> *"Once you have received clarification directly from the City please forward this to all Parties. We ourselves have reached out to several people and are awaiting further clarification ourselves."*

Following several email exchanges between Ms. Stewart and Mr. Tony D'Arpino, then the Manager of Toronto Building, South District, in which the City was asked to review Ms. Rigny's concerns, Ms. Stewart wrote to Ms. Rigny on September 17, 2019 providing a formal response. In that correspondence, which I do not reproduce in full here, Ms. Stewart provided the City's response in which Mr. D'Arpino confirmed '**unequivocally**' (my word and emphasis) that the most recent Zoning Notice issued by the City for the subject property was "correct" and the Zoning Notice "perfected." That letter was marked as Exhibit 1 at the Hearing and is attached as Appendix 3 in the Response.

In a letter to Ms. Stewart, dated October 31, 2019, Ms. Rigny expressed her continued disagreement with the City's interpretation of the applicability of Section 10.5.30.21.(3) to the subject property. However, in that letter, she also stated that she *"would like the TLAB to adjudicate the matter at the outset of the Hearing scheduled for November 18, 2019…**We will abide by the determination of the TLAB Chairperson in this regard."* **(my emphasis)**

The above, in my mind, confirms two indisputable facts. The first is that Ms. Rigny's lay interpretation of the Zoning By-law was, in fact, put before the Manager of the City Building Department for considered and it was rejected by Mr. D'Arpino. While I acknowledge that it is possible for the City to inadvertently miss variances in a Zoning Notice, I agree with the Appellant's solicitor that that did not occur in this case. In fact, although not a common practice, the City through Mr. D'Arpino did issue an interpretation after the Zoning Notice was issued, providing what I consider a thorough explanation which confirmed that the 2nd Zoning Notice issued by the City was correct.

Contrary to Ms. Rigny's assertion in her Review grounds that the TLAB "erred procedurally" (her word) in allowing the hearing of the appeal and asserting that the Member *"based his decision on an incomplete set of facts,"* I agree with Ms. Stewart's position, as expressed in her Response, that it was both *"reasonable and appropriate for Member Leung to accept the interpretation of City Building Department staff as to the variances required, as itemized in the Zoning Notice."*

Jurisprudence suggests that approval authorities such as the TLAB are responsible for determining whether the variances before them meet the four tests in s. 45(1) of the *Planning Act* and not whether the variances were appropriately identified by the City. It is the Zoning Examiner who is responsible for interpreting the Zoning By-law and therefore identifying and confirming the variances required for a given development proposal.

In support of this principle, Ms. Stewart offered the following case law excerpts as examples, previously cited. The complete decisions for each are attached as Appendices to her Response:

A. ***Sibboney, Re*** - In this case, which was an appeal of a COA decision refusing to legalize and maintain a rear elevated deck, the Member in that matter held that:

*"The Board relies on the City's zoning examiner whose responsibility is to interpret and enforce the performance standards found within the Zoning By-law." (*Appendix 5, Response)

B. **Jankovic, Re** - This was a refusal by the COA for variances to construct a two-storey dwelling with an attached, integral, one-car garage. In that case, the Teddington Park Resident's Association (TPRA) challenged the findings of the Zoning Examiner, arguing the examiner missed a required variance for the front yard setback. At paragraph 24 in that decision, Member Carter-Whitney wrote:

"The Board finds that this issue is not a matter before the Board, as the City's Zoning Examiner is charged with making that interpretation. The Board is charged with determining whether the variances before it at the hearing meet the criteria in s. 45(1) of the Planning Act."

C. ***Pacheco, Re*** – This was an appeal of a COA decision to the TLAB approving variances to construct a two-storey detached dwelling. The appellant raised concerns regarding the manner in which the Zoning Examiner calculated the permitted lot coverage.

In that matter, Member McPherson, at paragraph 21 in the decision, that:

"It is the City Building Department's responsibility to interpret the zoning by-law and identify the variances required… As noted during the hearing, the TLAB is responsible for determining whether the variances before it meet the four tests of the Planning Act and not whether the variances were appropriately identified by the City."

