Toronto Local Appeal Body

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FURTHER INTERIM REVIEW REQUEST ORDER

Review Issue Date: Tuesday, July 28, 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 RULE COMPLIANCE TO INITIATE AND BACKGROUND

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, Ms. Pascoe, 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.

Thereafter, the Request is directed for Adjudicative Screening under *Rule 31.15.*

A preliminary consideration under that *Rule* led to a Review Request Interim Order (Interim Order/Interim Decision) dated May 14, 2020 of some 23 pages directing that a *Notice of Proposed Dismissal* be issued pending receipt of a response to some 10 questions raised and identified as seminal to whether the matter of the Review Request should proceed further to a formal *Notice of Review* or is to be dismissed, in part or whole.

The Applicant's counsel, Mr. Andres, supplied, pursuant to *Rule 31.16*, a "Response to Interim Order and Notice of Proposed Dismissal" (Response) under date of June 29, 2020.

The Response consisted of 56 paragraphs and several attachments, including six (6) case authorities, most of which are supplementary to those filed with the initiating Review Request. There was no accompanying affidavit in the Response beyond that referenced from the Review Request.

The Response addresses the 10 matters raised and provides focused submissions.

In the interim as well, a Party to the appeal, Mr. Sukonick, wrote to the TLAB advising of a continuing interest in the Review Request - but made no formal submissions reserving any contribution pending the matter proceeding further.

This is my further determination on the Review Request having the benefit of the Interim Order and the Response, the latter pursuant to *Rule 31.17.*

JURISDICTION

Below are the TLAB Rules applicable to a request for review. As in the Interim Order, they are repeated here for ease of reference:

"**31. REVIEW OF FINAL DECISION OR FINAL ORDER**

A Party may Request a Review

31.1 A Party may request of the Chair a Review of a Final Decision or final order of the TLAB.

Chair May Designate Any Member

31.2 The Chair may in writing designate any Member to conduct any or all of the Review process and make a decision in accordance with the Rules.

Review Request does not Operate as a Stay

31.3 A Review shall not operate as a stay, unless the Chair orders otherwise. A Party requesting that a Final Decision or final order be stayed shall do so at the same time the request for Review is made.

No Motions Except with Leave

31.4 No Motion may be brought with respect to a Review or request for Review except with leave of the TLAB.

Deadline for, and Service of, Review Request

31.5 A Review request shall be Served on all Parties and Filed with the TLAB within 30 Days of the Final Decision or final order, unless the Chair directs otherwise.

Contents of a Review Request

31.6 A Party's Review request shall be in writing and be accompanied by an Affidavit which contains a concise summary of the facts and reasons for the requested Review, with specific reference to any relevant evidence. The Review request shall also contain:

a) a copy of the Final Decision or final order at issue;

b) a statement that explains the relevant grounds listed in Rule 31.25 that apply to the requested Review;

c) a concise written argument containing numbered paragraphs that includes applicable law and authorities;

d) copies of the referenced case law and authorities; and

e) a statement as to the requested remedy.

Transcripts

31.7 If any Party wishes to refer to any oral evidence presented at the Hearing that Party shall, if that oral evidence is contested and a recording thereof is available, have the relevant portion of the proceeding transcribed and certified by a qualified court reporter, Serve it on all other Parties, and File same with the TLAB forthwith and at that Party's sole expense.

Fee for Filing Review

31.8 A Party shall at the same time as Filing a Review request pay to the TLAB the required fee.

Early Response Accepted

31.9 Notwithstanding the timeline provided in Rule 31.20, a Responding Party may choose to respond immediately, once Served with a Review request.

Administrative Screening

31.10 The TLAB may not process a Review request if:

a) it does not relate to a Final Decision or final order;

b) it was submitted after the prescribed time for requesting a Review;

c) it is incomplete;

d) it was submitted without the required fee; or

e) there is some other technical defect in the submitted Review request.

Notice of Administrative Screening

31.11 The TLAB shall give a Party who has submitted a Review request that appears deficient a Notice of Non-compliance which includes:

a) the reasons the TLAB will not process the submitted Review request; and

b) the requirements for resuming processing of the Review request, if applicable.

31.12 Except in the case of Rule 31.10(b), where requirements for resuming processing of a Review request apply, processing shall resume if the Party complies within 5 Days with the requirements set out in the Notice of Non-compliance.

31.13 After the expiry of the time period provided in Rule 31.12, the TLAB shall refer the matter for adjudicative screening under Rule 31.15.

Notice of Review Request Deemed Filed on Original Date

31.14 If a documentary or technical defect set out in a Notice of Non-compliance is corrected in accordance with the Rules the Review request is deemed to have been properly Filed on the Day it was first submitted, rather than on the Day the defect was cured.

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.

31.18 Where the Chair dismisses all or part of a Review request, or is advised that the Review request is withdrawn, any fee paid shall not be refunded.

TLAB shall give Notice of Review

31.19 Where a Review request has not been dismissed under Rule 31.17, the TLAB shall give a Notice of Review to all Parties.

Response to Review

31.20 If a Party needs to respond to the Review the Responding Party shall Serve a Notice of Response to Review on all Parties and File same with the TLAB no later than 20 Days from the Date the Notice of Review is issued, unless the TLAB directs otherwise.

Contents of a Notice of Response to Review

31.21 A Responding Party's Notice of Response to Review shall be in writing and be accompanied by an Affidavit which contains a concise summary of the facts and reasons relied upon in opposition to the Review, with specific reference to any relevant evidence. The Notice of Response to Review shall also contain:

a) a statement that explains how the relevant grounds listed in Rule 31.25 do not apply;

b) a concise written argument containing numbered paragraphs that includes applicable law and authorities;

c) copies of the referenced case law and authorities; and

d) a statement as to the requested remedy.

Reply to Notice of Response to Review

31.22 If the Requesting Party needs to reply to any new issues, facts or Documents raised in a Notice of Response to Review that Party shall Serve on all Parties a Reply to Notice of Response to Review and File same with the TLAB no later than 25 Days from the Date the Notice of Review is issued, unless the TLAB directs otherwise.

Contents of a Reply to Response to Review

31.23 A Requesting Party's Reply to Notice of Response to Review shall be in writing and be accompanied by an affidavit and shall:

a) only address new issues, facts and Documents raised in the Responding Party's Notice of Response to Review; and

b) list and attach the Documents used in the Reply to Notice of Response to Review relating to those matters addressed in the Notice of Response to Review, and include any case law and authorities in support of the Reply.

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.

No Further Review Permitted

31.26 A Review decision may not be further reviewed by the TLAB.

CONSIDERATIONS AND COMMENTARY

Counsel in the Response has provided an informative set of submissions intended as answers to the matters raised in the Interim Order. I am grateful that they follow the organizational structure of the matters raised in the Interim Order for further elaboration.

II. The Interim Order and Notice are Outside of the TLAB's Jurisdiction

Prior to the responses to those matters raised in Questions **A- J** in the Interim Order, counsel raised in paragraphs 7-11 of the Response a submission that the TLAB has exceeded its jurisdiction "by improperly issuing the Interim Order and Notice pursuant to the adjudicative screening process set out in *Rule 31.15*."

In support of the submission, reliance on *Rule 31.15 a), e) and h)*, supra, are disputed as grounds eligible "to be reasonably applied by the TLAB to summarily dismiss the Review Request in the manner proposed."

It is asserted that the limited grounds in *Rule 31.15* "do not permit summary dismissal based on the Chair's judgment, prediction or anticipation of whether the matters raised "warrant a review" (Response, para.9). It is submitted that an unduly restrictive application of the grounds 'would' unfairly deprive the Applicants of matters "that they are entitled to have fully considered under *Rule 31.25*" (Response, para. 9).

To support the submission, the Review Request itself is asserted as complete and detailed exposure as to why the requested relief "***could*** be granted" (Response, para.10), all being squarely within the TLAB's jurisdiction.

The Response asserts an entitlement to a proper review pursuant to *Rules 31.19-25* on the basis of the Review Request having made a compelling case that warrants the ordering of an oral Hearing before a different TLAB Member (Response, para.11).

Respectfully, I disagree with the suggested circumscription of the TLAB Review responsibilities.

Rule 31 is a complete code intended to provide an opportunity to invite a review of a Member's Decision and Order based on identified criteria and grounds. It is not an automatic rehearing or a *de novo* hearing; even if a direction is given to consider the matter in part or whole under *Rule 31.24 c)*, in an 'oral hearing before a different Member', that is not a new Hearing but an inquiry into the eligible merits of the Review Request.

More important, the redraft of *Rule 31* instituted an adjudicative vetting process in the nature of a 'leave to appeal' filter. This procedural step is discussed at some length in the Interim Order in the section entitled *Considerations and Comments, A) Overview Observations and C) Role of Adjudicative Screening.*

Rule 31.15 specifically authorizes the Chair, or his/her appointee, to consider the Review Request from the perspective of the adequacy and relevance of the matters it raises to the eligible grounds for review that are listed in the *Rule*. The result of that application is either the ordering of a *Notice of Review* or a *Notice of Proposed Dismissal*. That result is the essence of a filtering discipline that permits the early elimination of issues that are not made out or fall outside the supported grounds and remedies of the review process.

For so long as the *Rule* is written to include Adjudicative Screening on those grounds, it is incumbent on the TLAB to apply them as an initial vetting of the Review Request.

The submission serves to read out this obligation from the *Rule*.

A support given in the Response for this interpretation is that the Applicant's own Review Request is compelling.

However correct that may be, in my view this is not a support basis for a jurisdictional error or an entitlement to avoid adjudicative screening that can serve the public purpose of confining a review request to relevant grounds specified in the *Rule*.

III. Response to Specific Matters Identified in Interim Order

Counsel asserts two repeated themes:

a. The Decision did not take all relevant considerations into account as it failed to evaluate each of the variances sought;
b. The Decision failed to consider or analyze many of the uncontroverted expert opinions offered by the sole professional witness qualified to so speak (Response, para. 13).

Each of these aspects were raised in the Review Request and were the subject, in the Interim Decision, in requests for further insight, definition and attribution to one or more grounds for relief under the *Rule*. They are further pursued in the Response.

I continue the capital lettering, bolded, of the requested questions for amplification of grounds used in the Interim Decision and that set out the framework and basis established by the Request and followed in the Interim Order for ordering the issuance of a *Notice of Proposed Dismissal:*

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

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.

In response, the Applicant identified some 8 instances of extraneous and/or incorrect observations (Response, para. 14):

a) The use of *8 Haddington Avenue* to demonstrate "the importance of this zoning provision", without Notice or the ability to consider distinguishing factors.

At this point, the Applicant has not responded to the commentary of the Interim Order dealing with the assertion, made in the Review Request, that this reference "was apparently a significant factor in the Decision" (Interim Order, page 7, 15-16).

I find that something more is required to raise this TLAB decision reference to a factor that casts a shadow over the Decision, either from the perspective of jurisdictional error or, later, procedural fairness. I have reread the Decision and do not see in it a basis or rationale to conclude that the Member employed it other than for the recognition that the same two storey height regulation variance has been litigated, at least once before the TLAB, in the past.

I wrote in the Interim Decision:

> "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" (Interim Decision, p. 16).

Every zoning performance standard is 'significant' when it is sought to be varied, especially in the subject case where relief from that very standard was a main issue for resolution. The recognition that that standard has been the subject of a previous Hearing in different circumstances says nothing about the comparative merits of the requested relief in the matter before the Member.

The Decision does not present, and the Applicant has not established that the reference to *8 Haddington Avenue* was employed to reach any conclusion adverse to the Applicant. There is no indication whatsoever of the employment of the reasons in *8 Haddington Avenue* as being applicable to the case extant. As such, there is no fact, admission or discussion in the Decision or the Response that is relevant to justify requiring any prior Notice of its consideration or an intervention on the basis of procedural fairness or jurisdiction arising from the mere reference to this case.

Beyond the Applicant's assertion of concern, there is nothing to support that the reference formed any part of the *ratio decidendi* in the matter before the Member.

I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

b) The Applicant asserts the Member, on page 6 of the Decision, made a finding that a house with three stories plus an exposed garage is 'unusually imposing', and is a negative characterization.

The language used falls out of the Member's attempt to describe a distinction in building form and its description between homes of three stories above grade and those where an additional level is revealed, due to topography, exposing garage or basement elements.

The Member describes this as an 'appearance' issue relevant to the application and assessment of the Official Plan and zoning by-laws' intent and purpose. It is an inference drawn by the Applicant that this description has a negative characterization element. For the Member, the distinction in building form and its impact on streetscape and other zoning standards requires a purposive consideration of 'appearance' as a relevant component of a number of the statutory and policy tests.

I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

c) The Applicant states that the Member's characterization of third storey approvals (17 on a base of 235 properties) over a 10 year period is a "very small number" over the Study Area, in the absence of further research, is random and unsubstantiated.

There is no assertion that the Member's reference to the statistics is wrong; the objection appears to be to its characterization and employment as reinforcing the intent of the zoning by-law imposing a two storey limitation on height.

The purpose of a review is not to reargue or debate with the Member his or her conclusions on the evidence except perhaps in circumstances of manifest error.

While this statistic is addressed further, below, I find that the reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

d) The Member's application of the fact of very few variances being granted since the passage of By-law 569-2013 for third storey additions is challenged as being incoherent insofar as it is related to the intent and purpose of the By-law.

The Member saw few examples of third storey variances since 2013 and employed that to support a proposition that the two storey height limit in the zoning by-law was being respected.

In my view, this type of information is provided to the Member with the opportunity to have conclusions drawn from it. I see nothing unreasonable or 'incoherent' in the Member's use of statistical comparison data and connecting it to the 'intent and purpose' aspect of the zoning 'test'.

I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

e) The Applicant identifies the consideration that the Member gave to the evidence, or lack thereof, respecting the role as between the TLAB responsibilities and those of the Urban Forestry division of the City was not a matter that was put in evidence or argued. It is submitted that the City's Urban Forestry Department enjoys an independent jurisdiction. Further, that it is standard practice in defined circumstances for Urban Forestry to request a condition that would trigger its jurisdiction.

Respectfully, this aspect is neither extraneous nor incorrect on the part of the Member. The written Decisions of the TLAB are replete with examples of Urban Forestry holding to positions and appearing before the Tribunal on environmental matters involving both public and private trees affected by development. These positions extend not just to assessment recommendations on tree retention, replacement or injury, but also to adherence to and conformity with the Official Plan policies of the City in respect of the Environmental Policies of the Official Plan and their applicability in specific circumstances. No evidence was called on any 'standard practice' of Urban Forestry respecting the imposition of referral conditions to Urban Forestry when trees are present and affected. Even if there were such evidence, it appears acknowledged that the Applicant determined not to address in evidence the matter of trees and their status, potentially affected by the proposed redevelopment.

In my view the Member was entirely correct in expressing concern as to this lack of evidentiary foundation on environmental influences in support of the variances sought to accommodate redevelopment. The Official Plan has clear environmental and tree preservation policies that the TLAB is required to consider, evaluate and address in determining whether the general intent and purpose test of the Official Plan is conformed to. Where there are acknowledged trees to be affected by the Applicants project, decisions of the TLAB are clear that the obligation rests with the Applicant to satisfy the Tribunal that those policies are or can be satisfactorily addressed. This was not done, and the Member expressed dissatisfaction. While Urban Forestry has a defined mandate in the City, there is no language to support that mandate as overriding the statutory language directing the TLAB as to the relevant variance tests.

The jurisdiction of the TLAB to examine general Official Plan conformity is not subordinated to that of Urban Forestry and the Response discloses no policy basis to suggest that that relationship is otherwise varied.

To put it differently, the TLAB has no express authority or obligation to defer or sub-delegate its mandate to consider Official Plan conformity to the role of Urban Forestry. The Member's recognition of this is reflected in the consequences he expressed of a TLAB approval ignoring the application of environmental approvals - as not being in the public interest. While the Member's statement is termed an 'unsubstantiated assertion', it is a reasonable and correct inference reached by an experienced (or any Member) knowledgeable of the Tribunal's frequent exposure to the issue.

I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

f) The Applicant identifies and asserts that the Member's recitation of 'personal characteristics, habits, prior and current vocations, and subjective non-expert value judgements' were 'relied upon to justify the weight given to Mr. Sukonick's lay evidence over the expert land use planning opinions of Mr. Volpentesta".

This concern is a substantive element of the Applicant's dispute with the Decision and it is discussed further, below.

It is a tautology that the qualifications and assessment of the evidence of a witness are for the Member to decide. It appears that there was no effort or overt decision made to qualify the witness Suskonick as an 'expert' capable of giving land use planning evidence. Rather, this individual was acknowledged as a citizen with a vested interest in the Application, being a project proximate to his residence, although not a formal Appellant. Lay citizens are entitled to opinions; the weight given to those expressions of opinion will be affected by measures of conduct, conflict, character, proximity, knowledge, detachment, research, credibility and a potential host of considerations that may appear in the individual circumstances. The professional witness is subject to no less a set of considerations, although he or she may be able to more easily access some credentials of relevance.

