

REVIEW REQUEST ORDER

Review Issue Date: Friday, June 24, 2022

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): WEN LE

Applicant: PROJEKT STUDIO ARCHITECTS

Property Address/Description: 108 ALBERTUS AVE

Committee of Adjustment Case File: 20 116500 NNY 08 MV (A0138/20NY)

TLAB Case File Number: 21 116616 S45 08 TLAB

DECISION DELIVERED BY: TLAB Chair D. Lombardi

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request) made under Rule 31 of *the Rules of Practice and Procedure (Rules)* of the Toronto Local Appeal Body (TLAB). The Notice of Hearing for this matter was issued on March 3, 2021, and therefore, the Request is subject to the current 'in-force' TLAB Rule 31 promulgated after December 2, 2020.

The Request is made by David Bronskill (Goodmans LLP) on behalf of Catherine Manoukian and Stefan Solyom (Owners), to cancel the Final Decision or final order dated October 28, 2021, and direct a 'de novo' Hearing before a different TLAB Member pursuant to Rule 31.16 (c).

An administrative screening was completed by TLAB staff, and the Request was initially deemed to not be compliant because the Request was filed one (1) day past the deadline for service (Rule 31.5).

However, Mr. Bronskill asserted that the 30th day fell on a weekend and pursuant to Rule 4.3 of the TLAB's Rules, "*the act may be done on the next Day that is not a holiday.*" He noted that the Request was filed on November 29, 2021, which satisfies Rule 31.5.

Therefore, the TLAB found ultimately that the Review Request was compliant.

BACKGROUND

The Request pertains to a Final Decision and Order (Decision) of Member Makuch regarding the Application for variances requested for the property located at 108 Albertus Avenue (subject property).

1. Chapter 900.2.10(949)(A), By-law 569-2013

The maximum building length is 14.0m.
The proposed building length is 15.57m.

2. Chapter 10.10.40.10.(1)(A), By-law 569-2013

The permitted maximum height of a building is 10.0m.
The proposed height of the building is 10.86m.

3. Chapter 10.10.40.10.(2)(B)(i), By-law 569-2013

The permitted maximum height of all side exterior main walls facing a side lot line is 7.5m.
The proposed height of the side exterior main walls facing a side lot line is 9.46m.

4. Chapter 10.10.40.40.(1)(A), By-law 569-2013

The permitted maximum floor space index is 0.6 times the area of the lot.
The proposed floor space index is 0.8 times the area of the lot.

5. Chapter 10.5.40.60.(7), By-law 569-2013

Roof eaves may project a maximum of 0.9m provided that they are no closer than 0.30m to a lot line.
The proposed eaves are 0.15 m from the west lot line.

6. Chapter 10.5.80.10.(3), By-law 569-2013

A parking space may not be located in a front yard or a side yard abutting a street.
The proposed parking spot is located in a front yard.

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

The maximum building height is 10.0m.
The proposed building height is 10.859m.

8. Section 400.6(3) Part IV 1(E), By-law 438-86

The by-law prohibits the parking of motor vehicles on the portion of the lot between the front lot line and the front wall of the building.
The proposed parking does not comply.

The Committee of Adjustment (COA) had conditionally approved all eight (8) of the requested variances, above cited, and the matter was appealed to the TLAB by the Appellant, Wen Le.

By Decision and Order dated October 28, 2021, the Member allowed the appeal and refused the variances sought by the Applicant, Projekt Studio Architects.

JURISDICTION

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

“31. REVIEW OF FINAL DECISION OR FINAL ORDER

A Party may Request a Review

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

Chair May Designate Any Member

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

Review Request does not Operate as a Stay

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

No Motions Except with Leave

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

Deadline for, and Service of, Review Request

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

Contents of a Review Request

31.6 A Party's request for Review shall be entitled "Review Request" and shall contain the following:

a) a table of contents, listing each document contained in the Review

Request and describing each document by its nature and date;

b) an overview of the Review Request not to exceed 2 pages that identifies

the grounds listed in Rule 31.17 that apply;

c) if the Review Request includes grounds based upon Rule 31.17 (c), a list of all alleged errors of fact or law;

d) a concise written argument contained in numbered paragraphs. The Review Request shall provide, avoiding repetition, the concise written arguments regarding each listed matter from Rule 31.17 in the same order and include the following:

i. the applicable section of the Planning Act or other legislative basis, if any, for the argument advanced;

ii. the wording of the applicable policy, By-law or authority, if any, in support of the argument advanced;

iii. the applicable transcript or other evidence and exhibit attachments, if any, in support of the argument advanced;

iv. a clear demonstration of how in the case of grounds asserted under Rule 31.17 c), d) and e), each would likely have resulted in a different Final Decision or final order;

v. copies of the referenced case law and authorities; and

vi. a statement as to the requested remedy.