It is clear from Member Leung's Decision and the materials filed in this matter, both at the Hearing and subsequently as part of the Review Request process, that the Member had a fulsome and prodigious set of facts before him at the Hearing, including two Zoning Notices and a confirmed Zoning By-law interpretation from the Area Manager of the City Building Department. On this basis, I find that the Member accepted that the subject property was a lawfully existing lot, and that a replacement dwelling could be constructed subject to the requested variances meeting the four tests of the *Planning Act*.

I also agree with Ms. Stewart and find that the Requestor is attempting to re-argue the case utilizing what can only be considered her 'lay' interpretation of the provisions of By-law 569-2013. Ms. Rigny provided no expert opinion regarding this issue at the Hearing and simply reiterated her understanding of the By-law in the Submission. I find her assertion that both the interpretation of the City Zoning Examiner (in reviewing both the original and revised proposals) and the Manager of the Building Department (South District) are incorrect, is improbable.

As well, her contention (in her Affidavit) that the "unfettered reliance" (para. I, Submission) on the interpretation of the City Building Department is "reckless" (her word) appears to me to be capricious and arbitrary.

I find nothing in her submissions and arguments that would support her proposition that Member Leung "erred procedurally" by allowing the hearing of the subject appeal.

With respect to the second ground advanced by Ms. Rigny in her Review Request, regarding her assertion that Member Leung erred in law because consideration of the "alleged 'omitted variance'" (my words) respecting the minimum lot frontage would have resulted in a different outcome, I also find this ground to be unfounded.

She seems to be suggesting that if a variance had been missed and was required, then it could not have been approved by the TLAB. However, I find that the Requestor has provided no evidence or argument to support this allegation. On the contrary, it was evident that the Applicant's position at the Hearing was that if a variance had been 'missed' as alleged by Ms. Rigny, the Applicant was prepared to defend the merit of a variance to authorize a new dwelling on the existing property and request an amendment to the proposal to add an omitted variance, if required.

I note that the Appellant is not seeking a variance from the provisions that Ms. Rigny has raised in the Review Request and, in fact, was content to rely on the variances identified by the City Zoning Examiner. The Member, in his Decision, allowed the appeal and granted the requested variances.

Ms. Stewart, in her Response, cited the (former) Ontario Municipal Board decision for 585 Hillsdale Ave. E. (PL150863) as a specific example of an approved variance to Exception 930(B) of By-law 569-2013, which permitted a new, detached house on a lot with a frontage of less than 7.5 m. That application is located almost directly across the street from the subject property and that matter.

That matter was referenced by Mr. Kivi during the Hearing at hand; he questioned on several occasions why the variance was needed in that case but not in the subject Application. In her response, Ms. Stewart indicated that the 585 Hillsdale application involved a severance to create a new lot with a frontage of less than 7.5 m and that the lot had not benefitted from a the recognition of lawfully existing lots under Section 10.5.30.21.(1).

Nevertheless, I am of the opinion that the justification argued by Ms. Rigny in her Affidavit that a variance could not be authorized to permit a detached dwelling on a lot with a frontage less than 6.0 m is moot since the City confirmed, more than once, that the variance was not required. Furthermore, the Applicant unequivocally acceded to the accuracy and completeness of the variances identified by the Zoning Examine, and Ms. Rigny agreed to abide by the determination of the Member in this regard, as confirmed in her correspondence of October 31, 2019.

Based on the above, I find that Ms. Rigny has not provided compelling reasons or evidence to establish the basis for a review under Rule 31.7 of the Rules of Practice and Procedure. I agree that the basis of the Review Request was extensively canvasses prior to and at the hearing of this matter, where the Requestor's

interpretation of the specific provisions of Zoning By-law 569-2013 relating to the subject Application, specifically, subsection (1) of Section 10.5.30.21, was rejected.

Furthermore, I find that the Review Request should be dismissed because the TLAB cannot be said to have erred in deciding a question that it was not required to, nor did, decide.

In summary, I conclude that the Requestor has not satisfied me as to the stated grounds for review for these distinct issues. There is no basis in the language of the Submission to suggest, let alone, demonstrate, that the Member who adjudicated the matter erred procedurally in allowing the hearing of the appeal or in basing his decision on an incomplete set of facts, or that he erred in law in not considering an omitted variance that would have resulted in a different order or decision.

DECISION AND ORDER

The Review Request is denied. The Decision dated March 6, 2020 is confirmed.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body