Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Tuesday, November 17, 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; Re-issued June 22, 2020

DECISION DELIVERED BY Ian James LORD

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

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

This decision and order ends the stage of Adjudicative Screening of the Request.

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) 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.

A further determination on the Review Request having the benefit of the Interim Order and the Response, the latter pursuant to *Rule 31.17,* was rendered July 28, 2020 by the issuance of a Further Interim Review Decision (FIRD) of some 38 pages.

The FIRD ordered dismissal of Variances 4 and 11, effected through a *Notice of Dismissal* Order of the same date, pursuant to *Rule 31.17*. As well, the FIRD effected the issuance of a *Notice of Review* Order of the same date, pursuant to *Rule 31.19.* It sought submissions on the remaining 10 variances determined by the Adjudicative Screening stage to warrant further consideration.

JURISDICTION

Below are the TLAB Rules applicable to a request for review. As in the Interim Order and the FIRD, 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

The Further Interim Review Decision (FIRD) stated the structure of the Adjudicative Screening role to be in the following terms:

> "*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." (FIRD, page 8)

There remains for consideration the 10 variances that were refused in the Decision. The Applicant Requestor, as indicated in the FIRD at page 9, framed the challenge as follows:

> "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).

The *Notice of Dismissal* directed in the FIRD eliminated the need for further consideration of Variances 4 and 11, related to a third storey request.

However, there remains from the FIRD several observations related to the other 10 variances that are the subject of the Review Request that are germane to the final stage of Adjudicative Screening. Some of these are listed below.

It is worth noting that the *Notice of Review* pursuant to *Rule 31.20-23*, identified dates for submissions to be made on these remaining outstanding variances requested: namely, Responses by August 17 and a Reply by August 24, 2020.

The FIRD provided further direction, at page 37, insofar as the COVID-19 pandemic crisis in Ontario played havoc with tribunal scheduling:

> "A *Notice of Review* shall be issued 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 disposition. The Requestor is at liberty to reformulate the Review Request 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 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 31.20 - 31.23 (sic.)*, 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. (Emphasis added)**

The TLAB Suspension Period ended August 14, 2020; the effect of that order was to extend the time for the *Notice of Review* Response and Reply under the *Rule* into September 2020.

As no submissions of any kind were received and for greater certainty, I instructed that the TLAB Secretary communicate specifically with the Parties as to a further definitive timeline for the receipt of submissions.

This was completed by a TLAB Support Assistant on October 8, 2020 whereby the Parties were advised that any submissions on the *Notice of Review* were to be received by October 16, 2020, failing which the TLAB would proceed with the finalization of the Administrative Screening stage of the Review Request.

Again, no submissions were received.

As indicated, this constitutes the final stage of Adjudicative Screening pursuant to the *Notice of Review.*

By way of summary, the COA granted the 10 variances, the Decision refused the same and the Review sought a reconsideration of the Decision.

I note the following extracts from the FIRD:

"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 Court's 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 against (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". (**Emphasis added, FIRD, p. 18-20)**

And further:

"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." (**Emphasis added,** FIRD, p.25,26)

And further:

"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." (Emphasis added, FIRD, p.34,35)

And finally, I bring forward the Directions commentary from the FIRD:

"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." (**Emphasis added,** FIRD, p.36)

ANALYSIS AND APPLICABLE CONSIDERATIONS

As above stated, there were no further submissions following the issuance and extensions of time for response/reply to the *Notice of Review*.

As a consequence, I have for consideration the TLAB record, the Decision, the Review Request, the Interim Decision, the Response and the FIRD.

Mr. Sukonick had expressed the interest in a further submission; however, promises are only valuable if they are fulfilled within the timeframe, twice extended.

It is incumbent on the TLAB to complete the Adjudicative Screening on this matter in a timely fashion in order that finality can be advanced. An Applicant is entitled to the finality of the administrative process.

From the extracts above recited, admittedly drawn from the FIRD (itself reliant on the earlier materials), a number of findings are apparent:

1. The 10 variances subject to the Notice of Review stem from a Decision that, individually or cumulatively, failed to address their merits and demerits to any significant degree.
2. The principle finding of the Decision, sustained in the *Notice of Dismissal*, related to the two variances related to the third storey addition. No substantive connection in the Decision was drawn between those two for third storey

habitable space and the remaining 10 variances. Consequently, this is not a case where it is self- evident that the failure of partial relief, a third storey, necessarily included the failure of additional relief not necessarily connected thereto.

3. In my view, whether or not there is an error of law to not address the 10 variances requested that was committed, I find it properly arguable that there was a denial of natural justice by the Member, under *Rule 31.25 b)*, in not addressing either the relationship between all the variances or to provide any analysis of the 10 variances on their individual and cumulative merit, on applicable tests. As such, the Applicant would never know the reasons behind the refusal of the 10 variances yet the finding in the Decision could stand as a substantive barrier, as *res judicata,* in a future application for relief.
4. Consequently, I am of the view, pursuant to *Rule 31.15 a)*, that the Applicant has demonstrated a sufficient basis in natural justice, if not as well in procedural fairness, both for a further determination that those 10 variances should be properly addressed, and also a sufficient basis upon which the TLAB could allow all or part of the requested relief. I accept the Applicant's submission, recited at p. 8 of the FIRD, that the Request for a 'proper review under *Rule 31.19-25'*, is made out as a compelling case.
5. Adjudicative Screening does not permit that I attempt to address a substantive remedy, beyond allowing a dismissal of a Review Request. I find that a dismissal of the 10 unaddressed variances is not justified and that there is no need for further written submissions under *Rule 31.24*. That leaves my jurisdiction to be an Order under *Rule 31.24 c).*

In the FIRD, I expressed some *obiter* commentary that bears repeating here:

> "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. (**Emphasis added**, FIRD p.37)

Clearly, the lack of response, as well to this invitation, indicates an appearance of disinterest at the *Notice of Review* stage, in a further revealing of positions.

Despite this, I remain sanguine that the Parties recognize that property renewal is a normal means of civic regeneration and that the pursuit thereof is the statutory prerogative of an owner that is supported to a degree by provincial and local policy, with attendant safeguards. Here, a replacement home is sought – a not unusual circumstance.

There may well be reasons why the Parties did not respond to the *Notice of Review*; that is a decision that remains with them.

I continue to think, again as *obiter,* that before a second and new oral Hearing is convened, the TLAB may well have a responsibility, in the absence of an application by the Parties, to require a mandatory mediation or pre-hearing conference, pursuant to the *Rules* of the TLAB.

This would serve to ensure that the final disposition of the matter is afforded an efficient and timely exposure, a resolution opportunity and a direction as to further proceedings - should they be required.

DECISION AND ORDER

I direct for 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), 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 Decision, or order a new *de novo* Hearing.

X 

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord