Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Monday, May 31, 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): GEORGIA FRAGGOULIS

Applicant(s): MODULAR HOME ADDITIONS INC

Property Address/Description: 19 WOLVERTON AVE

Committee of Adjustment File 20 112470 STE 14 MV

Number(s):

TLAB Case File Number(s): 20 193062 S45 14 TLAB

Motion Hearing date: March 22, 2021

DECISION DELIVERED BY CHRISTINE KILBY

APPEARANCES

Name	Role	Representative
Modular Home Additions Inc.	Applicant	
Anne-Marie McGonigle	Owner/Party	
Norm Rumfeldt	Primary Owner/Party	
Georgia Fraggoulis	Appellant	

INTRODUCTION

This is a Motion to Dismiss an Appeal without holding a Hearing, as permitted under the *Planning Act* and the Toronto Local Appeal Body (**TLAB**)'s Rules of Practice and Procedure (**Rules**). The hearing of the Appeal is scheduled to take place on June 21, 2021.

The Moving Party, Anne-Marie McGonigle, co-owns with Norm Rumfeldt (**Owners**) a home at 19 Wolverton Avenue in the former municipality of East York (**Subject Property**). The Responding Party and Appellant before the TLAB is Georgia Fraggoulis, a resident of 17 Wolverton Avenue which is next door to the Subject Property.

Ms. McGonigle brought this Motion on March 4, 2021. The Motion was heard on March 22, 2021 via Webex Virtual Hearing. Ms. McGonigle, Mr. Rumfeldt, and Ms. Fraggoulis appeared. No other Parties or Participants attended the Motion Hearing.

BACKGROUND

In a Decision mailed on September 1, 2020, the Owners obtained approval from the Committee of Adjustment, Toronto and East York Panel (**COA**) for two variances to permit the construction of a second-storey addition with a rear balcony. The variances are:

1. **Chapter 10.5.40.60.(7) By-law 569-2013**

Roof eaves may project a maximum of 0.9 m provided that they are no closer than 0.3 m to a lot line.

In this case, the eaves will project 0.29 m and will be located 0.01 m from the south lot line.

2. **Chapter 10.20.30.40.(A) By-law 569-2013**

The maximum permitted lot coverage is 35% of the lot area (87.79 m^2).

The altered detached dwelling will cover 41% of the lot area (102.75 m^2).

The COA's approval was subject to a condition that the rear second floor balcony shall be constructed with opaque privacy screening or fencing that is permanent, located on the south edge, to a minimum height of 1.5m, measured from the floor of the deck.

The Appeal

Ms. Fraggoulis filed a Notice of Objection before the COA and appeared at the virtual COA hearing held August 26, 2020. Following the COA's approval of the variances, Ms. Fraggoulis filed a September 12, 2020 Notice of Appeal with the TLAB and the Tribunal set a Hearing date for June 21, 2021. The nature, reasons and grounds for the Appeal as set out in the Notice of Appeal include:

- The COA's decision does not "fit the spirit" of the City of Toronto Official Plan (**OP**) and the variance is not minor;
- The rear second storey deck "that was part of the 41% lot coverage they requested" goes beyond the rear line of the dwelling;
- A rear second storey deck does not respect and reinforce the physical characteristics of the neighbourhood;

- Rear second storey balconies are not a prevailing physical characteristic of the properties in the relevant geographic area;
- The proposed rear second storey balcony cannot exist in the neighbourhood without conflict. It will diminish the quantity and quality of Ms. Fraggoulis' enjoyment of her rear yard due to concerns about privacy and overlook;
- There is concern that allowing the rear second storey balcony in this case will create a precedent; and
- Second storey decks are intrusive and will cause an undesirable impact on the neighbourhood.

The last paragraph of the Notice of Appeal states: "While we are aware that a balcony can be constructed as a right by our neighbours, it is using the minor variance to design and build the second storey balcony. However, a minor variance is a relative expression and must be interpreted with regard to the particular circumstances involved. We, respectfully, urge you to rule against the building of the second storey balcony because it does not fit the criteria in the Official Plan."

The Notice of Appeal uses the terms "deck" and "balcony" interchangeably but as the proposal before the COA was for a rear balcony, I will use the term 'balcony' throughout.

Motion to Dismiss

The Motion is supported by Ms. McGonigle's affidavit sworn March 4, 2021. In the "Grounds" section of her Notice of Motion, Ms. McGonigle asserts that Ms. Fraggoulis "has failed to provide reasonable grounds for appeal. The essence of her appeal is completely unrelated to the variances that were approved by the Committee of Adjustment…" (para. 1). Essentially, Ms. McGonigle takes the position that Ms. Fraggoulis' Appeal is focused solely on the second storey rear balcony, which does not require a variance. As no variance is required for the construction of the balcony, Ms. McGonigle argues that it is not before the TLAB and the Appeal should be dismissed.

The Motion materials also address the merits of the Appeal, arguing that second storey balconies are a common feature in the neighbourhood and that Ms. Fraggoulis' privacy concerns have not been adequately proven. To that end, Ms. McGonigle filed photographs of other properties in the area which have balconies and, as Exhibit 3 to the Motion, a list of signatures of neighbours supportive of the Owners' plans. Ms. Fraggoulis pointed out that these signatures were not properly appended to an affidavit but did not oppose their admission as an exhibit to the Motion. In any case, I did not review the photographs or signatures in great detail, nor did I engage with submissions on the merits of the Appeal as these are not at issue on this Motion.

Ms. Fraggoulis asked about using Google Maps during the Motion to show the buildings in the photographs submitted by the Owners. I explained that the photographs relate to the merits of the Appeal and were not related to the issues to be decided on the Motion. Accordingly, I indicated that I did not intend to review those photographs and so there would be no need to visit Google Maps during the Motion Hearing.

During the Motion Hearing, I directed Ms. McGonigle to Rule 9.1 of the TLAB's Rules and asked her to identify the grounds on which she relies for the Motion. Ms. McGonigle relied upon Rules 9.1(a)-(d), (h) and (i). The full text is reproduced below under 'Jurisdiction.'

Response

Ms. Fraggoulis filed a Notice of Response to Motion dated March 14, 2021 requesting that the Motion be dismissed. In response to the assertion that the Appeal was baseless and frivolous, Ms. Fraggoulis noted:

> We filed a Notice of Appeal on the grounds that application [sic] does not satisfy the test under Section 45(1) of the Planning Act in terms of satisfying the general intent of the Official Plan. The application adversely affects my property and can cause an adverse impact on the neighbourhood in general in that it won't co-exist in harmony with the existing physical characteristics of dwellings on small lots with mutual drives.

Ms. Fraggoulis' Response also pointed out that her privacy concerns stem from the close proximity of the neighbouring properties and the length of time a person can sit on a balcony versus looking out a second-storey rear window. Ms. Fraggoulis referred to a TLAB decision dated August 20, 2019 relating to a property known as 129 Campbell Avenue (**Campbell Decision**.) Ms. Fraggoulis cites the Campbell Decision as an example of a case where a rear deck was refused on the basis that it would be intrusive for the neighbour. I will address the Campbell Decision in greater detail in the 'Analysis' section below.

The Response also refers to a list of signatures of neighbours who oppose rear balconies (Exhibit A to Ms. Fraggoulis' Affidavit). As with the list of signatures collected by Ms. McGonigle, I gave the signatures no weight as they relate to the merits of the Appeal.

There were other points of dispute between the Parties about misleading evidence presented to the COA and confusion among neighbours regarding the signatures being collected. These are not germane to the question to be determined on this Motion and accordingly I did not consider them.

MATTERS IN ISSUE

Does this Appeal fall within the scope of cases that can be dismissed without a Hearing as defined by the applicable statute?

JURISDICTION

In order for the TLAB to dismiss an Appeal without a Hearing, the following statutory test must be satisfied.

S. 45(17) *Planning Act* - Dismissal without hearing

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if,

(a) it is of the opinion that,

> (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,
>
> (ii) the appeal is not made in good faith or is frivolous or vexatious,
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> (iii) the appeal is made only for the purpose of delay, or
>
> (iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process;

(b) the appellant has not provided written reasons for the appeal;

(c) the appellant has not paid the fee charged under *the Local Planning Appeal Tribunal Act, 2017*; or

(d) the appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal.

This test is codified in the TLAB Rules as follows:

Rule 9.1 of the TLAB Rules of Practice and Procedure

Adjudicative Screening by Member

9.1 In the case of an Appeal under subsection 45(12) of the *Planning Act* the TLAB may propose to, or upon Motion, dismiss all or part of a Proceeding without a Hearing on the grounds that:

a) the reasons set out in Form 1 do not disclose any apparent land use planning ground upon which the TLAB could allow all or part of the Appeal;

b) the Proceeding is frivolous, vexatious or not commenced in good faith;

c) the Appeal is made only for the purpose of delay;

d) the Appellant has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;

e) the Appellant has not provided written reasons and grounds for the Appeal;

f) the Appellant has not paid the required fee;

g) the Appellant has not complied with the requirements provided pursuant to Rule 8.2 within the time period specified by Rule 8.3;

h) the Proceeding relates to matters which are outside the jurisdiction of the TLAB;

i) some aspect of the statutory requirements for bringing the Appeal has not been met; or

j) the submitted Form 1 could not be processed and the matter was referred, pursuant to Rule 8.4, for adjudicative screening.

EVIDENCE

I explained to the Parties that a Motion is typically a hearing of legal arguments with reference to affidavit evidence, and that the evidence in each Party's affidavits would form the basis for the decision. Nevertheless, as both Ms. McGonigle and Ms. Fraggoulis were self-represented, I allowed them some leniency in speaking to the matters at issue and presenting evidence in the form of exhibits, given the importance of the Motion. The TLAB Rules provide for flexibility in favour of the just, expeditious and cost-effective adjudication of matters before the TLAB (Rule 2.11).

Ms. McGonigle and Ms. Fraggoulis were both solemnly affirmed.

It was presumed without being proven that the Subject Property is located in an area designated as *Neighbourhoods* in the OP.

Moving Party

Ms. McGonigle argued that Ms. Fraggoulis has not set out reasonable grounds for the Appeal in relation to the proposed variances at issue, but rather has focused her arguments and documentary disclosure on the proposed rear second storey balcony. Ms. McGonigle argued that this singular focus on the balcony is grounds for dismissal of the Appeal.

First, should the Owners' Application be approved, the balcony will be constructed as of right because it complies with the applicable zoning bylaw. In support of this argument, Ms. McGonigle referred to an exchange at the COA hearing between a COA member and Ms. Fraggoulis documented at paragraph 2 of the Notice of Motion.

Second, Ms. McGonigle noted that the proposed rear balcony is not connected to the variances sought for the Subject Property. Attached to Ms. McGonigle's Affidavit as Exhibit A is a Zoning Notice dated January 17, 2020 signed by Daniel Ndirangu, a City Zoning Building Examiner. It indicates that the two zoning bylaw variances required for the Owners' project are 10.5.40.60.(7) - Roof Projections, and 10.20.30.40(1) - Maximum Lot Coverage. The balcony is not referenced.

Ms. McGonigle later corresponded with Mr. Ndirangu to clarify whether or not the balcony was incorporated into the maximum lot coverage calculation. His response is in the record as Exhibit 1, an email from Mr. Ndirangu to Ms. McGonigle dated February

17, 2021. In that email, Mr. Ndirangu explained that the second storey balcony does not have an impact on the lot coverage calculations. Mr. Ndirangu later confirmed in an email dated February 18, 2021 (Exhibit 2) that his clarification relates to the zoning deficiencies identified in the January 17, 2020 Zoning Notice which he prepared for the Subject Property.

Third, Ms. McGonigle argued that any concerns about the impact of the balcony on Ms. Fraggoulis' privacy have been taken into account in the form of the condition for opaque screening ordered by the COA.

Ms. McGonigle briefly touched on the merits of the Appeal, including whether or not second storey balconies conform with the OP, citing photographs that she submitted prior to the Motion. She also discussed the scope of support among neighbours. Ms. McGonigle asserted that the signatures collected by Ms. Fraggoulis signify an aversion to balconies in general rather than demonstrating specific opposition to the Owners' proposed balcony.

Ms. McGonigle asserted that because of the Appeal's focus on the proposed rear balcony rather than the variances before the TLAB, the Appeal is designed to cause delay and is frivolous and baseless.

With respect to the Campbell Decision, Ms. McGonigle argued that it was distinguishable because it was based not only on the balcony proposed for that property, but took into consideration issues such as light, drainage, available sunlight, penetration and views. In that case, the second storey balcony being proposed extended past the immediate neighbour's back wall, while in this case, the balcony would be flush with Ms. Fraggoulis' back wall.

Ultimately, Ms. McGonigle argued that while Ms. Fraggoulis did provide written grounds for the Appeal, these grounds are not related to the variances granted by the COA. Accordingly, it is Ms. McGonigle's view that the Appeal does not disclose any apparent land use planning grounds upon which the TLAB could allow all or part of the Appeal, and should be dismissed.

Responding Party

Ms. Fraggoulis is a lifelong resident of East York. She is concerned that the Subject Property will set a precedent for the construction of second storey balconies which will impact negatively on privacy and the broader neighbourhood. On a personal level, Ms. Fraggoulis discussed the discomfort she would experience as a result of the Owners' proposed balcony, citing the close proximity of their homes. Ms. Fraggoulis questioned whether the balcony would be flush with her rear wall, although she said that even if so, it would offer views into her backyard.

Ms. Fraggoulis brought the Campbell Decision to the TLAB's attention as an example of a case where the TLAB denied permission to build a rear balcony due to proximity of neighbouring properties. She urged the presiding Member to consider making a similar order in the present case.

Ms. Fraggoulis had familiarized herself with the “four tests” required for any zoning bylaw variance application, including whether the variances meet the general intent of the OP. She also considered whether the proposed variance will cause an adverse effect on the surrounding properties in general. She was very familiar with the OP’s emphasis on the general character of a neighbourhood and cited the petition attached to her Affidavit as Exhibit A in support of her argument that the proposed balcony is not characteristic of the neighbourhood. She denied that the petition was general, arguing that it goes to the character of the neighbourhood. Ms. Fraggoulis’ chief concern is that the rear balcony will have a negative impact on her privacy and on the neighbourhood, and that the TLAB ought to examine the proposed balcony through the lens of the four tests.

With respect to the grounds for dismissal relied upon by Ms. McGonigle, Ms. Fraggoulis responded that her concern extended beyond privacy to the impact the proposed balcony would have on the character of the broader neighbourhood. She denied that she brought the Appeal to intentionally delay the Owners’ project, and denied that the Appeal was frivolous.

Ms. Fraggoulis disagreed that the Appeal is outside the TLAB’s jurisdiction. In response to Ms. McGonigle’s argument that the balcony is not part of the Application for variances, Ms. Fraggoulis asserted that because the balcony is part of the design for which approval is sought, the TLAB can review whether it meets the four tests and whether it has a negative impact on the surrounding neighbourhood.

When asked to explain the relief she is seeking, Ms. Fraggoulis asked that the Appeal be allowed to proceed so that the TLAB can review the photographs and signatures to decide whether or not the proposed balcony is characteristic of the neighbourhood and whether it meets the four tests. Her concern is that future builds will incorporate similar rear second storey balconies, and particularly that her southerly neighbour at 15 Wolverton will seek to install a balcony. Citing the Campbell Decision, Ms. Fraggoulis argued that the balcony is proximate, overbearing and intrusive in the circumstances, where the lots are small and share mutual driveways. Ms. Fraggoulis referenced at “19 inch” gap between the neighbouring dwellings. In sum, Ms. Fraggoulis’ concerns with the Application relate to precedent, character of the neighbourhood, and privacy. She felt that these were appropriate issues for the TLAB to consider.