Review Request not to Exceed 20 Pages

31.7 Excluding the table of contents, case law and transcripts, by-laws, exhibits and other supporting Documents, the Review Request shall not exceed 20 pages, double spaced, and written in 12-point font.

Transcripts

31.8 If any Party wishes to refer to any oral evidence presented at the Hearing and if that oral evidence is contested and a recording thereof is available, the relevant portion of the proceeding shall be transcribed and certified by a qualified court

reporter and provided to all Parties and the TLAB by Service forthwith and at that Party's sole expense.

Administrative Screening

31.9 The TLAB shall, upon the filing of a request for Review, review it for compliance and advise the Parties if:

- a) it does not relate to a Final Decision or final order; or
- b) it was not received within 30 Days after the Final Decision or final order was made, unless the Chair directs otherwise; or
- c) it failed to provide the requisite fee.

Response to Review Request

31.10 Despite Rule 31.9, if a Party needs to respond to the Review Request the Responding Party shall by Service on all Parties and the TLAB provide a Response to Review Request no later than 20 Days from the Date of Service pursuant to Rule 31.5, unless the Chair directs otherwise.

Contents of a Response to Review Request

31.11 A Responding Party's response to Review Request shall be entitled "Response to Review Request" and shall contain the following:

- a) a table of contents, listing each document contained in the Response to Review Request and describing each document by its nature and date;
- b) an overview of the Response to Review Request not to exceed 2 pages that contains specific reference to the Review Request's overview;
- c) a concise written argument contained in numbered paragraphs, giving a response to each argument in the Review Request, and include the following :
 - i. the applicable transcript or other evidence and exhibit attachments, if any, in support;

- ii. any other applicable legislation, policy documents, By-laws or other material that is not provided for in the Review Request; and
- iii. any other applicable authorities and copies thereof; and
- iv. a statement as to the remedy requested.

Response to Review Request not to Exceed 20 Pages

31.12 Excluding the table of contents, case law and authorities, transcripts, by-laws, exhibits and other supporting Documents, a Response to Review Request shall not exceed 20 pages, double spaced, and written in 12-point font.

Responding Party Not to Raise New Issues

31.13 A Responding Party shall not raise any issues beyond those issues raised in the Review Request.

Reply to Response to Review Request

31.14 If the Requesting Party needs to reply to a Response to Review Request, that Party shall provide by Service on the Parties and the TLAB a Reply to Response to Review Request not to exceed 5 pages, double spaced, and written in 12-point font and no later than 5 Days from the Date of Service pursuant to Rule 31.10, unless the Chair directs otherwise.

Contents of a Reply to Response to Review Request

31.15 A Reply to Response to Review Request shall contain the following:

- a) a reply to facts, matters and Documents raised in the Response to Review Request;
- b) list and attach the Documents used in the Reply to the Response to Review Request relating to those matters addressed in the Reply, including any case law or authorities raised in support.

Chair Authority

31.16 Following the timeline for the Service on all Parties and the TLAB of any Review

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Request, Response to Review Request and Reply to Response to Review

Request, the Chair may do the following:

- a) seek further written submissions from the Parties;
- b) confirm the Final Decision or final order and dismiss the Review Request, with reasons;
- c) cancel the Final Decision or final order, with reasons, and, where appropriate, direct a de novo Oral Hearing before a different TLAB Member.

Grounds for Review

31.17 In considering whether to grant any remedy the Chair shall consider whether the reasons and evidence provided by the Requesting Party are compelling and demonstrate the TLAB:

- a) acted outside of its jurisdiction;
- b) violated the rules of natural justice or procedural fairness;
- c) made an error of law or fact which would likely have resulted in a different Final Decision or final order;
- d) was deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different Final Decision or final order; or
- e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the Final Decision or final order which is the subject of the Review.

No Further Review Permitted

31.18 A Review decision may not be further reviewed by the TLAB

2. APPLICATION OF THE RULES

2.2 These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits.

- 2.3 The TLAB may exercise any of its powers under the Rules or applicable law, on its own initiative or at the request of any Person.

