TORONTO

Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Friday, January 08, 2021

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): ROBERT ULICKI

Applicant: LEA WILJER

Property Address/Description: 459-461 SACKVILLE ST

Committee of Adjustment Case File: 17 253383 STE 28 MV

TLAB Case File Number: 18 150889 S45 28 TLAB

Decision Order Date: Thursday, August 13, 2020

DECISION DELIVERED BY IAN JAMES LORD, SHAHEYNOOR TALUKDER, JUSTIN LEUNG

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

1. This is a request for review (Request) made under Rule 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB). The Request is made by two parties, the City of Toronto (City), represented by City Solicitor Matthew Longo, and three combined parties consisting of Patricia Milne, Hassan Uran and Blaine Pearson (Parties Milne, Uran and Pearson), represented by legal counsel, Jane Pepino. A third, somewhat informal request for review, was referenced in an affidavit of Sauius Jaskus. Mr. Jaskus, beyond filing an affidavit and addendum response, despite Notice, took no other part in the in the consideration of the Request.

2. The Request by the City was accompanied by an affidavit of Sara Amini of City of Toronto Legal Services that was received by the TLAB on the September 14, 2020. The second Request, by the Parties Milne, Uran and Pearson, was accompanied by an affidavit of Corinna Prior of Aird & Berlis LLP, sworn on September 11, 2020 and received by the TLAB on September 14, 2020.

3. The Applicant/Appellant, Robert Ulicki, responded jointly to the Requests on November 16, 2020 .The Applicant was represented by his counsel, Ian Flett. These reasons constitute the disposition of the review (Review).

4. In recognition of an initial and aborted Review consideration and the evident interest in the matter to the local community, the Request matter was directed and heard orally and virtually on December 16 and 18, 2020, by the above noted panel of the TLAB (review panel).

5. Despite there being two active Requests, this disposition treats the matter as a single reference, except where specifically noted. The TLAB is grateful to counsel for their separate identification of issues and their ability to avoid undue repetition. However, since each dealt with similar grounds presented in the applicable TLAB Rule, some overlap was inevitable giving rise to their joint consideration.

BACKGROUND

6. The matter which is subject of the Request pertains to an Interim Decision of Member S. Makuch issued August 13, 2020 (Interim Decision) applicable to variances requested for 459-461 Sackville Street (subject property).

7. The Interim Decision set aside the original decision issued by the Committee of Adjustment (COA) which had refused a series of ten variances under two applicable zoning by-laws. The variances were sought to facilitate the conversion of a two and half storey vacant but formerly mixed-use building containing four dwelling units and two retail/commercial units, to a day nursey (daycare) use to encompass the entirety of the building.

8. The Member issued the Interim Decision which approved these variances, arguably, on an interim basis. The 'final' consideration was reserved for a possible final approval that would be granted on December 10, 2021, preceded first by another Hearing on December 3, 2021. This additional Hearing was scheduled to allow all parties to re-convene to discuss the items which the Member had stipulated as part of his preliminary approval of this matter. That Hearing would act as a means of determining if the items the Member had listed as necessary had been fulfilled. If they were accomplished, then a Final Decision and Order would be issued. If not, the original Interim Decision, it is stated, may be vacated. The matter of the finality of the Interim Decision is raised extensively in the Review.

9. Mr. Longo, on behalf of the City provides in his submission 'City of Toronto-Request for Review of Decision & Order' (City Request), that the Member erred in law by not considering the relevant Official Plan (OP) policies that he considered were of central importance to this matter. If these relevant policies were considered, then there would have been a different outcome in the Decision. Mr. Longo proposed that, as a result of this error of law, the Decision be cancelled and the COA's decision be confirmed.

10. Mr. Longo further submitted that the Member failed to fully analyse the four tests for a variance, as per the *Planning Act.* He contends that the Member, in this instance, erred in his issuance of the Interim Decision as it did not impose conditions. He states that the Member elected to provide an approval on a temporary basis and then request that all parties to re-convene in one year's time to discuss this appeal matter and to determine if the items he outlined in his Decision had been successfully implemented, or not. The outcome of this 'future' hearing would determine if a Final Decision to approve or refuse these variances would be issued as a result.

11. Mr. Longo argues that this approach of holding on to jurisdiction is not legally appropriate, demonstrates multiple 'logical inconsistencies' is 'bizarre', offends the principle of '*functus officio'* and cannot be achieved by the Member in recognition of the relevant legislation prior to issuing this Interim Decision. As such, Mr. Longo posits that an error in interpretation and application of the law occurred. He contends, on one front, that to rectify this situation, the review panel should vary the issued Decision to include the following conditions:

    ii. The Owner must apply to the General Manager, Transportation Services and City Council as required, and be granted conversion of at least 5 on street parking permit spaces in the proximity of the subject site to temporary pick up and drop off parking spaces during the hours of 7:30-9:30 am and 4:00-6:00 pm.

    iii. The Owner must pay for and install all street marking and signage identified in section 5.10.1 and 6.2 of the Parking Needs and Traffic Assessment report prepared by Tedesco Engineering dated August 2018 and marked as Exhibit 1 to these proceedings. Design and drawings of such marking to be to the satisfaction and modification of the General Manager, Transportation Services.

    iv. The Owner must apply to the General Manager, Transportation Services and City Council as required, and be granted a permit for at least 2 commercial boulevard parking spaces for the lands identified as 'existing parking' on drawing A1.1 found at Exhibit 1[1] pg. 7.

    v. The owner must obtain permission from City of Toronto in the form of a lease or license, and enter into any other form of agreement as deemed necessary to the City, to permit the use of the municipal right of way as a playground as depicted in drawing A1.1 found at Exhibit 1 pg. 7.

    vi. Prior to issuance of building permit, building permit drawings, including plans, elevation and details shall be submitted to satisfaction of the Senior Manager,

[1] The exhibits referred to in these sub-paragraphs are exhibits tendered and accepted at the Interim Decision Hearing.

Heritage Preservation Services and a heritage permit shall be obtained under provision Section 42 of the Ontario Heritage Act.

vii. Permanent vegetative screening shall be planted in the rear yard of 459 Sackville Street along the full extent of the south property line at a minimum height of 3.0 metres.

viii. The rear yard playground shall be constructed with permeable materials.[2]

12. Mr. Longo noted that conditions iii) and iv) were contested by the Applicant. The expert witnesses of the parties disagreed over these conditions and their applicability for this proposal.

13. Alternatively, Mr. Longo states that if the relief to vary the Decision is not amenable to the review panel, that we can elect to cancel the Decision and order a re-hearing of the matter. The review panel, he argued, would have to assess both options which have been proffered and potentially weigh which would be more appropriate for the matter at hand.

14. Ms. Pepino, on behalf of Parties Milne, Uran and Pearson, submits in her Request for Review dated September 11, 2020 (Residents Request), that the Interim Decision of the Member is deficient as it fails to address evidence and supply reasons; it does not succinctly convey the reasons as to why the opposing parties to this matter had 'lost' in this matter.

15. Specifically, Ms. Pepino states that the Interim Decision issued did not clearly delineate how each of the four tests for a variance as per the *Planning Act* had been met. As such, the Request contends that the Interim Decision was issued inappropriately without proper consideration of the relevant legislation. She further outlines that, in her opinion, the evidence as proffered by <u>all</u> the expert witnesses had concluded that the four tests were not met with regards to this proposal, if conditions were not attached to the approval of variances. Ms. Pepino argued that the Decision did not provide concrete assessments in this regard. She further argued that the lack of proper planning rationale in this Decision was improper and did not adhere to established administrative law practices. In addition, she states that the structure of the Decision is flawed: to not impose conditions as part of its approval but to issue an 'interim' approval with a subsequent hearing to determine if certain items important to the Member were achieved, is a departure from the established jurisdiction of the TLAB and acts to nullify this Decision.

16. In her summation, Ms. Pepino recommends that the review panel cancel this Interim Decision and remove it from the official record. If the review panel were not to pursue this option, then alternatively we should schedule an additional hearing day. This hearing day would be used to determine that the conditions for the

[2] City Request; *Affidavit of Sara Amini.* para. 47.

approval of this matter, similar in form as those outlined by the City, are attainable before December 2021. We note that both Requestors are providing two arguably similar options for the panel to consider. Both submissions reference the fulsome disclosure documents and submissions which have been made on this matter over a two-year period.

17. The materials as outlined above and the summary provided act to contextualize the oral arguments which were presented to the panel in a two day hearing (Review Hearing) initiated in response to these two Requests.

18. In addition to counsel for the two Requestors, the Applicant's lawyer, Mr. Flett, was in attendance throughout and provided reply evidence to the review panel. Mr. Flett had also submitted related documents to the TLAB prior to the scheduled Review Hearing dates. In brief, Mr. Flett argued that although the Interim Decision as rendered by the Member may appear 'unorthodox' in final disposition and timing in comparison to other planning tribunal decisions, he stated that it is not inappropriate and is not acting to contravene any relevant legislation. He further argued that the Member has elected to approach the matter in a cautious manner by not attaching conditions to his issued Interim Decision. This was to ensure that he did not issue an Interim Decision that could not be properly disposed of within the jurisdiction of the TLAB or that would be in conflict with the anti-delegation rule, '*delegata non potest delegara'*.

19. To prevent such a situation from occurring, Mr. Flett said that the Interim Decision instructs the Applicant to approach the related departments and agencies to determine if items as outlined in the Interim Decision were achievable or not. A subsequent hearing would be convened to discuss the matter and to receive an update from the Applicant on discussions with associated staff. His approach as posited is attributed to the fulsome discussions of 12 days of hearings on the matter and the Member's desire to ensure potential issues which may prevent the deploying of a daycare centre at the subject property are separately assessed and addressed.

20. In Mr. Flett's view, the Member's Interim Decision is fully consistent with the principles of justification, transparency and intelligibility supported in *Dunsmuir* and cited and expressed as the duty owing on the considerations open to judicial review of administrative tribunals in *Vavilov.* (*Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65).

21. Both counsels for the Requestors included and made extensive reference to their respective "Outlines of Oral Argument" being the written argument provided to the Member (See for example: Affidavit of Corinna Jade Prior sworn September 11, 2020 incorporating, in Tab E, Ms. Pepino's written argument of June 26, 2020).

22. In addition, Ms. Pepino included two affidavits from her client's planner, Mr. Paul Stagl, who took direct issue with the Member's identification, or lack thereof, related to the weighing of relevant Official Plan policies, the principles of its

interpretation, the applicable tests and their consideration, or alleged lack thereof, in the Interim Decision.

JURISDICTION

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

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

a) the reasons for the request;
b) the grounds for the request;
c) any new evidence supporting the request; and
d) any applicable Rules or law supporting the request.

31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:
a) seek written submissions from the Parties on the issue raised in the request; b) grant or direct a Motion to argue the issue raised in the request;
c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or
d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:
a) acted outside of its jurisdiction;
b) violated the rules of natural justice and procedural fairness;
c) made an error of law or fact which would likely have resulted in a different order or decision;
d) been deprived of new evidence which was not available at the time of the Hearing, but which would likely have resulted in a different order or decision; or e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

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

CONSIDERATIONS AND COMMENTARY

24. As the review panel, we acknowledge some overarching considerations that follow and inform the Review of the Interim Decision. The following extract found in many

review decisions of the TLAB forms an appropriate context for the review panel's role in the conduct of the Review:

'Some general observations on Requests for Review have become instructive to the consideration and conduct of such requests.

It is appropriate to state the circumstances surrounding the purpose and application of Rule 31. These comments are general propositions to be kept in the mind of the reviewer so as to ensure that the purpose of the Rule is not redrafted to something different than its public interest objective: to enable a sober second consideration be given to a decision of the TLAB on any of the grounds recited by the Rule.

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

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

A Review Request right is not afforded as an opportunity to re-litigate or reargue a point that was made out but was not favourably received, in the decision affecting a Party. Fundamental to assessing the assertions made in the Request is the need to give the decision a fair and liberal interpretation and construction consistent with its role but tested against the defined, eligible grounds for its reconsideration. A decision must project a determination on matters put to it in a fair, deliberative and reasonable manner, as can be best expressed using clear language.

Members' expressions will differ in that regard and what is delivered by one may not be suitable for another. It is often said that decision writing does not require a punctilious review and recital of every fact or kernel of evidence or that every stop on the road to conclusion must be wrapped in detailed support. On the other hand, a decision must reflect a suitable basis for its conclusions taking into consideration all relevant

considerations, discarding the irrelevant and applying the law and policy made germane to the Tribunal's mandate, including its own deliberations'.[3]

25. The review process is not a second opportunity to re-litigate issues. It is also not an opportunity for the review panel to determine whether we would have decided differently if the review panel was the decision-maker at the hearing. For this specific matter, the Member presided over a hearing of 12 days, had the opportunity to hear from many witnesses, including expert witnesses and residents, and conducted several site visits. The Member was fully immersed in this matter.

26. The review process is a serious examination of the Decision limited to the grounds set out in Rule 31.7 as it then was, and if any of those grounds are satisfied, to provide appropriate relief listed in Rule 31.6.

27. Each of the grounds set out in Rule 31.7 has legal significance and is derived from administrative law jurisprudence. The parties provided submissions on the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[4] (*Vavilov*) as being the most relevant and important for an administrative tribunal including reviewing decisions made by its own members.

28. The Supreme Court of Canada in *Vavilov* provides clarification and direction on the framework to be used by a reviewing court when judicially reviewing an administrative decision. The Court clarified the proper application of the reasonableness standard with a focus on circumstances in which reasons for an administrative decision are required and available to the reviewing court.[5]

29. A reviewer at TLAB does not necessarily follow the standard of reasonableness or correctness when reviewing decisions based on the grounds set out in Rule 31.7. A TLAB decision can be either appealed based on an error of law or can also be subject to a judicial review. We were told the former is being pursued here in a parallel leave application proceeding. There, the standard of correctness (appeal on error of law)[6] and the standard of reasonableness (judicial review) are both applicable depending on whether there is an appeal or judicial review. The review herein is internal to the TLAB and the reviewer is not performing the same function as a court tasked with a judicial review or an appeal of an administrative decision-maker. However, this does not preclude the TLAB from adopting best practices from directions set out in *Vavilov*. Though the review is not entirely judicial in nature, the grounds set out in Rule 31.7 are developed from the compendium of administrative law jurisprudence and legislation. They are directory and frame the relevant basis upon which this review panel may confirm, vary, suspend or cancel the Interim Decision including, if appropriate, the ordering of a new Oral Hearing.