It is open to the Member, in evaluating the evidence of a lay citizen, to consider such 'personal characteristics': aspects as proximity, role, area familiarity, relevance of occupational experience in the building of inter-city residences; and the observed credibility and veracity of the individual. In this case there were two Hearing days of observation as questioner, advocate and witness, all as permitted by the TLAB *Rules*.

It is asserted that giving weight to such testimony in contrast to that of an independent professional planner ("over the expert opinions") is problematic, possibly irrelevant, extraneous or an error.

The matter as to whether the Applicant can support this nexus and its consequences is addressed further where raised below. It is to be noted and is as reflected in the Interim Decision, that the TLAB has provided in its *Rules* a wide latitude for the role of lay citizen witnesses to be heard, both as Representatives and in giving testimony.

In addition, the record herein notes, as described in the Interim Decision, page 14, that counsel for the Appellant accepted, in the *Transcripts*, the application of the TLAB *Rule 12.6* to the witness Suskonick.

While it is still possible that the Member can err in a variety of ways in addressing the evidence, generally the weight attributed by the Member to the evidence of a witness is a matter of his/her own jurisdiction. No instance of an overriding conflict and choice is exemplified, although it is clear that the expert opinion evidence on crucial assessments as to the third floor variance appears to have been rejected. The Member heard the evidence of the three witnesses and came to his own findings of relevance and weight having identified the elements and their consideration. That role is correct.

I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the immediate character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

g) The Applicant takes issue with the Member's comment and attribution that 'planning decisions' should not be made "on whether a constructed element is decoration." At issue is the appearance of third stories, in this case a different aspect from that of the observation of garage or below grade space. Rather, it is the distinction, if any, that can be drawn or supported as between the appearance of habitable third floor space and the design appearance of a third storey by decorative windows, without usable living space behind.

On its face, I find this issue as a genuine and legitimate consideration in the evaluation of a variance application to permit a third storey. Design appearance is an element of Official Plan policy concern for impact, streetscape, fit, suitability and otherwise. Design suitability is, of course, a matter for conjecture and a subjective assessment as is discussed further, in subsequent passages. For there to be evidence addressing the subject of exterior design is to be expected; how design approaches manifest themselves is clearly open to differing subjective opinions.

The discussion of exterior design attributes of the Application and the relevant surrounding environments is a relevant consideration. Whether opinion evidence, lay and expert, on the subject leads to an error in the Decision was open to be demonstrated in the Response.

Apart from sample identification repetition, I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have

the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

h) The Applicant argues that the finding made by the Member that the third storey of the building at 217 Hillhurst is "insensitive," is unsupportable since it was "built pursuant to a valid building permit based on zoning compliance."

This is, again, an aspect of 'appearance' and design which I believe to be a relevant consideration in determining the appropriateness and general conformity of a variance approval process under consideration.

The opinion of whether a component of a building is 'sensitive' or otherwise to itself or its surroundings is by any measure, a subjective value judgement upon which opinions will surely differ. Whether the weight attributed to opinion evidence should differ between persons dependent on their respective qualifications to express opinion evidence should differ, can be a legitimate area of concern in some circumstances. However, opinions based on subjective value judgments may prove difficult to resolve where the subject matter as here, appearance, is not measurable or exclusive to a particular field of expertise.

In any event, the attribution of "insensitive" is to the Member. The Member is also entitled to an independent, subjective, value judgment opinion, informed by the evidence but not dictated by it. This is the case in a subject matter or field of general application, such as design or appearance, as in this case of a third storey, real, faux dormers or proposed habitable space.

I find that this reference, even if I were to find it to be extraneous and gratuitous (which I do not), does not have the character of an error of jurisdiction, incorrectness or procedural error that warrants intervention or consideration.

In summary, I cannot find in the listing of matters in the Response claimed to be 'extraneous', matters that are either clearly irrelevant, incorrect observations or that are not germane to the tribunal in the exercise of its mandate. The Member's findings are also within the zone of reasonableness to conclude in relation to the third floor variance request.

I had asked that the alleged 'extraneous and/or incorrect observations' relied upon be identified and I am grateful for the list provided in the Response, paras. 14 and 15. However, as stand-alone matters and whether considered individually or collectively, I would dismiss the Review Request based on their further identification, without prejudice to the balance of the Response.

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.

This request for further and better particulars is addressed in paras. 16-24 of the Response.

In those paragraphs, the Applicant through counsel asserts a 'statutory obligation' (Response, para. 16) and entitlement to have all of the requested variances evaluated under the requisite 'tests'. Namely, that despite the application to permit a 'third storey' being termed the 'key variance' (Decision, p.3) and the 'true issue' (Decision, p.5), such a characterization did not exculpate or relieve the Member to providing a 'proper analysis' and 'determination' of each Application variance.

Counsel states there was no reasonable basis to conclude the third storey variance request was so fundamental that the residual variances could be neglected. In addition, that "the Decision failed to provide any analysis or justification whatsoever in refusing the other ten variances" (Response, para.18).

The submission again references, equates and applies the *De Gasperis* decision accompanying both the Review Request and the Response as the authority interpreting the obligations under section 45(1) of the *Planning Act. De Gasperis* is cited for the proposition that the decision maker must reasonably demonstrate "without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests" (Response, para.19; *De Gasperis (2005) O.J. No. 2890 (Div. Ct.)* at para.11).

In doing so, the Response states the analysis must demonstrate the path taken to resolution must be ascertainable, substantive and demonstrate "careful reasons why it preferred the evidence of one witness over another" (Response, para.22; *Simon v. Bowie, 2010 ONSC 5989 (Div.Ct.)* at paras 9-15*),* all the more so in this instance given two full days of Hearing*.*

Respectfully, I can only accept partially the Applicant's Response on this aspect.

I accept that the terminology for the variance sought for a third floor being the main "driver of the other variances" is not the Applicant's or that of the Member. It appears in my reasons in the Interim Order as a descriptor and is premised upon the characterization in the Decision of the 'key' role this variance request played in the evidence. Moreover, the *Transcripts* amply describe the Application and its design attributes (including height relief, building length and depth, floor heights) as inferentially being premised upon a third storey being sought to provide usable floor space for personal family reasons.

The descriptor is not, however, intended or used in the sense of being necessarily fundamental to each variance and is therefore not the basis to support a lack of further consideration of the alleged ground.

There is some relevance, however, to the fact that the Applicant, on being given the opportunity to reflect on the relationship between the variance request for a third floor and all the other variances, very clearly supported all the variances applied for (and granted by the COA), declined to address alternative forms of relief and in a studied response following client consultation relayed only support for the full package

of variances with anything less being "problematic" (Interim Order, section F. *Transcripts*, p.245-7).

I see no fault in an Applicant maintaining stout support for the package of variances required to affect the built form design proposed. As well, I accept - with one very important qualification raised in the Interim Order but not addressed in the Response - that a duty lies on the Member hearing a variance appeal to articulate with careful and replicable reasons, the determinations made in support of a variance and how it satisfies each of the four tests and applicable policy.

The emphasis, above, repeats the discussion in the Interim Order on the application of the principles expressed in the *De Gasperis* decision (Interim Order, p.17), where I said:

> "The case authority cited of *Re De Gasperis* (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**" (*De Gasperis*, para. 11, emphasis added).

This is an instance where none of the variances were granted in the Decision.

Some foundation may be helpful. An application for variance relief is a request to change the applicable standard (usually a regulation) in a zoning by-law, to something felt more suitable in the given fact situation. The statute, the *Planning Act,* requires certain matters to be addressed before that relief can be granted. The application has been described as a 'privilege', not a right. In fact, there is a right to make such application; however, there is no entitlement that such be granted.

The public interest evokes a consideration of the merits and demerits of the request.

In my view, although I have agreed with the statement of principles expressed by the Applicant, above, they are in *De Gasperis* subject to the premise that the requested variance is to be granted. It is in that case that the statute requires that the support base for the departure from the zoning by-law be reflected through reasons that address the statutory tests and policy. The public interest is expressed in the Official Plan and the zoning by-law and departures therefrom to be approved must be expressed with regard to their tenets on the four tests, policy and principles of good community planning.

De Gasperis is a circumstance where the required engagement was not done, where factors that reasonably bear on the decision were not articulated, where impact was almost an exclusive focus and where there was an omission of any analysis of the general intent and purpose of the Official Plan or the zoning by-law.

This is not the case of the Decision. I find that the Member properly set the framework of the statutory obligations imposed and applied it fully in the circumstance of the variance for a third storey. The Official Plan and zoning instruments were examined in the context of the subject property, site and applicable neighbourhood. I have not accepted the suggestion that there were irrelevant considerations and I find no

exclusive reliance on any one measure, including impact. The Member examined comparables, had the evidence of context, considered mass, height, bulk and built form as well as appearance and came to a conclusion on evidence that was before the Tribunal from different sources.

Having done so, the Member came to a decision on the third storey variance that did not support the two required variances.

While the law is clear, including from *De Gasperis,* that the decision maker must address the requisite policy and tests in a decision that grants a variance, the question arises as to whether the same standard exists in a decision that refuses a variance.

The Response does not address either aspect and it is an appropriate question not only for the variance for a third storey, but also for the remaining 10 variances sought by the Application.

Modern jurisprudence supports the proposition that the 'loser' as well as the 'winner' is entitled to know the reasons, intelligible reasons, for the disposition reached. This is not a statutory obligation but one devised more under the fairness principle than as an issue of jurisdiction. Its application is discussed further, below, in that context.

For the reasons above cited, I find that the Member provided a replicable and thorough set of reasons in concluding a third storey permission for the subject property was not appropriate for the subject property. The Member performed the analytical and discretionary task remitted in the Decision as if it dealt with an approval of an application for variance relief. There is nothing in the Decision or the Review Request/Response that suggests this consideration was out of the realm of being a 'reasonable' conclusion.

These considerations however do not answer the other issues raised:

a) Whether the other variances also received thorough and replicable treatment;
b) Whether the failure to describe or resolve why the evidence on one side was accepted over that on the other (raised here in the Response and addressed under '**C**', following);
c) Whether having found against the one 'key' variance to both by-laws, there was an obligation to continue to address the balance of the variances sought independent of the Applicant's support only for the 'package' of variances.

In reading the Decision, I cannot conclude that the Member omitted all consideration of the other 10 variances. The Decision, on pages 3-6 addresses aspects of these requests and provides for their disposition on page 11. The Member heard the evidence and there is no assertion that the Hearing itself was defective: all persons entitled to speak were fully heard. In addition, the *Transcripts* reveal the exchange with counsel and his reticence when put to the election of offering to address something less than full approval – something beyond the floor to ceiling height change offered obliquely in the submissions.

I accept the proposition put in the Response that the reasons behind the grounds for the refusal of the other 10 variances are inadequate in themselves and I have

acknowledged the right of the Applicant and counsel to not address alternative relief scenarios. That, however, does not fully answer the question as to whether those other variances were required to be articulated in a "careful and detailed analysis" to borrow a portion of the *De Gasperis* language, and as now sought in the Review Request and Response.

That extract referenced in paragraph 19 of the Response follows the Courts recitation of the 'four tests' and associated obligations of the decision maker, and reads in full:

> "I pause here to observe that the proper performance of this prescribed four-step exercise will rarely be simple. It requires, without exception, a careful and detailed analysis of each application ***to the extent necessary*** to determine if each variance sought satisfies the requirement of each of the four tests." (*De Gasperis,* para. 20*) Emphasis added.*

The implication in the emphasized words appears to recognize that there may be situations in which a full, comprehensive and detailed exposition of the evaluation methodology, rational and determination may not be necessary.

Here, the Member was alert to all the variances sought and listed same (Decision, p.2). The Member discussed the evidence on aspects of them as above noted and disposed of them as follows:

> "I find that the third storey variances fail to maintain the intent and purpose of the Official Plan and zoning by-law. As such they are not minor ***nor is the package of 12 variances suitable for the appropriate development of the land. They do not cumulatively respect and reinforce the existing physical character of the neighbourhood***." (Decision, p.11) *Emphasis added.*

As well, the Member had the *Transcripts* position of the Applicant that the variances were sought as to the entirety of the package.

And, finally, the Member had determined that the "key variance" and "true issue" had been decided <u>against</u> (not for) the granting of those two variances under the two by-laws.

It is a tautology in the jurisprudence of the Local Planning Appeal Tribunal (formerly the Ontario Municipal Board) and the TLAB that if a variance fails any one of the four tests, the variance itself fails and the application, including that variance, may fail with it. In this case, the "key variance" had failed.

I do not find the Applicant's submissions on this requested elaboration to be entirely compelling or determinative. I agree with the *Simon v. Bowie* case that the law does not require each test to be applied separately and formulaically; it is sufficient if the reasons make it clear that the Member applied the correct test substantively, taking the appropriate factors into consideration and considering the evidence properly. I also accept and agree with the *Clifford* case that the Member did not have to refer to all the evidence before he set out his findings provided he grappled with the substance of the

matter and was live to the issues in the proceeding. I am not comfortable that the *Opare and Leslie* case offers a useful parallel as it had no evidentiary record, contrary to this circumstance. Although I agree that for the 10 additional variances there is no clear recitation of the application of all four tests or policy, whether that is a fundamental flaw that warrants a Review Hearing on the issue or is a matter of law possibly to be addressed in the Applicant's Leave to Appeal Hearing remains a question.

It remains also to be considered whether the facts, above, invoke the ambit of the terminology in *De Gasperis* that the analysis in the totality of the Decision and its considerations is "to the extent necessary," so as not to require the Member to comprehensively assess the merits of each variance, namely the residual 10 variances.

I am inclined to the view that the Member's Decision on the seminal third storey issue meets and exceeds the statutory obligation of considerations for a refusal of the third storey variance. Further, there is an argument that the failure to articulate individual reasons for dismissing the other 10 variances in these factual circumstances is appropriate and reasonable in the context of the Applicant's instructions to counsel to address the Application only in its entirety.

There are, however, additional alleged grounds in support of the Review Request that are to be considered, below.

If an obligation exists at law to address all variances requested even in the face of a refusal of the main, then I would, of course, direct the issuance of a Notice of Review for further consideration including whether an oral Hearing before a different Member on the additional 10 variances is warranted.

Ancillary to these considerations is the right to re-apply with a different house design; however, that is not the issue to be resolved in the Review Request as framed, supported by the affidavit and supplemented by the Response.

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?

This proposition was put forward for further elaboration as distinct from **B.**, above. The focus for contribution here is the role of the planner and the responsibilities of the Member, more so than whether it is problematic to simply not address in any detail, the 10 variances that were refused without substantive reasons. That is, is there an independent ground for review in not contrasting, reciting or evaluating the evidence of the qualified professional planner on all matters or, specifically, the 10 asserted as being inadequately canvassed?

This question is raised in paragraph 22 of the Response: "is it (the Decision) required to give careful reasons explaining why it preferred the evidence of one witness over another", citing *Simon v. Bowie.*

As an ancillary aspect, the question raises whether it is an error to not articulate reasons for attributing weight to the evidence of one witness over another?

I have read *Simon v. Bowie* and I do not find either proposition to be the matters in issue. Rather, the issue therein is whether there existed sufficient reasons for the decision to be reasonable. In my view, above, the Member expressed a sufficiency of reasons related to the variance for a third storey and made a finding within the ambit of reasonableness in that matter remitted to him.

For all of the variances, the question in **C.** as to whether the evidence tendered is properly evaluated is addressed in the Response in paragraphs 25-33.

In reading those paragraphs with care I must allow for the possibility that the requests in the Interim Order were unclear as to specificity. It would have been helpful for counsel to have pointed to specific authority that supports the propositions that "**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…" (Interim Decision, Q. C.).** Instead, the Response broadly asserts "the Member's findings are neither clear nor grounded in the evidence" (Response, para.25) and that there is a definite failure of jurisdiction "as indicated in the case law set out above" (Response, para. 26).

Respectfully, when asked a specific question on Adjudicative Review, it is not open to the Requestor to suggest that the TLAB search for the response. Rather, specific authorities and passages can be helpful, if not essential; their identification is the responsibility of counsel.

The Response then departs to address questions not asked and makes submissions on the application of the tests. These submissions are deserving of consideration regardless of their context.

The submissions are in these categories:

a. The tests of 'minor' and 'desirable' are unaddressed; the 'minor' test is described 'primarily one of impact', but the Decision has 'no analysis anywhere' of impact (Response, para.27).

I agree that these tests are not addressed in any detail for the 10 variances sought but not that they are not considered in respect of the third storey variance, above. The Requestor's own case law makes it patently clear that 'impact' is only one element of 'minor' (*De Gasperis)* and the Member addressed 'minor' and 'desirable' on design, streetscape, compatibility, comparison and perception considerations. A formal finding was made.

A variance must satisfactorily and independently pass all applicable policy and the four statutory tests to be granted; the failure to pass any one element is a sufficient basis to refuse the variance where the considerations going into that refusal are relevant and not perverse. In the case of the refusal of two variances, here related to a third storey, for Official Plan policies, zoning intent and the tests of desirable and minor, the Member concluded against the Applicant's request. Any one test deficiency was sufficient, where properly grounded and reasonable. Any failure to amplify further

reasons on certain or any of the other of the four tests as to insufficiency would need express legal authority to demonstrate an error of law or jurisdiction had been committed, where so evidenced.

None was cited.

I agree that throughout there is little if any description of the evidence of the planner, Mr. Volpentesta (Response, para.28.) This alone does not equate to its lack of consideration. There is no assertion that the Hearing of that evidence was unfair, impeded, constrained or rejected as a matter of procedural unfairness. The evidence of the planner was heard as that was the duty lying upon the Member. Again, no express authority is referenced that requires the Member to document the evidence of each witness, identify areas of acceptance or disagreement or to distinguish a preference between witnesses on identified areas of evidence and to then write up and apply that consideration.

In my view, it is sufficient for the Member to hear fully the evidence and provide relevant reasons for the disposition of the Application variances. The reasons for a decision must demonstrate and replicate a path of relevant evidentiary considerations, be itself reasonable within the ambit of jurisdiction allocated and provide reasons which are not perverse. While those reasons may include language that is described as "pejoratively" or 'flippantly' dismissive of the Applicant's planning witness, more would be required to demonstrate that as a basis for relief, a ground which is not raised (Response, para. 30, 31; Affidavit, para.r)). It is for the Member to assess the weight of the evidence and communicate as to its perception or attributed weight. These aspects are for the Member to express, within the fair comment bounds of natural justice.

While I recognize the argument of the Applicant that inferentially asserts a misdirection by the Member as between the 'general' intent of the Official Plan and the Zoning By-law, over the 'specific', I do not see in the Response either specific references that generate that submission or that conclude its characterization is correct. I am not disposed to ordering further consideration of a Review Request based upon unreferenced arguments or asserted efforts to simply re-argue the evidence. The suggestion that the Member, in respect of zoning, confined and simply accepted and applied the regulatory permission for only two storeys after two days of evidence, is untenable on the language of the Decision read in its entirety. (Response, para. 28, 29, 30).

The Applicant raises the case of *Re Ghermezian* as a proximate example of third storey permission not addressed in the Decision (Response, para. 32). *Re Ghermazian* involved the conversion of existing roof attic area space into habitable space. This is not the case addressed in the Decision which engaged new construction from the ground up. The TLAB, and this Member, has on several occasions addressed the distinction between the conversion of existing attic space in historical or recently constructed dwellings, and distinguished the circumstance involving all-new construction and development proposals. While decisions of parallel tribunals on issues of close geographic proximity can be instructive, they are primarily useful for the considerations applied and for consistency; where their circumstances and issues differ in significant measure, it is not, in my view, universally necessary for the Member to

address or distinguish their relevance however strongly a Party urges or wishes the Member to do so.

This would not be a basis upon which I would direct a *Notice of Review*.

The Response of the Applicant continues and argues inconsistency in the Member's findings in describing area character (Response, para. 33). At issue is the Official Plan policy as to whether the Application would, *inter alia,* result in development that 'respects and reinforces the existing physical character of the area' (Official Plan, s.4.1).

In my view, there is nothing inconsistent in reflecting the evidence that over 50% of the dwellings on the subject block consist of three storeys with the finding that the "most frequently occurring form of development in the broader context is two storeys: (Response, para. 33, emphasis added). Not only do the two geographic areas of the findings differ, but the definition of the "form of development" is not curtailed to the number of storeys prevalent in one area over another or even the immediacy test. There is nothing to indicate that the Member misdirected himself as to the assessment of the policy direction, as properly recited, applicable to the Application's general conformity with the policy.

I find this challenge to be apples and oranges, not "internally inconsistent" and little more than an attempted rationale to find an opportunity to reargue evidence that was clearly received and addressed. Its presentation is not supported by the affidavit of Mr. Volpentesta which, interestingly, confines itself to a disagreement on the opinion conclusion reached on the evidence, not the express findings (Affidavit, paras. m, n)).

In the end, I cannot conclude from the responses to this issue that there is a reason to advance a *Notice of Review* based on 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, at least in relation to the third story variance sought. While the Applicant disagrees that the findings of the Member are clear and relevant to the issues, there is no basis established that the findings were not in evidence or were perverse. Rather, there is a clear intent or desire to reargue the evidence, an aspect or objective that does not warrant the other Parties to have to address.

I am not convinced that the Member was incorrect in the manner of deciding on the third floor variance.

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

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 opportunity to respond to this question followed, in the Interim Decision, as to whether there is some inherent limitation or rules on the Member's consideration of the evidence. It asks for specific examples with parameters that might demonstrate a violation of natural justice or procedural fairness, the grounds under which the concerns were advanced. I stated the premise in the Interim Decision as follows:

> "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*." (Interim Decision, page 15)

The Applicant has expanded on this request in the Response, paras.34-36.

The Response does not persuasively address these issues. Rather, it states the attempt to enforce disclosure standards on those opposed to the Applicant was rebuffed and discontinued "only after the presiding Member indicated a clear willingness to permit the Rule violations" (Response, para.34). It asserts the Member relied on the evidence of the opposition but cites no source examples; it suggests it was not reasonable to call reply evidence to those opposed - for 'lateness', arising both from the finality of the hearing event and the late disclosure by the those opposed, arising only in *viva-voce* evidence, and not earlier disclosed (Response, paras 35, 36).

Respectfully, the concerns are unsubstantiated. The Ruling made by the Member as to the scope of the Sukonick participation was in clear compliance with *Rule 12.6* and was accepted by counsel. The ability of a lay citizen to opine on planning matters is open to receipt and acceptance as a matter of weight. There was no prior motion for early dismissal or disclosure brought, as identified in the Interim Order, and no explanation was offered. Further, the right of Reply evidence in the Applicant was neither requested of nor refused by the Member – factors which might well warrant Review.

The test is not whether it is 'reasonable' for the Applicant to call reply evidence; that is a matter for counsel to assess, including the need for a recess or adjournment.

Rather than demonstrating where the Member allegedly failed to enforce applicable *Rules*, the Response submission identifies it did not pursue opportunities and did not exercise the right to reply evidence. The Response now wishes the opportunity to assert evidence that could have been available had it done so based on whether the opponents had made fuller disclosure in the first instance.

I agree with the Applicant that the *Rules* require disclosure, even by Participants, although formal witness statements are not a prerequisite. I agree that lay citizen members of the public are not allowed complete latitude to appear and opine at will. It does not appear that this was the case; the Suskonick participation was preceded with a

modicum of disclosure; there was extensive questioning and lengthy evidence given over two days.

These elements being present do not, on balance, support an inability on the part of experienced counsel with a professional witness present to scope a reply.

It is not for the Review process to address whether that should now be allowed to occur. It has the appearance of a request not to correct any wrong by the Member, but to afford an opportunity to further address the evidence with the benefit of the Member's Decision.

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.

This request reflects a request for further submissions on that same alleged ground, namely: a failure to address all of the requested variances, is a matter of procedural fairness and natural justice, as well as jurisdictional error, reviewed in **A.,** above.

The Request addresses this elaboration in paras. 37-39.

These paragraphs acknowledge that there may be circumstances where the denial of one variance renders the others moot or unsupportable, but asserts a duty on the Member "to clearly articulate why that is the case" (Response, para. 37).

Here, it is asserted that no 'interrelationship' was described and the finding of 'no cumulative respect' for area character of all the variances is an inadequate substitute.

Again, the refusal of the 10 variances beyond a third storey refusal is said to be largely unsupported.

I had asked for the support of a 'fundamental right' to have all variances addressed in these circumstances. In response, there is a declaration, unsupported by any authority, statutory or case law, to that effect (Response, para. 37).

I remain unconvinced of such an obligation where it is apparent the Hearing engaged a third storey recognition as 'key', found against it, and offered consideration of the Application's other 10 variances if that were to be the case.

I have also considered that an Applicant is entirely within their right to decline in pursuing a bifurcation of the Application through the late suggestion by the Member for the consideration of alternatives.

The Application was for a new dwelling of three storeys with associated variances. There is nothing in the record or the Decision that clearly defines the 10 variances were all dictated by and required as a result of the third storey variance.

There appears no evidence or finding on whether new construction could advance on the 10 variances without a third storey permission.

While it is understandable that the Member concluded from the response of the Applicant that it was pursuing an 'all or nothing' appeal, something more than what shows on the transcript would normally be expected in deciding not to address the other attendant 10 variances. No formal consent was provided to address that possibility.

The Member had license to decline to address the other 10 variances in some circumstances. The reasons adopted here are not identified and I agree with counsel for the Applicant that the responsibility to address those variances, or provide reasons why not, is not present in the Decision.

In the circumstance that a determination upon a proper and full evaluation of these 10 variances may result in permitting a building to be developed, with or without conditions, it would be responsible to address that scenario. This was not done.

I find, subject to the findings above and the following, that it is open to the Applicant to seek Review on this basis.

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.

The Response addresses this question for elaboration in paras.40-46.

In its response, the Applicant re-asserts that the third storey was not the 'main driver' of the other 10 variances and while it was the 'main issue', this did not afford the Member the license to not 'thoughtfully consider' the other requested variances. The Response asserts manifest unfairness to be put to the 'all or nothing' scenario during closing submissions.

Insofar as the submissions relate to the residual 10 variances, I agree with the tenor of these submissions at this stage.

The Applicant appears to have been denied a proper opportunity to address the submissions made that the 'exact same massing ***could*** be built" with an identical house to an observer, without the third floor variance (Response, paras.41, 42, 43, 44).

I note that there is no foundation for this insistence in the affidavit of Mr. Volpentesta; however, reference to his evidence is made.

The Response submissions are succinct and well expressed and I find they are a proper foundation to proceed to a *Notice of Review* for further submissions and considerations, if any, to assist in the determination of the Review Request.

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.

Like inquiry **C.,** this question again asks for fundamental authority of whether there is a 'fundamental' foundation in jurisprudence for the proposition put in the Review Request and Response that the Applicant is entitled, as a matter of natural justice and procedural fairness, to have its professional evidence detailed and resolved where the Decision is adverse to the Applicant.

As in the Response to **C.**, the Applicant claimed support ("**in the case law set out above"** (Response, para.28) in respect of its excess of jurisdiction ground; here, the Applicant claims a 'fundamental right' to have expressed "why the adjudicator rejected the experts opinions, in the manner described by the Divisional Court **in the cases set out above**" (Response, para. 47). Emphasis is added.

There is no reference to which case law or any particular reference therein. The cases themselves are not underscored or a reader directed to passages claimed of relevance.

In my view, if there are 'minimum standards for sufficiency of reasons' that are applicable, counsel has not identified them in the generality of the references. Clearly, the decision maker must address relevant considerations and paint a traceable path as to their consideration and disposition. The case authorities are clear that that expression is in the public interest and an expected duty of the decision maker as discussed earlier in these reasons and the Interim Decision. As also indicated earlier, the obligation does not require the Member to punctiliously reference every element of the evidence, but merely demonstrate that a proper consideration is given and identified in reaching the conclusion.

This is a standard incumbent on anyone who decides anything in the context of a fair hearing process.

Insofar as the issue of the third floor requested variance is concerned, the Applicant has not demonstrated the Member considered irrelevant considerations or failed to consider relevant considerations. Silence on any element alone does not mean that the reasons do not disclose, when read in their entirety, the Member's rationale for concluding on this variance.

The Applicant has pointed to no authority that supports at law the proposition that the replicable path to the decision must address specifically the Applicant's position in the evidence, and particularize reasons why that specific opinion is rejected, as isolated to the individuals. I agree that the issues raised germane to the appellate jurisdiction must be resolved but I am not persuaded - by vague references to even the Divisional Court subset of cases provided - that this obligation fixes the responsibility on the Member to address, set out and resolve ("considered, weighed and adjudicated upon' (Response, para. 47)) the evidence of everyone or of the one witness, the Applicant's planner, as distinct from all others.

In my view, it is sufficient if that evidence is heard, the issue is identified and discussed on relevant considerations and a determination is made with reasons, whether in support or contrary to the views of any specific witness. In this case, on the issue of the third storey, the Member identified the 'key' issue, heard all the evidence in regard thereto from several witnesses, addressed the relevant considerations applicable to one test (Official Plan general conformity), among others, and resolved the matter to not approve that variance, through expressed relevant considerations.

In the absence of the requested specific authority to require the Member to do more, on that variance, I find the Applicant has not provided a sufficient basis to remit the matter for further consideration as an issue of procedural fairness or natural justice.

On the issue of the other 10 variances, the Response adds nothing to the comments described above in previous sections. It makes the point there are minimum standards of sufficiency of reasons and I have agreed that those are thin or absent, despite the added element of the Applicant's desire and instructions to counsel to pursue the package of variances, all as recited in the *Transcripts*.

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

H. Whether there was no evidence to support a Member's finding;

In the Review Request, the Applicant asserts as well that not only was the evidence of its professional planner not considered and distinguished in the reasons for the Decision, but also that there was no evidence or no qualified professional evidence upon which the planner's opinion evidence could or should be rejected.

Inquiry **H.** requested further elaboration on the matters alleged as 'V. Errors of Law and Fact in the Decision (Request, paras. 44-72), to which this ground for review under *Rule 31* is addressed.

Inquiry **H.** follows this concern:

> "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 determinative 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."" (Interim Order, p. 18).

The Response addresses this inquiry at para. 48. a)-f) and identifies areas of 'no evidence, or no reasonable interpretation' of the evidence to support identified findings.

The assertion of "no reasonable interpretation of the evidence" is conjectural and a matter remitted to the Member, subject to the constraints earlier referenced: e.g., relevance; absence of perversity (not alleged).

This restatement is not an element of inquiry **H.** and runs afoul of the Review principle that efforts to reargue the evidence are to be avoided and are not a listed ground to permit reconsideration of a decision of the TLAB.

Moreover, while the affidavit of Mr. Volpentesta states the belief that many of the findings in the Decision are "inconsistent with the evidence (he) presented at the Hearing" (Affidavit, para. 21) and contain "omissions, inaccuracies and mischaracterizations described above" (Affidavit, para. 23), nowhere does it assert or use the language "no reasonable interpretation." I find that counsel's revision of the inquiry muddies the response and, at least in part, is not founded by support in the Affidavit in support of the Review Request, or by any subsequent affidavit.

The matters raised in response to inquiry **H.** are (paraphrased) in the Response, para. 48 and are commented upon herein:

a) Adjacent buildings. While a relevant consideration for analysis, no finding is referenced as to weight or determination is made. The Applicant's assumption as to 'implications or use which flow from the analysis and Decision' is neither a fact, an express finding of the Member nor does it amount to an absence of evidence.

b) Mix of physical characters. The Applicant asserts no evidence to support the Member's statement, "I do not consider this to be a neighbourhood with a mix of physical characters" (Decision, p.7) and attributes this to relate to 'house form' and the evidence on 'two and three storey houses' (Response, para. 48 b)).

   In fact, the attributed finding occurs under a discussion of 'Three stories" and states as follows:

   > "The (Official) Plan says, "the proposed development within a Neighbourhood will be materially consistent with the prevailing physical character of properties in both the broader and immediate contexts." The prevailing character of the broader context is the most frequently occurring form of development, which is two storey. I do not consider this to be a neighbourhood with a mix of physical characters" (Decision, p.7).

In my view, the excerpt as challenged as having 'no evidence, or no reasonable interpretation of the evidence' is unsubstantiated. Not only is the Member addressing a specific Official Plan policy inclusive of the broader Neighbourhood, but he is not confining his conclusion to 'house form' or any particular aspect of it, e.g., number of stories. Moreover, the phrase 'mix of physical characters' is not confined to relate to residential dwelling units as an element of consideration.

The finding is that the broader 'neighbourhood' consists of two storey dwellings as most frequently occurring; this is not a denial that there are other building forms. It is not a denial of the presence of three storey dwellings. On this point, Mr. Volpentesta addresses the 'immediate context' and has an opinion on that (Affidavit, para. m, n), but such lends no support to the assertion that the Member erred or had no evidence to have found in the above extract.

c) Architectural details. The Applicant asserts there is no foundation for the Member's "suggestion on page 7 that Mr. Volpentesta's opinion (on appropriateness of a third storey) was "based on architectural details instead of the intention of the by-law."

