

DECISION AND ORDER

Decision Issue Date Tuesday, July 13, 2021

PROCEEDINGS COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant(s): FERNANDA DAMIANA PISANI

Applicant(s): CLEED

Property Address/Description: 430 EUCLID AVE

Committee of Adjustment File

Number(s): 20 171214 STE 11 MV

TLAB Case File Number(s): 21 119223 S45 11 TLAB

Hearing date: Tuesday June 29, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY D. Lombardi

REGISTERED PARTIES AND PARTICIPANT

Applicant	CLEED INC.
Appellant	FERNANDA PISANI
Owner/Participant	BITA GHAFARI
Participant	TIM DAVIN
Participant	DAVID PULLEYBLANK

INTRODUCTION

This is an appeal by Fernanda Pisani (Appellant) from a decision of the Toronto and East York Panel of the City of Toronto (City) Committee of Adjustment (COA)

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granting variances for the property known as 430 Euclid Avenue (subject property). The application was submitted by CLEED Inc. (Applicant) on behalf of Ms. Bitia Ghaffari (Owner). The COA's conditional approval granted permission to the Owner to alter the existing 2½-storey semi-detached dwelling on the subject property by constructing a rear basement walkout, a rear ground floor deck, a rear 2nd-storey addition, and a 3rd-storey addition with a rear balcony (Application).

The subject property is located on the west side of Euclid Avenue, northwest of College Street and Bathurst Street, and is designated *Neighbourhoods* in the City's Official Plan (OP). *Neighbourhoods* are considered physically stable areas consisting of residential uses in lower scale buildings.

It is also zoned Residential (R) in the City's comprehensive Zoning By-law 569-2013 (new By-law), as amended, and Residential in the former Toronto Zoning By-law 438-86 (former By-law). The purpose of the Residential Zone category in these respective By-laws is generally to permit low-rise residential built form and to limit the impact of new development on adjacent residential properties.

The COA had before a request for five (5) variances in total, four (4) from the new By-law and one (1) from the former By-law.

The Toronto Local Appeal Body (TLAB) issued a Notice of Hearing (Form 2) pursuant to the TLAB's Rules of Practice and Procedure (Rules) setting a return Hearing date for June 29, 2021.

Prior to the return date, and on the direction of the presiding Member, the Tribunal convened a 'virtual' Pre-Hearing Conference (PHC) for June 17, 2021, with the Parties and Participants in the matter to investigate whether there was any interest in pursuing TLAB-led Mediation as encouraged by the Tribunal's Rules.

Following preliminary opening statements, Ms. Ghaffari and Ms. Pisani agreed to enter into voluntary and confidential Mediation which engaged most of the day on June 17th and included several 'break-out' sessions and discussions regarding possible redesign options for the proposal. Although there was positive discourse with and between the Parties, it became apparent that further discussions with respect to specific design details were restricted without the participation of Ms. Ghaffari's architect. As a result, the Mediation session was adjourned with the direction that the Parties continue discussions privately with the input of the Owner's architect.

The Parties were advised that the June 29th Hearing date would be retained and that the matter would continue that day either as a fully disputed appeal or, in the event of a request for further Mediation, as a second Mediation session with the goal of achieving a settlement. The Parties were also directed to inform the TLAB in advance of the June 29th Hearing as to the progress in settlement discussions, whether all the issues had been resolved, and how the day would proceed.

On June 28th, the Tribunal received an email from the Appellant advising that further discussions with Ms. Ghaffari had not resulted in a settlement of any of the

issues in dispute and further that Ms. Ghaffari's preference was to proceed with the fully disputed hearing of the Application on June 29th.

BACKGROUND

The TLAB convened a 'virtual' Hearing in respect of the appeal in this matter on June 29, 2021, by way of the City's WebEx meeting platform. In attendance, remotely, were Ms. Ghaffari and Ms. Pisani as well as Tim Davin and David Pulleyblank, residents who elected Participant status in the appeal. I note that Mr. Davin is co-owner of the dwelling at 432 Euclid Avenue which shares a party wall with the subject home as well as Ms. Pisani's spouse.

At the outset, I advised that pursuant to Council's direction, I had attended the site, walked the surrounding neighbourhood, and had reviewed the pre-filed materials but that it is the evidence to be heard and referenced that is of importance.