CONSIDERATIONS AND COMMENTARY

Having regard to Rule 31.17, above, the Requestor cites as a basis for consideration paragraphs 31.17 a) and c). The Request is sufficiently clear as to support the allegations so as to permit each to be considered in turn. There are overlaps in the stated grounds and it is appropriate to consider those of associated importance.

At the outset, it is appropriate to state the circumstances surrounding the purpose and application of Rule 31 as it above appears. 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 to a decision of the TLAB on any of the grounds recited by the Rule.

In reviewing the circumstances of these alleged grounds, it is incumbent upon the reviewer to pay close regard to the Decision and the foundations for decisions upon which a Member relies. The TLAB generally employs a template format for 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 not just for the preparation antecedent of 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-voice evidence and the deliberative consideration given thereto, as inherent in decision writing. The premise of this deliberation is 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 an opportunity to re-litigate or re-argue a point that was made out but was not favourably received, in the Decision, affecting a Party or a Participant. Although the latter is not entitled to request a Review, they can participate in a Review that is properly constituted.

Fundamental to assessing, for Review purposes, the assertions made in the Request is the need to give the Decision a fair and liberal interpretation and construction consistent with its role. 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 expressed suitably by another.

Although decision writing does not require a thorough review and recital of every fact of evidence or that every conclusion must be 'wrapped' in detailed support, a

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decision must reflect a suitable basis for its conclusions with considerations and discarding the irrelevant and then applying the law and policy relevant to the Tribunal's mandate, including its own deliberations.

It is with these considerations in mind that I've read and reread the Member's Decision and the Request itself.

I note that it is incumbent on the presiding Member that heard the matter to listen to the evidence and make decisions based on the application of the law, policy, the evidence, and the public interest. Nevertheless, a Member's decision is based on that Member's discretionary perception of the evidence and relevant considerations.

I have reviewed the filed submissions in this matter as to the main TLAB hearing event which consumed two full Hearing Days, the Decision, the authorities referenced, and the DAR recording of the Hearing. Those filings are extensive, represent an expression of the Applicant's and the community interests and were, by all appearances, fully accessible and aired before the Member.

I also can advise that I attended the site and walked the surrounding area in preparation for undertaking consideration of the Review Request.

Error of Law or Fact

It is important that the reviewer applies the language of the Rule and not enter into a set of considerations that depart from the responsibilities of a Review. A Review is not, as above stated, a re-hearing of the matter to consider whether the reviewer might have come to a different conclusion. Rather, it is a canvass as to whether any of the statutory grounds afforded a review under the *Statutory Powers Procedures Act* are established.

In this regard, the full consideration must be stated and applied which is as follows; namely, whether the Member:

“c) made an error of law or fact **which would likely have resulted** in a different Final Decision or order.” (emphasis added)

This standard implies that the reviewer must not only be apprised by the Review Request of a clear error of law or factual matter of significance but also be satisfied that if the error occurred, it would likely have led to a different decision.

In the Request, two errors are asserted concerning TLAB Rules 31.17 a); the Tribunal acted outside of its jurisdiction and violated the rules of procedural fairness; and c), an error of law or fact which would likely have resulted in a different Final Decision or final order, respectively.

Specifically, there are two errors relating to the decision maker's understanding of the intent of the provisions of the zoning by-law regarding the length variance and the relationship of the proposed Floor Space Index (FSI) variance to building length and massing. Additionally, the Requestor asserts that the TLAB did not apply the four

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statutory tests in subsection 45(1) of the *Planning Act (Act)* and the decision maker failed to provide reasons to support his finding.

1. The Request contends that the Decision erred in understanding the purpose of the uniform building length provisions in the zoning by-law and arrived at a conclusion without any supporting evidence. It also erred in its finding regarding the zoning by-law provision regulating building length and in the application of this provision to the Application.
2. The Request contends that the Decision erred in placing weight on the Applicant's design solution to reduce the proposed density of the proposal and in failing to appreciate the previous reduction in building massing.
3. The Request contends that the Decision did not apply the four statutory tests in the *Act* and lacks interpretation, analysis, and reasoning to support the findings in the Decision.

The Requestor summarized the Decision issued by the TLAB as follows:

- TLAB rejected the opposing evidence that the requested variances do not respect and reinforce the physical character of the neighbourhood.
- TLAB found that the proposed extension to the existing dwelling, based on the Application, would fit within the neighbourhood.
- TLAB found that the rear walls of the dwellings in the neighbourhood do not line up uniformly but are at different depths.

Building Length Variance and Relationship to FSI

The Request maintains that the TLAB held that the intent of the zoning by-law *is "to have uniform (building) lengths to ensure a pleasant experience of openness"* and that a uniform length standard in the current zoning is *"to ensure a proposed dwelling is compatible and appropriate for the area."*

The Requestor asserts that this is a clear error and a conclusion without any supporting evidence given.

First, the Request contends that this is in direct contradiction to the presiding Member's finding that rear walls of dwellings in the neighbourhood do not line up uniformly but are at different lengths. Therefore, the Request concludes, essentially, that "having uniform building lengths to ensure a pleasant experience of openness" cannot be sustained when redevelopment in the neighbourhood is occurring without the rear walls of dwellings lining up uniformly.

Second, the Request submits that the presiding Member, in his Decision, failed to analyze the lack of uniformity in building lengths in the area, including on the immediately adjacent where those lengths "*greatly*" (the Requestor's term) exceed existing conditions and the building length proposed by the Application. These existing

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dwellings, the Request contends, “*block the views and vistas in rear yards that the TLAB suggests should be protected.*”

Third, the Request asserts that the TLAB recognized that there is no common law or statutory right to a view as stated by the Member on page 5 of the Decision, where he wrote, “*I state this, while recognizing that there is at common law or statutory law no right to a view, but (sic) and that there is in an urban area no guaranteed of a view or privacy.*”

Additionally, and in this regard, the Request submits that the TLAB also failed to appreciate that the length of the existing dwelling on the Appellant’s property falls below the alleged “uniform length provision” in the zoning by-law even though the Member essentially found that the length of any dwelling to be developed on the subject property “*should fall below the length permitted by the existing zoning.*” (p. 5, Request for Review of Tribunal Decision, dated Nov. 29, 2021)

Addressing the proposed built form, the Requestor suggests that the Member ‘*mischaracterized*’ (Requestor’s term) City Planning staff’s opposition to the proposed FSI and that the proposed built form would not result in any undue planning impacts on the adjacent neighbours.

The Requestor notes that City Planning staff asked for an FSI not exceeding 0.8 times the area of the lot, and the Applicant revised the proposal accordingly. As a result, the Requestor submits that City staff had no concerns with the proposed built form and did not express a concern that the Application would result in any undue impacts of a planning nature.

Therefore, it also asserted that the Member erred in failing to appreciate that the Applicant did reduce the overall massing of the proposed dwelling in response to consultations with the City and objecting neighbours, placed weight on the design solution chosen by the Applicant to reduce the density to satisfy the City, and provided no analysis as to how an alternative approach would have a different impact.

Acted Outside Its Jurisdiction and Breached Procedural Fairness

The Requestor asserts that the Member failed to apply the four tests in subsection 45(1) of the *Planning Act* “in a meaningful way,” as required by the *Act* and applicable case law, and that the Decision did not set out the analysis necessary to illustrate that the Member interpreted and applied the four tests.

The Requestor also submits that the Member failed to engage the evidence in any meaningful way thereby making it impossible to understand how the evidence was weighed at arriving at the Decision. The assertion by the Requestor is that ‘jurisdictional failures’ of this nature are amplified when the findings in the Decision are internally inconsistent.

Finally, the Requestor submits that there was no evidence to support the findings made in the Decision that the intent of the building length provisions in the zoning by-law is to “ensure a pleasant experience of openness.”

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Correspondingly, the Requestor also asserts that the presiding Member rejected the evidence of the Appellant's land use planner regarding "fit" and "respecting the physical character" of the neighbourhood and that this acknowledgment "*leaves the preferred evidence of Ms. MacFarlane (the Applicant's expert land use planner), which clearly supported approval of the Application and a decision dismissing the Appeal.*"

ANALYSIS, FINDINGS, REASONS

The Review Request submitted by the Applicant asserts that there is a convincing and compelling case that the Decision contains several significant errors of law and fact such that the TLAB would likely have reached a different decision had such errors not been made. Further, the requestor respectfully submits that the TLAB acted outside of its authority and breached the rules of procedural fairness.

For the purpose of this analysis, I will undertake the review request utilizing the grounds under Rule 31.16 (c) put forward by the Requestor although I note that the Requestor made an error in the submission by highlighting the incorrect version of the TLAB's Rules of Practice and Procedure. The Requestor incorrectly noted Rule 31.25 of the Rules prior to December 2, 2020, which I take as a technical error and one which I have corrected.

The TLAB is tasked by the *Planning Act* with adjudicating appeals from a decision of the City's Committee of Adjustment with distinct authorization of jurisdiction under Section 45 (Minor Variances).

The common law adds a series of constraints as to what constitutes the TLAB role, including defining limits of jurisdiction, the obligation to distinguish between the relevant and the irrelevant, and standards of fairness, legality, and expression.

The latter factor, the expression of reasons, is asserted in the Request to be entirely deficient in the Decision. The obligation is to provide and communicate the reasons not so much why the 'winner won', but why the 'loser lost'. This attitudinal expression by the judiciary reflects the need for growth in the evolution of, in this case, administrative law, to afford an adequate, replicable and rational basis as to how the decision was reached, and why. It is also to afford the public with a measure of confidence, whether in agreement or disagreement, that a formal and proper evaluation was given and made of the materials and of the opinions provided.

To do less is to risk concern for the exercise of intemperate discretion but, in my view, more importantly, it would fail to recognize the obligations on a trier of facts and opinions to communicate to the Parties and participants the appreciation of their contribution and its employment.

I concur with the Requestor and find that the presiding Member did not consider each of the four statutory tests and, in the Decision's reasons, set out whatever may be reasonably necessary to demonstrate that the TLAB interpreted and applied those tests. I also concur that the Decision lacks such interpretation and analysis and provides

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limited or insufficient reasoning to demonstrate that the Member adequately considered the four statutory tests, only briefly mentioning them on page 5 of the Decision.

The Requestor, in his submission, highlights the importance of transparent reasons and cites the Ontario Court of Appeal in *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670 (at para. 29) for guidance. In that decision, the Court found that while it is accepted that a tribunal does not need to refer to every piece of evidence or set out every finding or conclusion, the “path” taken by the tribunal must be made apparent.

The Requestor also notes that in subsequent decisions, the Divisional Court clarified that the law requires an adjudicator on a minor variance application to substantively apply the four planning tests. The Request asserts that while the TLAB is not necessarily required to separately and formulaically address each element of the statutory test in respect of each variance, it is required to give careful reasons explaining why it preferred the evidence of one witness over another.

I concur with the Requestor that the presiding Member was required to address each of the issues in dispute and the four tests and to comprehensively address the merits of each and that the Member failed to do so in a fulsome manner. I concur that it is difficult to understand how the Member considered evidence related to the building length in the neighbourhood and related such evidence to the four tests. The failure of the Decision to engage this evidence in any meaningful way also means that it is impossible to understand how the evidence was weighed by the decision-maker in arriving at the Decision.

Jurisdictional failures of this nature are amplified when the findings in the Decision regarding such matters as overall massing of the proposal, area character and fit, common law or statutory law guarantees no rights to a view or privacy, etc., are internally inconsistent

REVIEW DIRECTION

I am satisfied that the Decision fails in its essential purpose of applying promulgated law and policy in a manner that communicates the decision is premised and fully supported on relevant considerations, approach, and evidence.

It is important to state that this decision does not take a position of adjudicating on the merits or otherwise of the Application as that requires a Hearing process where the Parties and Participants have a full opportunity to address all relevant considerations and the Member demonstrates consideration of the same. This cannot turn exclusively on perceptions of any particular attribute, i.e., the purpose of the uniform length provision in the zoning by-law, in the absence of a full and replicable consideration of policy, criteria, and the application and consideration of generally accepted planning principles to all the variances sought.

In my view, while this may have occurred in the presiding Member’s own deliberations, which was simply not transmitted in the Decision and, therefore, is not present.

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I have found that there are sufficient grounds under TLAB Rule 31.17 c) to grant the remedy requested in this Review Request.

Therefore, TLAB staff are directed to schedule and give *Notice of Hearing* for a '*de novo*' Hearing of the Application which was the subject of the TLAB Decision and Order regarding 108 Albertus Avenue and dated October 28, 2021.

DECISION AND ORDER

Pursuant to TLAB Rules 31.16 c) and 31.17 c) of the TLAB's Rules of Practice and Procedure, the Decision regarding 108 Albertus Avenue and dated October 28, 2021, is cancelled and a new '*de novo*' Hearing is ordered to be held before a different TLAB Member concerning the requested variances.

X



Enter Panel Member Name
Panel Chair, Toronto Local Appeal Body
Signed by: dlombar