The Member actually stated this:

> "In my view, the map of three and three-plus houses suffers from a fundamental defect in that reliance is placed on 'faux' third stories. Mr. Volpentesta said that he included these in his tallies in a subjective fashion, but always erred on the side of conservatism. However, careful as he was, it strikes me that a variance cannot be based on architectural details instead of the intention of the by-law, which is to limit actual third floor habitable space" (Decision, p. 7).

I find this matter as spurious when raised as a matter of 'no evidence'. The *Transcripts* evidence lengthy discussion on the existence and appearance of third floor space and numerous examples of inconclusive use of space where dormers are present. Mr. Volpentesta in his affidavit acknowledges several considerations go into the evaluation of third floor space, including impact on the public realm, roof pitch, volume (Affidavit, para.p)). The Member, in the extract, is drawing his own conclusion, having heard the evidence, as to the presence or absence of architectural details, and is not attributing that to anyone. It (architectural detail) is identified as a relevant consideration related to appearance and streetscape.

I see no merit in advancing to a Review, assertions as to an unfounded premise (Affidavit, para. p)) or a 'suggestion' on interpretation from the Decision (Response, para. 48 c))

d) Statistics. A finding is challenged that 17 third storey approvals in a study area of 235 properties over a ten year period is a 'very small number'.

There is no assertion the statistic is incorrect or was never in evidence in some form. Its perception by the Member is a matter of weight and is neither an error of

fact nor law. The use of statistics is discussed in the Interim Decision with an invitation to substantiate further the basis of complaint (Interim Decision, p.22-23). The need for disclosure of the Member's use of the statistical information supplied and the Applicant's further submissions thereon is addressed elsewhere in these reasons.

e) Zoning Regulation and 'on/off' switch. The Applicant makes the "suggestion" that the Member attributed to Mr. Volpentesta the opinion that the zoning regulation providing for a maximum number of storeys in the building simply as a trigger for applications for variance.

Mr. Volpentesta does not appear to address this in his Affidavit that is otherwise observing on alleged Decision deficiencies.

The Decision, page 8, quotes the planner's evidence on the subject of the two storey regulatory limit:

> "It's not strictly speaking a numerical upper limit; it just becomes a threshold that would trigger a public process…"

Respectfully, the regulation in the by-law is simply that: Maximum number of storeys: 2.

In the absence of language or statutory construction aids that suggest otherwise, the clear intent of the by-law is that residential dwellings within that zone category be limited to two (2) storeys in height. Variance requests can follow; however, there is no language supporting their invitation.

If there is a 'suggestion' attributable to the Member, its source appears to have been the planner's statement in the evidence. This is not a basis to advance a Review Request.

There is no suggestion of an incorrect or inaccurate quote or any evidence of an intention to the contrary as to the upper limit in respect of the application of the regulation.

f) Urban Forestry. The Applicant takes issue with the Member's expressed assumption that Urban Forestry Staff will assume environmental issues have been considered in the TLAB reaching a decision on an appeal.

The planner, Mr. Volpentesta, disagrees with this description of an assumed consideration (Affidavit, para.s)), but provides nothing further by way of explanation, rebuttal, experience or support. There is no assertion of unfamiliarity or a lack of evidence on the role of Urban Forestry, its elaboration or anything concerning the role of the TLAB in considering and applying Official Plan policies on environmental matters.

As described earlier, perhaps in the Interim Order, the TLAB is to consider the test of general conformity to the Official Plan, including its environmental policies.

That is its responsibility. The Applicant offered no opinion evidence in any form on the subject of tree protection and a tree protection zone.

An experienced Member, as at present, can take notice that City Staff will presume the TLAB has considered the applicable policy,

I see no error of fact or law on this Member's observation as a basis for concern and evidentiary deficiency, let alone one that could yield a different result and warrant advancing a review.

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.

This inquiry serves to invite instances where the independent professional opinion evidence of the sole planner present was voiced and rejected on matters for which no other informed opinion evidence could be entertained.

The Applicant responded to this inquiry on paras. 49-52 of the Response.

In furthering the submission that an expert's opinion, to be rejected, requires an obligatory and transparent explanation, the Applicant argues that otherwise professionalism would have no distinction.

Of particular relevance is the accusation that the Member cited a portion only of the Official Plan policy he applied (Official Plan, 4.1.5), whereas it is asserted that the planner interpreted the policy in its entirety to a contrary result and the Member failed to articulate a basis for its rejection.

On this point I might have greater sympathy if either the Response or the original Affidavit (affidavit, para.22 a, m)) had any greater specificity or support.

The Affidavit simply attests to the planning evidence that Official Plan policy 4.1.5 "is met" (Affidavit, para. 22 m)) and nothing further. The *Transcripts* (p. 125) confirm the opinion evidence of the planner in a similar context.

In contrast, the Member points to a specific clause (4.1.5 c)) and emphasizes 'prevailing **heights …**and **dwelling type**' as areas of distinction in the Application.

Official Plan policy 4.1.5 affords a list of criteria for the assessment of area character and formulating an opinion of whether an application 'respects and reinforces the physical character of the area'.

Those criteria are not identified as conjunctive or cumulative, such that all must be met to warrant approval of a variance; by the same token, there is no language that precludes a determination on any one of the criteria, as, for example, identified by the Member. As stated earlier, all tests, including the general intent and purpose of the

Official Plan and zoning by-law must be met and the failure to satisfy the TLAB on any one, can be fatal.

The Response does not cite any missing policy or error in the policy quoted. Rather, it states that where the policy application and interpretation of the Member differs from that of the planner, there is a duty to explain the reasons why.

The interpretation of policy is a legal matter; however, the interpretation is not challenged. Rather, it is the application of the policy language to which a further explanation is sought, and a deficiency alleged. That application is open to apply professional and lay advice and make a subjective interpretation on the evidence, provided it is related and relevant to the test.

I am satisfied that the Decision when read as a whole, including the reference to the specific Official Plan policy emphasized, provides sufficient explanation as to why the more general and sweeping policy application advice was rejected - in favour of the specific application of identified criteria in 4.1.5.c).

A further specific example is presented in para. 51 of the Response concerning the appearance of a comparative dwelling: 217 Hillhurst. The planner found this dwelling to exist as part of the area character, to fit, be compatible and meet the policy of respecting and reinforcing existing physical character. Both the witness Suskonick and the Member considered the appearance of that dwelling as “insensitive.”

At issue is the weight ascribed and whether the rejection of the Planner’s evidence warranted description.

In reading the Decision, even if I were to ascribe to the subjective assessment as to insensitivity to be of no weight, appearance cannot be discarded as a relevant consideration.

There is nothing in the text of the Decision that is pointed to that transfers the appearance comment on 217 Hillhurst to the specific design scheme of the Application. Still less is there any fault alleged or supported by the affidavit in the application of design considerations to Official Plan tests of sensitivity, fit and compatibility - all of which are acknowledged as relevant and have an element of subjective judgement that is not the exclusive prerogative of the expert planner.

The Applicant asserts that the Member “appears” to have accepted lay judgement observations on existing conditions without explaining their link to applicable policy. In my view, this attribution is too far afield into speculation and subjective judgement to warrant further Review; it is mired in detailed opinion evidence on appropriate considerations involving matters of subjective assessment that were all canvassed in evidence. I find that, on the Application/Appeal, the Member was entitled to formulate his own subjective judgement on design and appearance matters of acknowledged policy relevance, from the canvass of evidentiary considerations, and employ both purposively if he saw fit, without the detailed sorting explanation desired by the Applicant.

Finally, the Applicant asserts that the Member used supplied data, did his own manipulations and could have considered those results in reaching the Decision.

There is nothing to dispute these assertions, although it is an unfair comment to suggest that the Member ignored the planner's opinion advice on the base data not so re-formulated.

Again, there is no evidence that the advice of the planner was not heard, refused or deliberately ignored; certainly, the statistics provided are acknowledged and the Applicant, as originator, was informed as to their presence. There is also no evidence that the Member's use of the statistics was directly or indirectly responsible for the result. The terminology used in the Response is "if" (Response, paragraph 52).

I agree that a Member can err in creating evidentiary considerations not put directly in evidence, not disclosed to a party adverse to the implications taken, and that appear on the face of the record as being seminal in the decision made.