In Reply, Ms. McGonigle offered further background regarding the design of the proposed balcony. She noted that the original proposed size for the balcony was larger than the plans before TLAB. When the original plans were submitted to the City, the Owners were advised that the balcony size should be changed in order to conform to the zoning bylaws. This change was made prior to the COA application. Ms. McGonigle confirmed that the rear balcony will be flush with the rear exterior wall of Ms. Fraggoulis’ home, thus reducing the scope of overlook into the yard. Ms. McGonigle repeated the efforts made to accommodate Ms. Fraggoulis’ privacy concerns, namely the privacy screen.

ANALYSIS, FINDINGS, REASONS

The applicable test for dismissal is set out in section 45(17) of the *Planning Act*, which is reiterated by TLAB Rule 9 (both reproduced above). I directed Ms. McGonigle to Rule 9 but will review the criteria as presented in the *Planning Act*. I find that subsections 45(17) (b), (c), and (d) are not engaged by this case. The bulk of Ms. McGonigle's submissions focused on those elements listed under subsection 45(17)(a).

> (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal

Ms. McGonigle referred to Rule 9.1(a) which echoes this criterion, as well as to Rule 9.1(h) regarding the TLAB's jurisdiction to order the relief sought by the Appellant. I will also address Rule 9.1(i) under this heading as Ms. McGonigle's submission was that the grounds cited for the Appeal do not fulfil the statutory requirement.

The Notice of Appeal refers to some of the planning tests in the *Planning Act*: conformity to the OP, whether the proposed variances are desirable and appropriate, and whether they are minor. Further, Ms. Fraggoulis' Motion materials and submissions on the Motion clearly demonstrate knowledge of the four tests that the TLAB must consider. However, none of these assertions relate to the variances before the TLAB. Ms. Fraggoulis' grounds for the Appeal center solely on the proposed rear balcony. There were no submissions before the TLAB that suggest that Ms. Fraggoulis is opposed to the lot coverage and roof eaves variances.

Based on the Zoning Notice attached to Ms. McGonigle's Affidavit as Exhibit A, the balcony does not require a variance in order to be constructed. Therefore, the grounds cited by Ms. Fraggoulis for allowing the Appeal – that the balcony does not meet the four tests and particularly, does not conform to the OP – are not grounds upon which the TLAB could allow the Appeal.

Following a review of the evidence, including the Zoning Notice and the correspondence with Mr. Ndirangu entered as exhibits at the Motion, I find Ms. McGonigle's submissions convincing.

Although Ms. Fraggoulis asserts in the Notice of Appeal that the balcony is included in the lot coverage variance sought by the Owners, Ms. McGonigle presented evidence from the Zoning Examiner confirming that the balcony was not included in the calculation of lot coverage. Ms. McGonigle also gave evidence that the balcony design was adjusted prior to seeking approval at the COA in order to bring it into compliance with the applicable zoning bylaw.

Consequently, I find that the evidence demonstrates that the specific rear balcony proposed by the Owners can be constructed "as of right," that is, without the need for permission from the TLAB. It is not part of the lot coverage variance sought by the Owners.

Ms. Fraggoulis presented the Campbell Decision as an example of a case in which the TLAB disallowed a balcony that was not directly before the TLAB in the context of a proposed extension. While other TLAB decisions are not binding on me, I have reviewed the Campbell Decision.

The variances sought in the Campbell case related to floor space index (**FSI**) and a side yard stair encroachment. The extension was proposed to extend past the back wall of the neighbouring house. The neighbour who opposed the extension was concerned about the massing and scale that would result from the FSI increase. The TLAB considered the proposed decks because they were part of the proposed FSI increase. Member Lord agreed that in that context, given the design of the proposed extension in relation to its neighbour, attention to the way the FSI increase would be implemented in terms of design and distribution was warranted. Member Lord found that a second floor and rooftop balcony would be inappropriate in the circumstances. Although ultimately the requested variances were approved, Chair Lord ordered a condition prohibiting the construction of a rear or roof balcony.

When asked about her hoped-for outcome from the Appeal, Ms. Fraggoulis responded: "Campbell." I interpreted that to mean that Ms. Fraggoulis would like the TLAB to deny permission for the construction of the proposed balcony similar to the condition ordered in the Campbell Decision.

I find that the Campbell Decision does not offer a helpful precedent for this case. Here, the proposed rear balcony is not related to any variance before the TLAB. It does not increase the lot coverage proposed for the Subject Property. It is within the Owners' rights to construct through building permit issuance. There are no concerns about massing or scale of the proposed extension. Therefore, the TLAB would not have a basis for ordering a condition similar to that ordered in the Campbell Decision.

For these reasons, I do not find in favour of the relief sought by Ms. Fraggoulis.

(ii) the appeal is not made in good faith or is frivolous or vexatious

Ms. McGonigle cited Rule 9.1(b) in support of the Motion.

Based on the evidence presented, I do not accept that the Appeal was made in bad faith or is frivolous or vexatious. Ms. Fraggoulis' materials were completed carefully and with reference to what Ms. Fraggoulis believed were the relevant planning principles. During the Motion, Ms. Fraggoulis expressed her view that the TLAB has jurisdiction over matters such as privacy, conformity to the OP, and the character of neighbourhoods. Ms. Fraggoulis indicated that she felt the TLAB should consider the rear balcony as it is her belief that it represents a departure from the general character of the neighbourhood. I find that the Appeal was made as the natural next step following the COA's allowance of the requested variances and not for any improper purpose.

(iii) the appeal is made only for the purpose of delay

Ms. McGonigle relied upon Rule 9.1(c) and argued that the Appeal is causing a delay which hampers the Owners' ability to begin their project. There is no question that the filing of an Appeal will cause delay, and this was particularly the case during 2020 and

the COVID-19 public health crisis. There were some administrative challenges which further delayed the Appeal's progress, through no fault of any Party.

I find on the basis of Ms. Fraggoulis' written and oral evidence that the Appeal was made out of a sincere concern about the Owners' proposal. I believe Ms. Fraggoulis was trying to follow the procedure available to her. Accordingly, I find that while delay is a by-product of the Appeal in the current circumstances, the Appeal is not made "only" for the purpose of delay.

> (iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process

Ms. McGonigle relied upon Rule 9.1(d) which relates to this criterion. I find that this ground is not applicable in this case. The filing of an Appeal to TLAB following an unsatisfactory result at the COA does not represent an abuse of process. Further, there is no evidence before me of other TLAB proceedings commenced by Ms. Fraggoulis.

Having dismissed the other criteria listed under section 45(17)(a) of the *Planning Act*, I find that this Motion turns on the question of whether the TLAB is capable of providing the relief sought by the Appellant. While Ms. Fraggoulis' grounds of Appeal cite the applicable planning tests, the TLAB must be capable of allowing an Appeal on the basis of the grounds disclosed in the Notice of Appeal. In this case, there is no variance sought or required in relation to the second storey rear balcony. On the basis of the materials filed and the evidence given during the Motion, I find that the TLAB could not allow all or part of the Appeal based on the grounds advanced by Ms. Fraggoulis.

Therefore, I find that the Appeal falls within the criteria for dismissal without a Hearing.

DECISION AND ORDER

For the above reasons, the Motion is allowed, the Appeal is dismissed and the COA Decision mailed September 1, 2020 is final and binding. The TLAB Hearing in this matter scheduled for June 21, 2021 is cancelled and vacated. No further appearances or submissions to the TLAB are required.

If there are difficulties experienced in the implementation of this Decision and Order, the TLAB may be spoken to on notice to the other Party.

X 

Christine Kilby
Panel Chair, Toronto Local Appeal Body