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[3] TLAB Case File Number: 19 161087 S45 08.
[4] 2019 SCC 65 (*Vavilov*).
[5] *Vavilov*, para. 78.
[6] *Vavilov*, paras. 17, 33, 36, 37, 52.

30. At paragraph 15 of *Vavilov*, the Court states:

    In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.[7]

31. At paragraph 83, the Court further states:

    It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also Ryan, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

32. We follow the Court's guidance in that our Review decision must, as a whole, be *transparent, intelligible and justified*. In following this guidance, the reviewer does not seek out every single error in the decision by way of reviewing each sentence in the decision line by line. We, as reviewers, also cannot substitute the decision maker's Interim Decision with our own solely on the basis that we might or would have reached a different outcome or try to find the "correct" solution for the matter.

33. The review panel acknowledges and finds that the Interim Decision has grammatical and typographical errors. However, perfection in a decision is not necessary nor is it the essential goal[8]. Instead, the reviewer must determine whether any alleged error highlighted by a request for review satisfies the

[7] *Vavilov*, para. 15.
[8] We refer to para. 91 of *Vavilov*, wherein the Supreme Court states that "the written reasons given by an administrative body must not be assessed against a standard of perfection."

enumerated grounds in Rule 31.7. A decision that contravenes these grounds cannot not be transparent, intelligible and justified.

34. We have used the foregoing principles throughout this review. We have read the Interim Decision before the Review Hearing and re-read the Interim Decision after the Review Hearing in light of the clear and detailed submissions provided by the parties. We deliberated and discussed each of the alleged errors in detail. Our Review decision is based on a consensus achieved amongst us after significant deliberation.

35. Without any attempt to diminish the importance or argument associated, counsels for the Requestors identified, above, an engrossing list of submissions requiring review panel consideration. These include the following assertions:

   a) "Most importantly", the City Request argued an error of law in the Member's failure to deal with Official Plan policies 2.3.1.4(d) with respect to discouraging non-residential parking on local streets, and 4.1.3(b) with respect to impact considerations of permitted uses in the Neighbourhoods designation (especially, minimize noise and parking adverse impacts).[9]

   b) There is a distinction to be drawn between a 'decision' and an 'order' of the TLAB; the substantive 'decision' was irretrievably made and cannot be retrieved through the device of an 'order' that fails to deal with discrete items, interim or otherwise.

   c) A loss of jurisdiction occurs where there is a finding that 'all the tests have been met' despite contrary evidence, an acknowledged lack of final evidence on impact and a delegation of evidentiary determinations to third parties. It was asserted that the Member was not alive to the issues and tests of impact by the delegation to others of essential elements of impact: e.g., the delivery of the provision of pick-up/drop-off and staff parking. The consequences of an approval could not and was not considered, it was asserted, as the impact of operations was not known, and this constituted a fatal flaw to reaching a finding on the variances.

   d) An earlier Motion to require the essence of external approvals before the Hearing was not addressed (or, it is noted, pursued); therefore, an interim decision that is not a conditional decision resulted in an insufficient evidentiary basis for a final decision, or even a conditional decision that can be finalized administratively.

   e) The failure to deal with the evidence on 'safety' and balance it in the disposition is an error of law, natural justice and procedural fairness.

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[9] City Request, para. 24.

f) The use and employment of 'site visits' far exceeded assessments of 'context' and 'fit' by gathering undisclosed elements of 'relevant and significant information' constituting an abuse of discretion.

g) Entirely missing from the Interim Decision is any reference to the absence of evidence on or to the 'intent of the zoning by-law' or any discussion of it.

h) The intended retention by the Member of jurisdiction is unfair with the passage of time, the staleness of 2018 evidence, the potential for unavailability of the Parties, and the potential for repetitious, prolix, dated, expensive and burdensome processes contrary to the finality intended of an administrative appeal.

ALLEGED ERRORS AND FINDINGS

36. At the beginning of the review hearing, the chair of the review panel had confirmed that we have reviewed the written review materials submitted by all the parties but looked to the counsel of each party to bring forward these submissions. The parties' submissions are described above and follow below based on the parties' oral submissions, with a focus on their written submissions, where applicable.

37. Ms. Pepino in her written submission on behalf of her clients had referred to Rule 31.7(d) but did not discuss it during her oral submissions. Therefore, we have not emphasized the alleged error with respect to this specific rule.

Misapplication of the OP policies resulting in error in law (Rule 31.7(c))

38. Mr. Longo, counsel for the City, submitted that the Member incorrectly applied the OP by excluding any direct reference to two policies, considered by the City to be of central importance, in his reasons.[10] The consequence of this exclusion was that the Member failed to accurately determine whether the Application before him satisfied the general intent and purpose of the OP.

39. The two policies noted to have been excluded are:

Policy 2.3.1.4:

The functioning of the local network of streets in Neighbourhoods and Apartment Neighbourhoods will be improved by:

a) maintaining roads and sidewalks in a state of good repair;

[10] City Request, para. 24.

b) investing in the improvement of bus and streetcar services for neighbourhood residents;

c) minimizing through traffic on local streets; and

d) discouraging parking on local streets for non-residential purposes.

Policy 4.1.3:

Small-scale retail, service and office uses are permitted on properties in Neighbourhoods that legally contained such uses prior to the approval date of this Official Plan. New small-scale retail, service and office uses that are incidental to and support Neighbourhoods and that are compatible with the area and do not adversely impact adjacent residences may be permitted through an amendment to the Zoning By-law, where required, on major streets shown on Map 3, with the exception of portions of streets which have reversed lot frontages. To maintain the residential amenity of Neighbourhoods, new small-scale retail, service and office uses will:

a) serve the needs of area residents and potentially reduce local automobile trips;

b) have minimal noise, parking or other adverse impacts upon adjacent or nearby residents; and

c) have a physical form that is compatible with and integrated into the Neighbourhood.

40. Mr. Longo submitted that the OP is to be read as a whole, as stated in OP 5.6 Interpretation policy:

> 1. The Plan should be read as a whole to understand its comprehensive and integrative intent as a policy framework for priority setting and decision making.
>
> 1.1 The Plan is more than a set of individual policies. Policies in the Plan should not be read in isolation or to the exclusion of other relevant policies in the Plan. When more than one policy is relevant, all appropriate policies are to be considered in each situation. The goal of this Plan is to appropriately balance and reconcile a range of diverse objectives affecting land use planning in the City.

41. Mr. Longo in his oral submissions stated that the reasons in the Interim Decision do not deal with the subject-matter of these policies – including the proposed non-residential use as a daycare and the parking and impact considerations.

42. The City does not take issue with the Member considering other OP policies. Mr. Longo agreed that while the OP must be read in its entirety as per OP 5.6.1, there

are certain policies that are essential to a specific matter that must be considered. Mr. Longo submitted that the decision-maker in his reasons, must refer to them. It is not an issue of recital of the policies but related to the "justification" concept in *Vavilov*, where the Member demonstrates in his reasons that he "wrestled" with the essential evidence and policies. For this specific matter, the City submitted that the Member did not engage in an analysis of the OP 2.3.1.4 and 4.1.3 which the City had argued was of central importance and the most relevant policies at the hearing.[11] They were important because "they are geographically limited to the land use designation of the subject site (Neighbourhoods), and they deal with considerations of "use" of a site."[12] The City submitted that the Member made an error in law by not considering the most relevant policies in light of OP 5.6.1.

43. The relief sought by the City with respect to this alleged error of law is as follows:

    That the review panel, upon review of all relevant evidence and appropriate Official Plan policies that were not considered by the Decision Maker, determine that the appeal does not meet the intent of the Official Plan and vary the Decision to refuse the minor variances pursuant to Rule 31.6(d) and uphold the unanimous refusal of the variances by the Committee of Adjustment.[13]

44. The City did not present its own witness at the hearing with respect to land use planning. However, it was able to pursue the importance of these policies through cross-examination of the Applicant's land use planner, Mr. Sajecki. On cross-examination by the City, Mr. Sajeki had acknowledged that the subject property did not meet certain criteria for "new small scale retail use."[14] In response to the City's submission, Mr. Flett, counsel for the Applicant presented that Mr. Sajecki made an error when he made the said admission, as use of a daycare cannot be considered a small-scale retail use.

45. To support the City's submission, Pearson et al.'s land use planner, Mr. Stagl, provided a supplementary affidavit signed November 25, 2020, where he stated:

    > 6. The Member did not query my evidence respecting the need to balance various Official Plan policies or whether the Plan directed that one or more policies might or should be considered in priority of another as he had based on his own readings of policies 3.1.5.4, 3.1.5.5, 3.1.5.6 and/or 4.1.11.

46. We infer from Mr. Stagl's main and supplementary affidavits that the Member did not ask him about some of the policies that the Member had relied on to make his decision. Had the Member done so, Mr. Stagl, it is said, would have had the opportunity to discuss OP 5.6.1.1 and the policies that the Member relied on. The

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[11] City of Toronto Review Request, paras. 29, 37.
[12] City of Toronto Review Request para. 37.
[13] City Request, para 2(i).
[14] City Request, para. 36.

City had called no planning witness nor was the City Review supported by an affidavit of a planner, as is appropriate in the circumstances. Mr. Stagl in his affidavits makes no reference to policy 4.1.3.

47. We find that both Mr. Flett's submission (as stated above) and, significantly, Mr. Stagl's affidavit and supplementary affidavit as being not relevant, gratuitous and, in the latter's case, constitute instances of commentary on the Interim Decision and Hearing observations that are wholly unsuited. These can be viewed as attempts to introduce evidence at the Review Request stage.

48. The failure to properly consider or to misapply OP policies is an error of law. The Divisional Court in *Toronto (City) v. Romlek Enterprises* stated that:

> The proper interpretation of the Official Plan and the Secondary Plan is not a factual matter to be decided based on opinion evidence from planners, but rather a question of law *(Toronto (City) v. 2059946 Ontario Ltd.,* [2007] O.J. No. 3021 (Div. Ct.) at para. 4). The Board member was required to interpret these documents himself.[15]

49. At issue before us is whether (1) the Member made an error of law by incorrectly applying the OP and (2) if an error is found, whether that error would have resulted in a different Final Decision or final order.

50. We find that the Member has not erred in his interpretation and application of the OP. A significant portion of the decision is dedicated to the Member's analysis of the OP. This analysis includes polices 2.2.1.3(d), 2.2.1.5[16], 3.1.5.4, 3.1.5.5, 3.1.5.6, 3.2.2.1(a).1 and 4.1.11. The City does not allege that the Member erred in his interpretation of these policies – there is no objection to the application and interpretation of these policies. The City's main objection is related to the absence of any reference to the two policies that the City considers of central importance for this matter.

51. The Member tied in other aspects with these policies, such as the "use" anticipated by the zoning bylaw:

> The Official Plan, therefore, treats daycare centres as "local institutions" which "play an important role in the rhythm of daily life" in low density residential area such as this. It does not consider them to be undesirable or unsuitable uses in this area, but rather use which is appropriate as it "plays an important role." The zoning bylaw also anticipates such a use in an area designated Neighbourhoods. It states in Section 2 (2) Purpose of the Residential Zone Category: The Residential Zone category permits uses associated with the

[15] 2009 CanLII 27819, at para. 34.
[16] In page 22 of his decision, the Member refers to the Downtown policies and states OP 2.2.1.5.

> Neighbourhoods designation in the Official Plan. … the zones within this category also include permission for parks and local institutions. The zoning bylaws make specific reference to "local institutions" which includes a day-care centre and has clear language pointing out an intent to allow such a use even though it is qualified.[17]

52. The Member identified his concern with the evidence provided by the land use planning witnesses:

    There is no requirement in the Official Plan to prove need for such facilities as day cares or inequity with respect to them; rather, the Plan encourages this particular use across the City. These policies were not appropriately considered by the planners.[18]

    I make these findings as a result of my site visitations and reading of the applicable Official Plan policies I have outlined above and because I did not find the evidence of either planner addressed these policies to my satisfaction.[19]

53. It is incumbent on the Member to interpret the intent and purpose and apply the OP. It is also an expectation of the parties to put their best case forward. In this matter, the Member was unequivocal that the parties' land use planner witnesses, as expert witnesses, did not put forward all of the OP policies relevant in the determination of this matter. To address Mr. Stagl's statements in his supplementary affidavit and Parties Milne, Uran and Pearson's written submissions regarding breach of natural justice,[20] the onus is not on the Member to call attention to or reference all the relevant policies that should have been considered. The Member's interpretation of specific policies without reference of other policies or this disclosure to the other parties does not amount to a violation of natural justice or breach of procedural fairness. This is not an instance where the Member made a previously unaddressed issue at the hearing germane and central to his Decision. The Member referenced, interpreted and applied in detail a seminal and publicly available policy document as part of his statutory obligation.

54. We do not agree that the reference absence of the two policies that the City considered central to this matter represents an error of law but rather is a product of the weight the Member gave to these policies. The Member heard from many witnesses during the 12-day hearing. He was in the best position to interpret the OP polices and give the appropriate weight to each policy. There can be no doubt that the subject matters of

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[17] Interim Decision, pages 20 and 21.
[18] Interim Decision, page 23.
[19] Interim Decision, page 23.
[20] Parties Milne, Uran and Pearson Review Request, para. 17.

the policies underscored by the City in its request were central to the evidence and the reasons as weighed by the Member.

55. With respect to 2.3.1.4, the City states that the 'discouragement of parking on local streets for non-residential purposes' and the improvement of the local network of streets are not addressed. With respect to OP 4.1.3, the City emphasized as relevant that the concept of small-scale retail use and parking should be on 'major streets shown on Map 3'. The Member may not have specifically addressed these policies preferring instead to address the policy support for daycare uses as a local institution. We find that the subject matters of these policies were addressed in his Decision. Namely, after a discussion of daycare centres as "local institutions", the Member continued to state that:

> I find, therefore, an opinion which attempts to reduce the desirability of *a day care use* as such, by describing it as a *non-residential use* or equivalent to *a commercial use* in an area designated Neighbourhood is not helpful. I find that while there is no basis or obligation upon which to find need, *the Official Plan clearly provides for and supports daycare centres in Neighbourhoods.*[21] [emphasis added]

56. We refer to paragraph 91 of *Vavilov*:

> A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16.

57. Accordingly, the Interim Decision and the reasoning contained are not to be judged on a standard of perfection and based on a checklist of whether all of the OP policies have been explicitly addressed. The Member, in his own style, addressed what he considered to be the relevant OP policies and we do not have any compelling submission before us that the Member's interpretation and application of these policies has resulted in an error of law, let alone one that would likely have resulted in a different decision.

Failure to include conditions and the nature of the decision (Rule 31.7(a) and Rule 31.7(c))

58. Mr. Longo and Ms. Pepino both made submissions with respect to the lack of conditions attached to the Interim Decision and the nature of the order imposed by

[21] Interim Decision, page 21.

the Interim Decision. These submissions overlap and the facts related to these submissions are combined and summarized as follows:

i. At the hearing, conditions to be attached to the decision (if variances were approved) were discussed and a set of five conditions were agreed upon by all parties.[22]

ii. There were other conditions that the City requested, which the Applicant did not agree to.

iii. The Member unequivocally found that the variances individually and cumulatively met the four tests, subject to one condition which is that the approval will not come into effect until December 31, 2021.[23] Later in the Interim Decision, the Member recognized that there are issues of implementation and that the hearing is adjourned to December 3, 2021 to address the issues of implementation pending final approval on December 10, 2021.[24]

59. The set of five conditions that the parties agreed to are as follows (differently framed from those referenced in paragraph 11 of this Review):

i. All experts agreed that a minimum number of on-street parking spaces were required for basic PUDO[25] functioning on the site. The disagreement arises in the number of spaces. Based on the strength of the TMIG Report recommendations a minimum of 5 spaces must be provided.

ii. The installation of all safety signage and pavement markings recommended in the Tedesco Report.

iii. Applicant must apply for and obtain a heritage alteration permit issued pursuant to Section 42 of the Ontario Heritage Act. This was a condition requested by City Planning and Mr. Sajecki agreed it should be imposed.

iv. Vegetative screening along the south property line. This was a condition requested by City Planning and Mr. Sajecki agreed it should be imposed.

v. Rear playground must be constructed with permeable material. This was a condition requested by City Planning and Mr. Sajecki agreed it should be imposed.[26]

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[22] While the five conditions were agreed upon by the parties, the number of parking spaces set out in condition # 1 was not in agreement.
[23] Interim Decision, page 18. The Member later in his decision changed the date to December 20, 2021.
[24] Interim Decision, page 25.
[25] PUDO refers to “pick-up and drop-off”.
[26] City Request, para. 46.

60. The additional conditions that the City proposed but were not agreed upon by the Applicant is as follows:

    i. The Applicant must apply to the General Manager, Transportation Services and City Council as required, and be granted a permit for at least 2 commercial boulevard parking spaces.

    ii. The Applicant must obtain permission from the City of Toronto in the form of a lease or license and enter into any another other form of agreement as deemed necessary to the City to permit use of the municipal right of way as a playground.[27]

61. Mr. Longo submitted that the "election to impose conditions is not separate from or outside of being satisfied that the Four Tests are met."[28] Mr. Longo referred to the Interim Decision where the Member stated that the variances are granted unconditionally.[29] By granting the variances unconditionally, the Member has "closed the book" on this matter and made a final determination. Mr. Longo further stated that the Member erred in jurisdiction (Rule 31.7(a)) when he attempted to retain jurisdiction by adjourning the hearing to December 3, 2021 after he had made an unconditional approval of the variances.

62. Mr. Longo requested that the relief that the Decision be cancelled, and in the alternate:

    The review panel vary the Decision and impose as conditions of approval a requirement that the owner obtain approvals from the City for the creation of at least 4 dedicated pick-up and drop-off spots on street, as well as all other conditions of approval that were subject of agreement with the Appellant's expert witness.

    Or

    That the Decision be set aside and a new hearing be scheduled concerning the Application, pursuant to Rule 31.6(c) of the TLAB's Rules.[30]

63. Ms. Pepino made further submissions with respect to conditions and the nature of the Interim Decision. She noted that the Member recognized that there are issues of implementation connected with having a daycare on the subject property and that the Member has noted these issues in page 25 of the Interim Decision. She submitted that the matter before the Member was premature and these issues of implementation should have been addressed at the hearing as part of the four test analysis. She was unequivocal in stating that her position was not that there had to be full compliance by the Applicant with respect to these matters of

[27] City Request, para. 47; Affidavit of Sara Amini, p. 83 and page 38.
[28] City Request, para. 41.
[29] Interim Decision, page 25.
[30] City Request, para. 47.

implementation. What should have been required as part of the analysis of the four tests was to require the Applicant to provide some form of satisfactory evidence that the Application has met the four tests. In her oral submissions, she provided some examples, such as work with city staff to address heritage requirements, parking lot requirements, etc. Ms. Pepino submitted that by not engaging in such analysis, the Member abrogated his jurisdiction by "improperly delegating to others, decisions on future physical and functional characteristics of the proposed use."[31] Both counsels argued that the Member's Interim Decision "put the cart before the horse"; namely, made a final determination before all the evidence on suitability, permission and impact was available for assessment. It is noteworthy that Ms. Pepino acknowledged that this issue of prematurity had been raised by the residents but not dealt with in a Motion brought prior to the commencement of the Hearing. It had not been pursued at that time; it is raised now as a support component of the Residents Review.

64. With respect to the nature of the Decision, Ms. Pepino underscored this submission by distinguishing for the panel the difference between a 'decision' and an 'order', in administrative law, but without references to either the Rules of the TLAB or case authority. She submitted that the Decision is final with an interim order. As the Member has made a final decision, she asserted he is now *functus officio* and any attempt to hold another day of hearing to discuss matters of implementation is an error of jurisdiction.

65. We direct the Requestors to the definition of "Final Decision" set out in Rule 1.2 TLAB's Rules, which states:

> "Final Decision" means the decision made by the TLAB following the Hearing of evidence and submissions;
>
> The Member's decision to hold another day of hearing for further submissions implies that the Member made an Interim Decision and not a Final Decision.

66. Ms. Pepino, on behalf of her clients, sought the following relief:

    i. The Decision and Order be cancelled and that staff are directed to take appropriate action to expunge it from the record.

    ii. In the alternative that the Order be cancelled, and the Decision varied to remove any approval of the variances or granting of the appeal, but rather to require the applicant/appellant to provide evidence at a continued hearing that the matters listed as necessary for operation of the use have been secured, or have been conditionally approved by the named Ministry, body, agency or individual, no later than December 2021.

[31] Residents Request, para 8.

67. At the review hearing, Ms. Pepino appeared agreeable to alternate but secondary relief, suggested by Chair Lord, which was to vary the Interim Decision and impose conditions. Further, with respect to the second relief, Ms. Pepino expressed concern that should the hearing be continued with the current Member, then the relief will not be effective as the Member has already made up his mind and rendered a final decision.

68. We agree with the submissions of both Ms. Pepino and Mr. Longo that the Member erred in law and in jurisdiction by not imposing conditions and also by retaining jurisdiction when no conditions are imposed.

69. The Member was aware of the difficulty in finalizing the matters before him. In his Decision, he identified the difficulty:

> Page 9: “The jurisdiction of the Toronto Local Appeal Body (TLAB) in this case is clearly limited in that the Tribunal’s approval of the variances would not necessarily result in the approval of the establishment and operation of the proposed daycare.”
>
> Page 18: “Based on the evidence I heard, read and summarized above, and based as well on a number of visits to the site, I conclude for the reasons I set out below that the variances individually and cumulatively meet the four tests. The appeal, therefore, should be allowed and the variances approved; subject, however, to the following condition: the approval will not come into effect until December 31, 2021.”
>
> Page 24: “In conclusion, I find all the variances individually and cumulatively meet the four tests.”
>
> Page 25: “Having made a finding that the variances should be granted there are nevertheless issues of implementation. I find that the day care will only function properly, and variances will only be meaningful if: (a) street parking is approved by City council, (b) a provincial license is obtained based on a plan approved by a provincial director demonstrating that such matters as: street parking (where children and their parents cross the street) and play areas, garbage and stroller storage, and access and egress, for example, are shown to be appropriate; (c) a site plan is approved by the Chief Planner of the City, or his delegate, demonstrating such matters as landscaping, including soft landscaping, and buffering, and any boulevard use; (d) approved heritage preservation is provided for; and, (e) a boulevard lease is entered into, if necessary.
>
> To make my approval conditional upon all of these matters it was argued would be an improper delegation of my approval authority. While I do not agree with that position, in order to avoid a dispute respecting it, my Order is an Interim Order unconditionally granting the appeal and approving the requested variances.”

> Page 26: "The interim order, the unusual delay in the coming into force of my final order, and the recommencement of the Hearing prior to the Order coming into force, will ensure that the appellant has an opportunity to obtain all appropriate approvals and that no bodies will refuse an approval because the variances have not been approved. On the other hand, a failure to act in good faith to obtain an approval may result in the final Order being vacated.
>
> The appeal is allowed and the variances in Appendix 1 are granted and approved on an interim basis. This Interim Order will come into force and effect on December 10, 2021; however, it is subject to the continued hearing of the matter on December 3, 2021."

70. A review of these above portions of the Interim Decision fairly and clearly shows that the Member struggled with the concept of appropriate conditions and that some of the "issues of implementation" (such as the provincial license) may require the approval of variances before approval can be granted. As part of his statutory obligation to interpret and analyze the four tests, in our view, he should have considered these conditions and addressed them properly with finality in his disposition.

71. We find that the Member's reference to "issues of implementation" are conditions and should be viewed as such. The Member erred in law by not addressing these "issues of implementation" as direct conditions. We are satisfied that they are of such moment that their absence, if not secured, would likely have resulted in an error, even the possibility of a different final decision or final order. Instead, the Member made a determination, and retained jurisdiction to address the approvals from various other approval bodies. It is an error of law to avoid addressing these "issues of implementation" directly in his Interim Decision and then to attempt to retain jurisdiction and adjourn to another date to deal with these issues. He further added a good faith test only on the part of the Applicant/Appellant on the approval of the conditions. The good faith test is presumed and not an appropriate addendum to the four statutory tests.

72. It is an error of law to approve the variances "unconditionally" and then impose a condition subsequent that may result in vacating the decision. This aspect of the Interim Decision is neither transparent nor intelligible. This aspect has left the parties perplexed about whether the Member's disposition is a Final or an Interim Decision. The inclusion of the conditions would have resulted in a different decision in content, as it would be clearly conditional. In our view, the Member erred in the intent to retain jurisdiction in the face of his satisfaction that the variances satisfied the relevant policy and statutory considerations.

73. We place no weight in the Requests' submissions that the conclusions reached on the variances inexorably depended on the determination of the external agencies engaged in their own mandates of consideration. The evidence tested the known range of impacts expected and no others were raised or demonstrated satisfactorily as not having been canvassed. The fact that terms or conditions providing for the exercise of mandates of external agencies have yet to be finalized

is a common experience in the determinations of the TLAB. If those mandates are not satisfied, it may be that the approvals of the TLAB within its jurisdiction may not come to fruition. The TLAB and the Member should have every expectation that those mandates will be conducted also under the presumption and in good faith and in a manner commensurate with own responsibilities and the public interest. Nothing more or less should be attributed to them. While it may not be in every circumstance that absolute finality is required, in the matters that were before the Member it is abundantly clear that the effort to retain jurisdiction after those mandates have been exercised leads to such a proliferation of unfair consequences, recited quite thoroughly by Ms. Pepino, as to be unsupportable.

74. We find that to correct this error, it is necessary to vary the Interim Decision to impose conditions that are relevant to this matter. This is suitable relief, as we do not find that the Member has erred in approving the variances themselves but did err in failing to attach conditions to be associated with such approval. Before us, we have the conditions that were agreed upon by the parties, the extra conditions that the City would have preferred to include, and the “issues of implementation” that the Member identified in his Interim Decision. Adding conditions to the variances will correct the error in the Interim Decision while retaining the substance of the Member’s findings and the overall decision to approve the variances, the reasons for which we have traced and find replicable, despite the challenges.

75. The conditions are attached to this Review decision as **APPENDIX B** and are explained as follows:

    a) Condition # 1: This condition addresses the requirement that a provincial permit to operate a daycare must be obtained from the responsible provincial authority. In his Interim Decision, the Member stated that the variances will be meaningful if his “issues of implementation”, among others, are dealt with. By including this condition, the TLAB will not operate beyond its jurisdiction as this condition does not allow the TLAB to overreach, attempt to influence or decide matters differently or on behalf of any provincial decision-making authorities. Failure to obtain the necessary provincial permit can, we are told, result in a failure to operate a daycare on the subject property.

    b) Conditions # 2, 3, 6, 7 and 8: These conditions had been agreed upon by all parties and are reasonable. The Member referred to these conditions as “issues of implementation.”

    c) Condition # 4: The Member found that “the downtown area of the City parking spaces do not need to be provided for staff on site, as was it was uncontested that the area was served by public transit, a public parking lot, and the day care could be reached on foot of by bicycle.”[32] However, parking may be required for provincial approval to be provided or the Applicant may determine

[32] Interim Decision, page 19.

commercial boulevard parking. This condition addresses the necessity of such parking if and when such parking becomes a requirement.

d) Condition # 5: In his Decision, the Member found that "…. the use of the boulevard for a play area (if permitted by the City) instead of a garden does not override the other factors I have addressed. Children playing as opposed to plants growing is not necessarily a significantly adverse result."[33] The Interim Decision does not oppose the use of the municipal right-of-way/boulevard as the playground and the Member considered this condition as an "issue of implementation" as well. The play area may be required for provincial approval to be provided or the Applicant may determine to pursue the play area on the boulevard. This condition addresses the necessity of such a play area if and when such a play area becomes a requirement.

Errors arising from site visits resulting in a breach of natural justice or procedural rules of fairness (Rule 31.7(b))

76. Ms. Pepino submitted that the Member solely relied on the information he gained on his site visits to dismiss the opinions of expert planners and substitute his own decision.[34] She contends that the Member's did not disclose the relevant and significant information he gleaned from him site visits to the parties and that that constitutes an abuse of discretion and error of law.

77. The relevant portions of the Interim Decision that deals with site visits are as follows:

Page 12: It is imperative to note that, as I informed the Parties, I visited the site a number of times. Such visits were important in my application of the four tests.

Page 23: The planner in opposition clearly was of the view that the variances did not. In his opinion this proposal "did not fit." His opinion was based on a number of factors: such as historic preservation; intensity of use; and, use of public realm for private purposes. *I have visited the site and reviewed the plans*. I do not agree. The historic building is to be maintained, the new use is indirectly encouraged by the Official Plan, the use of the boulevard for a play area (if permitted by the City) in-stead of a garden does not override the other factors I have addressed. Children playing as opposed to plants growing is not necessarily a significantly adverse result. *I make these findings as a result of my site visitations and reading of the applicable Official Plan policies I have outlined above* and

[33] Interim Decision, page 23.
[34] Residents Review, paras. 19-23.

because I did not find the evidence of either planner addressed these policies to my satisfaction. [emphasis added]

78. Ms. Pepino recognized that site visits by Members are mandated by the City Council. She submitted that such site visits cannot violate the following legal principle as stated by the Divisional Court in *Juno Developments (Parry Sound) Ltd. v. Parry Sound (Town)*:

> It is clear that where a tribunal collects evidence outside of the hearing itself, without the opportunity for a party to cross-examine, then the tribunal has failed to give each party a reasonable opportunity to be heard. This is a fundamental principle of natural justice.[35]

79. The Member's statements regarding site visits must be read in context of the whole of the Interim Decision. The Member gave importance to his site visits and referred to his site visits in conjunction with the review of site plans or his review of OP policies. It is clear from reading the Interim Decision that the Member did not solely rely on his site visits or any previously unidentified element for his conclusions, nor were there undisclosed and relevant findings of importance that should have been disclosed to the parties. He reviewed the site plans, made significant analysis of the OP polices and contextualized these with his site visits. We see no basis in the substance of the submission that site visits in this instance added any particular impact or observation which was not discussed in the evidence or which was not properly identified. A site visit (or visits) is an important source to support the Members' appreciation of the subject property, neighbourhoods and issues. The attempt to confine the purpose of a site visit to one or more descriptive words in a policy direction of the Official Plan is not something this panel is prepared to support.

80. We do not find that the site visits by the Member have resulted in a breach of natural justice or procedural fairness.

<u>Failure to address the general intent and purpose of the zoning by-law, resulting in error in law (Rule 31.7(c)</u>

81. Ms. Pepino submitted that the Member erred in law when he failed to address the general intent and purpose of the zoning by-law. She submitted that the Interim Decision does not have any reference or application of this test, such that the "intent" of the zoning by-law cannot be found in the Interim Decision.

82. We disagree. A careful review of the variances at issue show that many of the variances are for existing conditions and the others were related to the use of the building on the subject property as a daycare. The Member addressed the concept of "use" as a daycare. Instead of a regimental analysis of each of the four tests, he

[35] 1997 Carswell Ont. 1049, para. 14.

made an intuitive and combined analysis of the “use” concept as relevant in both the OP policies and in the zoning by-law. The Member noted that the use of building as a daycare is a major issue[36] and made the following references and conclusions:

> Page 16 (under Evidence): The evidence respecting use related largely to whether a day care centre should be permitted in this building, as the City’s bylaw designating the site historic stated, that it was constructed as a retail facility. It was for this reason one of the variances was necessary: since the bylaws requires a daycare centre be in a detached or semi-detached house and constructed as such. The appellant’s evidence was that the building’s appearance was preserved since no significant changes were being made to the external designated facade and that the building’s appearance was appropriate for the neighbourhood. The residents’ planner’s evidence was to the contrary. In his opinion, the building had a retail appearance, and thus was different from the residential physical character of the neighbourhood.
>
> Page 21 (Reasons, Analysis and Findings): The Official Plan, therefore, treats daycare centres as “local institutions” which “play an important role in the rhythm of daily life” in low density residential area such as this. It does not consider them to be undesirable or unsuitable uses in this area, but rather a use which is appropriate as it “plays an important role.” The zoning bylaw also anticipates such a use in an area designated Neighbourhoods. It states in Section 2 (2), Purpose of the Residential Zone Category: The Residential Zone category permits uses associated with the Neighbourhoods designation in the Official Plan. …
>
> the zones within this category also include permission for parks and local institutions.
>
> *The zoning bylaws make specific reference to “local institutions” which includes a daycare centre and has clear language pointing out an intent to allow such a use even though it is qualified.* [emphasis added]

83. The Member, therefore, notes that the use of a daycare is not a new use. It is a use which is permitted but subject to specific restrictions. These restrictions are the reason why variances are being sought. Our attention was not called to any other provision seminal to the intent of the zoning by-law that was engaged by the variances sought and not addressed and was not simply an existing condition. The Interim Decision sufficiently considers the zoning instrument to satisfy us that no error has occurred through this submission.

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[36] Interim Decision, page 8.

84. The Member also dealt with another aspect of the requested variances, which was whether the built form of the building resulted in the requirement for Variance # 3 (see: **APPENDIX A** of this Review). The Member noted the physical structure of the building and addressed the historic use of the building:

    The building is two stories and is composed of two adjoining semi-detached buildings; each has a large window fronting on Sackville. It has a large veranda which fronts on Sackville as well. The veranda occupies the City owned Sackville St. boulevard. The building is currently not in use; immediately prior to this time it was used as a butcher shop and retail store. By its appearance and age, it fits with the physical character of the neighbourhood, does not stand out, and is currently not out of keeping with the neighbourhood.[37]

85. It was open for the Member to conclude that if the daycare's use was an available option, then it was appropriate to have a daycare on the subject property based on the evidence before him. As such, we do not find that the Member erred in law as he addressed the general intent and purpose of the zoning by-law.

<u>Failure to address the issue of safety, resulting in error in law (Rule 31.7(c))</u>

86. Ms. Pepino submitted that the increase in traffic and resulting safety issue was not addressed in the Interim Decision. This issue was significant to the parties and the participants at the hearing. Ms. Pepino submitted that instead of addressing the safety concerns, the Member considered these concerns as a minor issue under the banner of the "traffic and parking" issue.

87. We find that the consideration of pedestrian safety and its references are found throughout the Interim Decision, for example:

    Page 15: Nor was it clear that on street parking was so dangerous to the children and parents, as a result of needing to cross the street to reach the day care from a parked car, that it should not be allowed.

    Page 19: The safety of on street drop-off and pick up is, as will be discussed below, a matter of provincial concern, but in my view crossing a street to a daycare in a neighbourhood like this in downtown Toronto is not a serious risk but one which any parent will have to evaluate in deciding whether to use the facility.

88. The Member may have included the safety concerns as part of traffic and parking issues; however, the Member, throughout his Interim Decision, clearly addressed parking and traffic issue as a main issue, along with reference to safety issues as

[37] Interim Decision, pages 6 and 7.

stated in the preceding paragraph. We are satisfied that the Member did not overlook this aspect in respect of either the nature or scale of the variances.

Conclusion

89. We find that the review requestors in their Requests have not provided compelling submissions to cancel the Member's Interim Decision - on the grounds stated in the foregoing paragraphs.

90. We further find that the Member erred in law and in jurisdiction because he failed to impose pertinent conditions to the approval of the variances. He further erred in retaining jurisdiction after approving the variances. We find that the most suitable and practical remedy is to vary the Interim Decision to make it a Final Decision, to remove the adjournment of the Hearing and to include a list of conditions for the approved variances set out in **APPENDIX A**.

REVIEW REQUESTS DECISION AND ORDER

91. The Requests in this Review are granted in part.

92. The Interim Decision dated August 13, 2020 insofar only as it relates to that part thereof by its language contemplating an interim order, is cancelled.

93. The Decision and Order paragraph of the Interim Decision dated August 13, 2020 is varied by its deletion and replacement with the following:

    a) The variances listed in **APPENDIX A** are granted, subject to the Conditions of Approval identified in **APPENDIX B.**

    b) The Conditions of Approval 1,2,3,4 and 5 in **APPENDIX B** are to be complied with on or before December 10, 2021, or such further time as a different Member of the TLAB may permit, failing which the Requests for Review requesting cancellation of the August 13, 2020 Decision are granted and the variances approved in paragraph 1 hereof are vacated and the decision of the Committee of Adjustment is confirmed.

    c) **APPENDIX A** and **APPENDIX B** form part of this Decision and Order**.**

94. Subject to the disposition so noted, the Decision and Order dated August 13, 2020 is otherwise confirmed.

95. If difficulties arise in implementing this disposition, a different Member of the TLAB may be spoken to, on Notice.

X

I. Lord
Panel Chair, Toronto Local Appeal Body

X

S. Talukder
Panel Chair, Toronto Local Appeal Body

X

J. Leung
Panel Chair, Toronto Local Appeal Body

APPENDIX A

Variance Approvals

1. Chapter 10.5.50.10.(3), By-law 569-2013

A minimum of 50% (S6.62 m^2) of the rear yard must be maintained as soft landscaping. In this case, 0% (0 m2) of the rear yard will be been maintained as soft landscaping.

2. Chapter I0.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index of the mixed-use building is 1.0 times the area of the lot (354.82 m^2). The building will have a floor space index equal to 1.72 times the area of the lot (610.37 m2).

3. Chapter 15045.20.1 j2)(A), By-law 569-2013

A day nursery is a permitted use provided that it is located in a building originally constructed as a detached house or semi-detached house and that the day nursery occupies the entire building. In this case, the day nursery will not be located in a detached house or semi-detached house.

4. Chapter 200.5.10.1.(1), By-law 569-2013

A minimum of two parking spaces is required to be provided. In this case, zero parking spaces will be provided.

I. Section 6(2)(12)(i), By-law 438-86

A day nursery is a permitted use provided it is the whole of a detached house or semi-detached house. In this case, the day nursery will not be located in a detached house or semi-detached house.

2. Section 4(5)(B), By-law 438-86

A minimum of two parking spaces is required to be provided for on-site. In this case, there will be zero parking spaces provided for on-site.

3. Section 6(3) Part III 1(A), By-law 438-86

A minimum of 30% of the lot area (106.45 m) shall be landscaped open space. In this case, 0% of the lot area (0 m^2) will be landscaped open space.

4. Section 6(3) Part 11, By-law 438-86

The maximum permitted gross floor area of a mixed-use building is 1.0 times the area of the lot (406.45 m^2). The building will have a gross floor area equal to 1.72 times the area of the lot (610.37 m^2).

5. Section 6(2)(12)(iv), By-law 438-86

A day nursery is a permitted use provided no part of the building is closer to the nearest side lot line than 0.5 m. The building will be located 0.0 m from both the north and south lot lines

APPENDIX B

Conditions of Approval

1. The TLAB is in receipt of a written communication from the Owner providing evidence from an agent on behalf of the Province of Ontario that a permit, license or other approval, conditional or otherwise, has been issued by the Ministry of Education or other provincial authority authorizing the operation of a daycare at the subject property.

2. The TLAB is in receipt of a written communication from the General Manager, Transportation Services of the City that an appropriate number, safety signage, pavement markings or other forms of delineated on-street parking spaces**,** in proximity to the subject property and for the purpose of the pick-up and drop-off of daycare children, have or will be provided to the satisfaction of the General Manager.

3. The TLAB is in receipt of a written communication from the General Manager, Transportation Services of the City that the Owner has paid for or provided security in the amount necessary to provide drawings for and the installation of such facilities or matters required in Condition 1, generally in accordance with the recommendations of the *Parking Needs and Traffic Assessment Report* of Tedesco Engineering for the subject property, dated August, 2018 (Hearing *Exhibit 1*), as may be further modified to the satisfaction of the General Manager, Transportation Services.

4. At the Owner's discretion or if required by any Provincial approval to so provide, the TLAB is in receipt of a written communication from the General Manager, Transportation Services confirming that the Owner has been granted (or has not applied for) a permit for commercial boulevard parking space in the location of existing boulevard parking (Drawing A1.1, Hearing *Exhibit 1, p.7*), at the Owner's sole expense or security, to the satisfaction of the General Manager, Transportation Services.

5. At the Owner's discretion or if required by any Provincial approval to so provide, the TLAB is in receipt of a written communication from the Chief Planner of the City confirming that the Owner has been granted (or has not applied for) a lease or license or entered into any other form of agreement required by and satisfactory to the City to permit the use of the municipal right-of-way as a children's playground in the location depicted in Drawing A1.1, Hearing *Exhibit 1, p.7*, at the Owner's sole expense or security, to the satisfaction of the Chief Planner.

6. Prior to the issuance of a building permit, building permit drawings, including plans, elevations and details shall be submitted to the satisfaction of the Senior Manager, Heritage Preservation Services and a heritage renovation or alteration permit or other approval shall be obtained, if required, under the provisions of the *Ontario Heritage Act.*

7. Permanent vegetative screening shall be planted and maintained in the rear yard of 459 Sackville Street along the full extent of the south property line at a minimum height of 3.0 m prior to occupancy for daycare purposes, at the Owner's sole expense or security, and to the satisfaction of the Chief Planner.

8. The rear yard playground of the subject property shall be constructed with permeable materials prior to occupancy for daycare purposes, at the Owner's sole expense or security, and to the satisfaction of the Chief Planner.