At the commencement of the Hearing, it was established that there were no representatives from the Applicant, CLEED Inc., in attendance nor had any Disclosure Documents been provided to support the Application. The only documents filed with the Tribunal were submissions filed by Ms. Ghaffari after the due date of May 10, 2021, as outlined in the Notice of Hearing. These included her Election of Participant Status (Form 4), two photographs of the rear of the subject property and abutting dwellings borrowed from Mr. Pulleyblank's Document Disclosure Book (Exhibit 3), the Planning Staff Report to the COA dated January 25, 2021, and the Site Plan drawings.

The first three (3) documents were filed with the TLAB on May 19, 2021, while the last document was submitted on June 8, 2021, all filed well past the May 10th due date.

Ms. Ghaffari also confirmed that she had not directed the Applicant to attend the Hearing, and that she had not retained Legal Counsel or an Expert Planning Witness to provide evidence on her behalf.

She stated her intention to rely solely on her own testimony to provide evidence to support the position that the variances being sought meet the four statutory tests under s. 45(1) of the *Planning Act (Act)*.

I noted that Ms. Ghaffari is the owner of the subject property, and her interests would be directly and substantially affected by the Proceeding or its results, and by law is entitled to be a Party. However, the TLAB's Rules require her to disclose that intention to the Tribunal and do so by the due date stated in the Notice of Hearing. As well, she is required to comply with the Rules for disclosure.

Instead, Ms. Ghaffari election Participant Status late after the due date had passed for such election and did not submit a Participant Witness Statement or any substantive evidence. I informed her that interlocutory relief from the presiding Member to permit her Participant Status at the Hearing and to allow her filed documents to be considered as part of this proceeding was required. Additionally, I advised her that the

TLAB generally discourages late filings and, furthermore, that where a person requests elects status, whether Party or Participant, after the expiry of the time set out by the Rules and in the Notice of Hearing for such election and after the delivery of any Witness Statements, whether or not that person participated before the initial decision of the COA, no privileges or obligations are afforded or extended to such individuals in respect of any proceeding before the Tribunal.

It is at the discretion of the presiding Member then, on request, admit an oral statement by the individual and any documentary submissions made and admit that into the record only with the leave of the Member conducting the Hearing.

In view of the particular circumstances in this matter, I asked Ms. Pisani whether she would object to allowing Ms. Ghaffari's filings to be admitted into the record and to allowing her to make a statement under oath as is permitted of a Participant in a proceeding pursuant to TLAB Rule 13.7 d). Ms. Pisani stated that she would not object.

Therefore, since Ms. Ghaffari has a direct interest in the outcome of the Appeal, and in the absence of opposition from Ms. Pisani, I exercised my discretion to allow her to speak to the Appeal, and to be cross-examined by Ms. Pisani. I also ruled that Ms. Ghaffari's late filings would be admitted into the record, and she would be allowed to make an oral statement at the Hearing at the time set for such a statement.

MATTERS IN ISSUE

The Owner has provided neither Document Disclosure nor filed a Witness Statement as per TLAB requirements and has stated her intention to rely on the opportunity to provide oral testimony as the evidentiary basis for supporting the variances requested.

Ms. Pisani, as well as both Participants, Messrs. Davin and Pulleyblank, have expended considerable effort and cost to fully prepare for the hearing of this matter, having complied with all the TLAB's requirements. Ms. Ghaffari had provided no indication to the other Party and Participants of even the most basic arguments she wished to employ in pursuing the Application at the Hearing.

Therefore, the question I must ask is whether the Applicant/Owner has provided the necessary evidentiary basis for the Tribunal to find that the Application meets the four tests in the *Act* and approve the five variances.

JURISDICTION

Provincial Policy – S. 3

A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2014 Provincial Policy Statement ('PPS') and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area ('Growth Plan').

Variance – S. 45(1)

In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- are desirable for the appropriate development or use of the land; and
- are minor.

EVIDENCE

Given the circumstances in this matter in that neither the Applicant nor legal counsel appeared at the Hearing to support the Application and no formal documents were submitted, and that Ms. Ghaffari chose to elect Participant which she filed late and without any Witness Statement, I asked that the Appellant speak first.

I affirmed Ms. Pisani and she offered an opening statement (Exhibit 1) in which she provided some context as to discussions between her and Ms. Ghaffari during the time period after the Mediation session and prior to the return Hearing date.

She advised that they met on June 25, 2021, characterizing it as being a ‘good meeting’ during which explored the design options discussed preliminarily during Mediation with the attendance of Ms. Ghaffari’s architect. The key discussion point centred on the proposed 3rd storey addition, tiering and setback options for that addition, and the functionality of the interior for the proposed 3rd floor.

Ms. Pisani noted that removing the 3rd storey addition and permitting a walkout in its place would lessen the impacts on her property of the current proposal as well as result in reducing the overall variance for Floor Space Index (FSI) required by the Owner. Nevertheless, she expressed her interest in engaging in additional, TLAB-led mediation if that would assist in resolving the remaining issues in dispute.

I was advised that Ms. Ghaffari requested time for reflection and agreed to provide a response to the Appellant prior to the June 29th Hearing date. However, on June 27th, Ms. Ghaffari advised the Appellant that the design options discussed were too costly and disruptive to the proposal that she preferred proceeding to a full disputed Hearing before the Tribunal.

At this point, Ms. Pisani read from her Witness Statement, entered into the record as Exhibit 1, expressing concerns with the proposal for the subject property and the variances that are before the Tribunal for approval. Her concerns can be grouped under four general headings: adverse impacts on her property; the massing of the proposed additions and neighbourhood character; heritage and neighbourhood integrity; and precedent.

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She also referred to her rather detailed Document Disclosure Book of some 54 pages, entered as Exhibit 2, which included a series of photographs and diagrams, in addition to case law both from the former Ontario Municipal Board (OMB) and the TLAB.

As to the first two concerns, she submitted that the proposed 2nd and 3rd storey additions at the rear of the existing dwelling would result in “significant massing and scale” (her words) and the additions will also result in the reduction in “the only source of natural light that illuminates a stairwell leading to the 3rd floor.” She suggested this would reduce sunlight to the rear of her property and create impacts of overlook and privacy.

With respect to the latter two concerns she expressed, Ms. Pisani suggested that the homes in this neighbourhood were originally built as tiered structures with slightly pitched roofs to accommodate ‘airspace’ (her word) between tightly positioned, densely built semi-detached, older dwellings. She stated that the homes on Euclid Avenue are over 100 years old and asserted that the proposal would impact the “neighbourhood’s Victorian character.” (Exhibit 1, p. 2)

She was concerned that approving the Application and granting the variances requested by the Applicant would set a precedent that would alter the existing neighbourhood character.

She requested that the TLAB not grant the variances requested by the Applicant and before it for approval.

Mr. Tim Davin, who elected Participant status, was affirmed, and stated that he was the co-owner of the abutting, semi-detached along with Ms. Pisani. He acknowledged that his testimony was largely duplicative of that already provided by Appellant and would be brief. He explained that he works from home and has an office on the 3rd floor and that having adequate daily exposure to natural light reaching all levels internally in his home “is integral to our physical and mental well-being.” He asserted that the proposal would completely block that natural light.

Finally, David Pulleyblank, who also elected Participant status, spoke in opposition to the Application. He filed an extensive 34-page Participant’s Witness Statement that included photographs and diagrams, which was entered as Exhibit 3 for the record. His evidence was more focused on why the Application did not satisfy the four-part test in the *Planning Act*, highlighting relevant sections of the OP and Zoning By-law.

While Mr. Pulleyblank’s concerns with the proposal were similar to those of Ms. Pisani; he referenced relevant sections in the OP and Zoning By-law to support his position that, if approved, the requested variances and the Application would result in an oversized development that did not fit the neighbourhood. He referenced some COA Decisions in the neighbourhood for the properties at 424 and 428 Euclid Ave. as a comparative to what is being proposed and characterized the approved rear additions at those locations as “overbuilt properties” and “anomalies.” (Ex.3, p. 33)

In concluding his testimony, he suggested that the proposed rear additions on the subject property would directly impact the abutting property owned by the Appellant and Mr. Davin and are opposed by many of their neighbours. He asserted that if built, the proposal would cause serious problems for the attached dwelling at 432 Euclid, and he asked the Tribunal to not grant the variances requested.

At this juncture in the proceedings, I affirmed Ms. Ghaffari to provide an oral statement in support of the Application. She explained that she purchased the subject property in November 2019 and asserted that the dwelling required significant upgrades through renovations to make it livable. As the current homeowner, she is seeking the requested variances to increase the floor area within the home and to undertake exterior improvements that are intended to maintain the Victorian character of the dwelling.

She asserted that the proposed renovations and additions will result in the front façade remaining significantly unchanged and that the proposed alterations to the existing dwelling would be similar to the renovations undertaken at 424, 428, and 458 Euclid Avenue. She also noted that she was not changing the character of the streetscape and that the proposal will continue to maintain the Victorian architectural heritage of the street and neighbourhood.

ANALYSIS, FINDINGS, REASONS

I admonished Ms. Ghaffari for the lack of any substantive evidence in support of the Application.

I explained that the TLAB is committed to sustaining an accessible forum for the resolution of land use planning disputes within its mandate. On occasion, as in the matter at hand, this means granting latitude to those who are self-represented and those who are not familiar with the TLAB appeal process. This, however, does not mean that a person involved in a Hearing before this Tribunal is excused the basic responsibilities and respect that must be accorded to the TLAB process and to the other Parties and Participants engaged in the matter who have followed the Tribunal's Rules.

There are numerous resources, on the TLAB website and elsewhere, that are available to assist the public and stakeholders that engage in the appeal process in understanding what a Hearing before the Tribunal entails and the duties and obligations of Parties, Participants and Representatives in the TLAB appeal.

In this matter, it is the Applicant that is requesting that the TLAB grant variances as is vested in the jurisdiction of the Tribunal as expressed in s.45(1) of the *Planning Act*. But that entitlement is required to survive an assessment of all relevant considerations and be reasonable, including the consideration of the four tests in the *Act*.

In the subject matter before this Tribunal, however, the Owner has chosen to spare herself the expense of retaining an Expert Witness or legal counsel to guide them through the process of the hearing of the appeal. Ms. Ghaffari also did not submit

relevant supporting evidence of any significance nor filed that documentation in a timely manner. This is a choice, perhaps ill advised, that she was free to make, and that in fact she ultimately did make.

However, Ms. Ghaffari is not free from obligations to the TLAB and the other Parties and Participants to abide by the basic principles of procedural fairness and she is not excused from the obligations required by the TLAB.

While some participants might be unacquainted with the principles of administrative law, or those of good community planning, even the most cursory of research would identify that the basis for granting of variances to a Zoning By-law in Ontario, whether at the Committee of Adjustment or via appeal at a tribunal, rests on the applicant satisfying the four tests outlined in s.45(1) of the *Act*. In other words: do the variances sought maintain the general intent and purpose of the Official Plan; do they maintain the general intent and purpose of the Zoning By-laws; are they desirable for the appropriate development or use of the land; and are they minor.

An appeal against a decision of the COA is a hearing ‘de novo’ meaning that the entire application must be considered anew. The burden rests squarely on the Applicant to prove its case, even where the COA has previously authorized the requested variances. As has been established in various case law, ‘variances are a privilege and not a right’.

It is the Applicant’s responsibility to put before the Tribunal the evidence necessary to enable the TLAB to make findings required by the *Act*. In this matter, the Applicant has failed to address these four tests in any substantive way. Although Ms. Ghaffari very briefly alluded to the Official Plan and the Zoning By-law, it was only on the prompting of the presiding Member, and only superficially. She provided no substantive professional planning evidence to support the assertion that the variances sought maintain the general intent and purpose of the OP or, for that matter, the Zoning By-law.

This was also the case for her position that the requested variances are desirable for the appropriate development of the land. Simply stating that the proposal is premised on a few examples of other similarly renovated dwellings on Euclid Avenue which were previously approved and have integrated within the neighbourhood is facile and unconvincing. This was also successfully challenged by the Appellant and the Participants in this proceeding.

The extremely minimal and late filings submitted by Ms. Ghaffari in this matter do not rise to any apparent level or threshold of convincing me that the four statutory tests have been met. In arriving at this conclusion, I cite the case of *Ding v. Cruz*, 89 Dunloe Road, OMB File No. PL141455 (May 14, 2015), which was a decision that allowed an appeal and refused variances because of a lack of planning evidence. In that matter, OMB Member Duncan wrote at Paragraph 11, “*The Board was thus faced with a situation where no planning evidence would be made available upon which the Board could properly consider the application.*”

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Furthermore, at Paragraph 14, the Member stated, *“The Applicant could not satisfy this burden in light of the lack of planning evidence. The Applicant has not presented any evidence to the Board upon which the Board could authorize the requested variance or any part of it.”* And, finally, at Paragraph 16 in that Decision, the Member concluded that, *“In light of the lack of any planning evidence for the Board to rely upon, the Board found that the Applicant would not be able to satisfy his onus under s. 45(1) ...”*

Therefore, given the above absence of any planning evidence, I have no basis to find that the variances sought by the Applicant satisfy any of the four tests as outlined in the *Act* and find that the Applicant has failed to provide the evidentiary basis for a finding in their favour. Furthermore, the Applicant has not satisfied the burden upon which the TLAB could authorize the requested variances in any respect.

DECISION AND ORDER

The appeal is allowed; the decision of the Committee of Adjustment mailed on February 10, 2021, for the above-referenced File number is set aside.

2021-07-12

X 

Dino Lombardi
Toronto Local Appeal Body
Signed by: dlombar