Leaving aside the issue of the 10 variances, I am not persuaded that a sufficient number of these factors are present here to warrant a further Review consideration. The opportunity was given to develop this theme further and, on the submissions, it is framed as conjecture and a matter for further evidentiary debate; there is no suggestion that if the aspect of the numerical analysis had not appeared in the Decision, the result would be a different decision.

In total, these examples under **I.** are not compelling as being grounded in matters extraneous to or without justification in reaching an informed judgement.

J. Whether and where the fairness principle is claimed to be breached.

In this response, the Applicant re-iterates its submission that the cumulative failure of the Member to consider and evaluate the planning evidence "renders the Decision inadequate and therefore amounts to a breach of the fairness principle" (Response, para. 53).

There is also the assertion that the collective impact of the errors identified in the Review Request "clearly affected the outcome" with the only reasonable perception and conclusion supporting a different result (Response, paras. 54, 55).

With respect to this latter submission, the Interim Decision addresses, seriatim, the identified 'errors of fact and law' listed in the Review Request and provides commentary on their substance ultimately concluding, with one reservation, that the submissions were without compelling merit (see: Interim Decision, p. 19-22). There is nothing further by way of evidence or Decision reference in the Response adding to these considerations, beyond the aforementioned submission as to their suggested cumulative impact.

In the Interim Decision I stated that I found the list to be unsubstantiated, not simply 'insufficient on their own' to warrant review (Response, para. 54). In the absence

of a further substantiation of these alleged errors that were described to be individually without merit, it is not possible to conclude that any cumulative assessment has or could be made to constitute the foundation for a Review as to their potential effect.

The one reservation was reflected in the following extract:

> "I have discussed, above, and left open the question as to whether having found non- compliance with the general intent and purpose of the Official Plan and zoning bylaw, there is still required the obligation that the other variance tests need be addressed in punctilious detail."

That aspect is examined further in these reasons with the benefit of the Applicant's Response submissions.

On the first matter, I have considered, above, the submissions in the Response concerning the Member's obligations to consider, weigh, and state reasons addressing the planning opinion evidence of the Applicant's planner distinct from providing replicable reasons addressing findings on the variances sought.

And further distinguished that record as between the 'key' variance of a third storey permission and the 10 other variances.

In summary, I find that fairness dictates the Parties be told the outcome for their positions with reasons that are readily ascertainable, relevant, relate to the evidence tendered in its entirety, are not perverse and are within a zone of reasonableness.

While it may be a counsel of perfection for 'punctilious' detail to demand more, the Applicant has not convinced me with particularized references that there is specific, compelling authority that goes beyond these demands. Namely, to require that the opinion evidence of any one or all of the witnesses, whether qualified as a professional or not, needs to be presented in the decision, then juxtaposed with any contrary view and then resolved with reasons in the text, followed by a further explanation as to how that resolution relates to the variance or variances in issue.

Rather, the task of the TLAB Member is to address the variances sought in the Application/Appeal and resolve and report them out providing reasons based upon an application of relevant policy and tests in a manner consistent with available evidence, engaged principles of administrative jurisprudence, the application of public interest goals and the values of good community planning. That task may be and often does involve the application of discretionary subjective judgement in the field of land use planning.

Where a Member considers and evaluates the variances requested in the manner described, I find that the fairness principle is respected and it is not a breach thereof, certainly where it is undisputed that all the evidence was heard, and where the considerations evidenced in the reasons are respectful of the task as defined.

I find no issue of fairness in the Applicant's submissions relative to the Decision, in relation to the third storey requested variance, related to the requested detail to address the planner's evidence.

DIRECTION (IF APPLICABLE)

Rule 31, as drafted and applied herein casts an inordinate burden and discipline on the Requestor and the Members conducting an Adjudicative Review, the Review itself and in "an oral Hearing before a different Member', should the stages of the Review Request proceed that far.

The *Rule* contemplates and provides, on Adjudicative Review (as discussed in the Interim Decision), a power to dismiss, in the vetting process of whether a Review Request of a Member's Decision and Order warrants reconsideration on defined grounds set out in the *Rule.*

Adjudicative Review is effectively a 'leave to appeal' function that permits the filtering of Review Requests to substantiated grounds set out in *Rule 31.25.*

Dismissal can be the 'end of the line' for the Requestor and it should not be undertaken other than sparingly, gingerly and with an abundance of caution. Yet Adjudicative Review is designed to ensure that only eligible grounds advance and that all Parties then have the right to input on the disposition of the Review Request. A 'Hearing' is not axiomatically a right or entitlement at all, even where the Review Request proceeds to the engagement of all Parties following issuance of a *Notice of Review*.

If, as the final stage of Adjudicative Review the matter does proceed to "an oral Hearing before a different TLAB Member" (*Rule 31. 24 c*)), that Hearing is not *de novo,* but is related to the remaining substance of the Review Request. The remedies that can result include the power to 'confirm, vary, suspend or cancel' the decision of first instance, or order a new *de novo* hearing.

Regardless of this Member's opinion on the rigour of the Rule, the considerations are specific and detailed and warrant resolution within the scope of *Rule 31.17*.

In the foregoing, I have found potential grounds in the Requestor's request to have the 10 variances detailed, considered and evaluated in a more complete manner. I will direct that the disposition of that matter be advanced by requiring a *Notice of Review* be issued soliciting any further input on those matters under *Rule 31.19.*

I do not find that the Decision has been established to be potentially flawed on an eligible ground under the *Rule 31.25* in the submissions of the Requestor, in respect of the third floor variance permissions sought. I find it unnecessary to remit that aspect to the other Parties for submissions on a *Notice of Review.* I will dismiss that part of the Review Request at this stage under *Rule 31.17*, for the reasons detailed in the Interim Order and in this further determination.

I remain seized of the Adjudicative Review process and will provide a further direction on completion of the *Notice of Review* process in accordance with *Rule 31.24.*

***Obiter* Considerations**

By way of *obiter*, meaning simply parenthetical comment, the Applicant/Appellant claims an entitlement to have the remaining 10 variances considered based on the evidence and the expressed, largely constructive, position of the Parties.

Whether or not an entitlement is found to be the case as the Review advances, it appears to this Member that all interests are best served by taking a responsible approach to the residual variances of the Application with a view to their resolution without, perhaps, the need for further substantive litigation.

In that regard, and without prejudice to any position or submission in response to the *Notice of Review,* if all interested Persons address the 10 variances and associated conditions, if any, it remains possible that the matter could reach a consensus or resolution with limited angst, expense and significant further involvement.

It should be apparent to all that the Applicant is also entitled to make application to the COA for further, even similar variance relief, whether or not this disposition advances. As the *Notice of Review* proceeds and permits, the opportunity to reflect on that circumstance remains open and I urge all interests to address their position on a more expeditious resolution.

The TLAB encourages Parties and Participants to present consensual positions. It will examine these expeditiously with a view to the public interest and consistency with principles of good community planning.

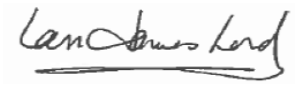
The *Rules* provide for settlement Hearings or Motions, where applicable.

DECISION AND ORDER

1. The Request to Review the Decision in respect of variances 4 and 11 set out in the Decision (Decision, p.2, Table 1, ‘number of storeys’, i.e., permission for third floor habitable space) is dismissed. The TLAB Staff are directed to issue a *Notice of Dismissal* on this aspect.
2. TLAB Staff are directed to issue a *Notice of Review* under *Rule 31.18* on terms limited to whether or not the residual 10 variances identified in the Decision as variances 1, 2, 3, 5, 6, 7, 8, 9, 10 and 12 (Decision, p.2, Table 1) should be subject to review and their disposition. The Requestor is at liberty to reformulate the Review Request and Response consistent with and as felt appropriate to address the terms hereof. Whether or not a revised Review Request is formulated, no Party has an obligation to consider or address any matter related to the dismissal in paragraph 1 hereof. The *Notice of Review*

will afford the other Parties/Participants an opportunity to comment on the restricted Review Request.

3. The timeline for responses and replies to the *Notice of Review* are set out in the *Rules* of the TLAB, *Rules 31.20 – 31.23.* Despite the issuance date of this Decision and Order and *Rule 31.31:20-31-23*, the period for response to a *Notice of Review* shall not begin to run until such time as any suspension period (currently scheduled to expire August 14, 2020) of TLAB's public business is lifted. Once lifted, the timelines set out in the *Rules* are to be strictly observed.
4. The TLAB Staff are directed to attach or include in the *Notice of Dismissal* and the *Notice of Review,* above, the Interim Order and this Further Interim Review Request Order as a schedule.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord