Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Thursday, July 28, 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): Losel and Kristi Tethong, owners of 324 High Park Ave; Renate Walker and Bruce Mitchell, owners of 324A High Park Ave.

Applicant: SGL PLANNING & DESIGN INC. c/o Raymond Ziemba

Property Address/Description: **324 – 324 A High Park Ave**

Committee of Adjustment Case File: 21 158567 STE 04 MV (A0913/21TEY)

TLAB Case File Number: 21 234769 S45 04 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), by the owners of the property known municipally as 324 High Park Avenue and 324A High Park Avenue. During the Pre-hearing Conference phase of the Appeals at the TLAB for both properties, the lawyers agreed that the two Appeals should be consolidated into one Hearing pursuant to Rule 22.1 of the TLAB's Rules.

As a result, on December 17, 2021, the TLAB issued a single Notice of Hearing for this matter and therefore, the Request is subject to the current 'in-force' TLAB Rule 31 promulgated after December 2, 2020.

The Request is made by Russell Cheeseman on behalf of Losel and Kristie Tethong, the owners of 324 High Park Ave. (subject property) and Renate Walker and Bruce Mitchell, the owners of 324A High Park Ave. (subject property). Both owners retained Mr. Cheeseman as their solicitor in this matter; therefore, for this Review Request, both property owners will be referred to collectively as the Owners and the subject properties as the Properties, respectively.

The Review Request seeks to cancel the Final Decision or final order issued by Member Yao, dated October 28, 2021, and to 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 deemed to be compliant.

BACKGROUND

The Review Request pertains to a Final Decision and Order issued by the TLAB on May 3, 2022, refusing the following variances requested by the Owners to extend and reconfigure existing hard surfaces on the Properties to permit a parking space in the front yard and to modify the front yard landscaping.

1. Chapter 10.5.50.10.(1)(D) By-law 569-2013

A minimum of 75% (19.16 m²) of the required front yard landscaped open space must be in the form of soft landscaping.

In this case, 67.63% (17.28 m²) of the required front yard landscaped open space will be in the form of soft landscaping.

2. 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.

In this case, the parking space will be located in the front yard.

JURISDICTION

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 the Review 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 except with leave of the Chair.

Deadline for, and Service of, Review Request

31.5 A Review request shall be provided to all Parties and the TLAB by Service within 30 Days of the Final Decision or final order, unless the Chair directs otherwise.

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. ii. the wording of the applicable policy, By-law or authority, if any, in support of the argument advanced;
iii. iii. the applicable transcript or other evidence and exhibit attachments, if any, in support of the argument advanced;
iv. 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 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

CONSIDERATIONS AND COMMENTARY

Having regard to Rule 31.17, above, the Requestor cites as a basis for consideration paragraphs 31.17 a), b) 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 unambiguous 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 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, 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 Applicants and the community interests and were, by all appearances, fully accessible and aired before the Member.

I have also reviewed the Review Request submissions made by Mr. Cheeseman on behalf of the Owners filed with the TLAB which consists of a 13-paged Overview of the Review Request and the Review Request grounds and various excerpts from the *Planning Act*, *City of Toronto Act (2006), City of Toronto Municipal Code*, and the *Statutory Powers Procedure Act*. The submissions also cited case law in the form of *R v Find, 2001 SCC 32*.

I also reviewed the City of Toronto's Response to Review Request (Response) filed with the TLAB on June 22, 2022, under Rule 31.10 of the TLAB's Rules. The submission includes an Overview of the Response and cites case law in the form of two previous TLAB Review Request decisions, *RE: Deane 2020 CarswellOnt 13123, 13 O.M.T.R, 139,* and *Re: Cantam Group, 2018 CarswellOnt 20304, 3 O.M.T.R. 489*.

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

Review Request Grounds

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

In its 'Overview', the Review Request sets out the basis for the Request and the rationale for why the Owners of the subject Properties ask that the May 3, 2022 Decision and Order be reviewed:

- The Owners of the two Properties sought certain variances for both Properties that would have the effect of permitting a parking pad in the front yard of each respective property. The variances sought were refused by the COA on October 20, 2021.
- Both Properties have pre-existing parking pads in the front yard. The Requestor asserts that none of the neighbouring property owners raised concerns at the COA or the appeal of the COA decision at the TLAB.
- The City opposed the variances because the variances if granted, would permit a parking pad in the front yard of both properties, whereas Chapter 10.5.80.10(3) of Zoning By-law 569-2013 prohibits parking pads in the front yard in certain City wards unless permitted by the City.
- A moratorium under the direction of City Council has been imposed on granting such permits in the ward in which the Properties are located.
- In the Decision and Order, the Member held that the variances should be refused on the grounds that they would constitute a permanent loss to the public supply of street parking and would therefore impact the public realm, resulting in the variances not being considered minor, contrary to s.45(1) of the *Planning Act*.

The Review Request asserts the following grounds for a Review:

The TLAB acted outside of its Jurisdiction

In the steps that the presiding Member took in reaching his decision, he exceeded his jurisdiction as a Member of the TLAB. Within this ground, the Requestor alleges the decision-makers made two separate exceedances by referring to:

a) Case law that was never put before the Member or qualified by counsel

Within this ground, the Requestor's assertions impact and overlap all three grounds in Rule 31.17 of the TLAB's Rules. I will address each separately below.

The Requestor submits that the decision-maker made references in his Decision to a 1985 Supreme Court Canada caselaw, *R v Big M Drug Mart Ltd.*,*1985 CanLII 69 (SCC) [1985] 1 SCR 295* (R v Big) that neither Party put before the TLAB. It is also asserted that no Party was offered the opportunity to present case law in respect of the point established by the Member in his Decision in this regard.

The Owners assert that they would have expected an opportunity to fully present their case to the TLAB and that the Decision would have been based on the evidence provided during the Hearing. The Requestor submits that the decision by the Member to rely on case law that he obtained himself and his failure to request comments on same from counsel is contrary to the principles of procedural fairness and natural justice.

The Requestor cites the Supreme Court of Canada's position that the threshold for judicial notice is a strict one and quotes from a decision of the Court (*R v Find, 2001 SCC 32*) that *"a court may take judicial notice of facts that are either (1) so notorious or generally accepted as to not be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."* (Review Request June 2, 2022, p. 9, para. 28)

In this regard, the Requestor asserts that the Member's interpretation of *R v Big M Drug Mart Ltd. c*annot be described as a fact that is either notorious or generally accepted, and the Member's knowledge of that case cannot be described as a generally accepted technical fact, information or opinion within the Tribunal as a whole. Therefore, the Supreme Court of Canada of R v Big should not have served as part of the reasoning of the Decision.

Additionally, the Requestor asserts that the Member made *extensive* (his term) references to previous TLAB decisions including his own, although again this jurisprudence had not been referred to by either Party in the Hearing. In doing so, the Member exceeded his jurisdiction.

As well, the Requestor submits that the Member made references in his Decision to certain evidence in the form of a recording or transcript of the Hearing which Mr. Cheeseman was not advised would be 'created' (his term) and which was not provided to either Party during the two Hearing days or prior to the issuance of the Decision.

Again, Mr. Cheeseman asserts that this contravenes the Owners' right to procedural fairness and natural justice.

b) The City of Toronto Municipal Code.

The Request highlights the decision-maker's reference to the *Municipal Code* in his Decision and asserts that this exceeds the TLAB's jurisdiction and mandate which can be found under s.115(5) of the City of Toronto Act, 2006, S.O. 2006, c. 11, Schedule A.

The Requestor notes that the TLAB's mandate is specifically set out in s.142-2 of the *Municipal Code* and in addition to its *Rules of Practice and Procedure*, the TLAB is also governed by the *Statutory Powers Procedure Act, R.S.O 1990, c. S. 22* which permits a tribunal to (a) take notice of facts that may be *judicially noticed* (his italicizing), and (b) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge in making its decisions.

c) Reference to New Caselaw

The Requestor submits that the decision-maker made extensive references to case law in his Decision that other TLAB Members and he had previously issued, although these decisions had not been referenced by any of the Parties in this matter. In doing so, the Request asserts that the Member exceeded the TLAB's jurisdiction.

Procedural Fairness and Natural Justice

The Requestor highlights the Member's references in his Decision to *R v. Big M Drug Mart Ltd.*, and notes that at no point in the Hearing did the Parties cite this case nor were they offered an opportunity to present a case in respect of the point established by the Member.

Given that the Owners expected an opportunity to fully present their case to the TLAB to support their request to grant the variances sought and that the Decision would be based on these points, the Requestor submits that the Member's decision to rely on case law that he *"both obtained himself and failed to request comments on same from Counsel"* (p. 10, para. 31, Review Request) is contrary to the principles of procedural fairness and natural justice.

Mr. Cheeseman also suggests that the Member in his Decision made *"extensive references"* (his term) to a recording or transcripts of the Hearing, a copy of which was not provided to counsel *"to confirm the quotes within the Decision are accurate."* (p. 11, para. 31, Review Request)

Under Rule 27.8 of the TLAB's *Rules*, *"any Party producing a transcript or partial transcript of a proceeding must advise the TLAB and other parties to the proceeding that it has done so."* (p. 11, para. 31, Review Request) He submits that since this was not done, this was procedurally unfair to the Owners.

Error of Law

The Requestor questions the Member's obligation in the Decision, to consider the *Municipal Code* in order to determine the *"operation and application of legislation"* as the Supreme Court of Canada found in *R v. Big M Drug Mart*. The assertion made is that not only did the decision-maker make an error in law by unilaterally introducing and relying on this case in arriving at the decision, but he also committed an error in his interpretation of that caselaw.

In paragraph 33 of the Review Request, Mr. Cheeseman in describing the interpretation the Member made writes the following:

> *"He states that this case requires him to look at the object of legislation (being the bylaw (sic) in this case), through the impact of the operation and application of the legislation. He also states that since the Municipal Code was passed under the Municipal Act, 2001, S.O. 2001, c. 25, he is required to make reference to the Municipal Code in order to determine the object of the prohibition against front yard parking in the zoning by-law. However, the enabling legislation of the TLAB in and of itself states that the jurisdiction of the Board is to be the appeals of decisions relating to requests for minor zoning variances, and/or consents for land severances."*

The general reference being made by the Requestor, I believe, is to a passage in the Decision found on page 5 where the Member addresses the zoning by-law and the Municipal Code (819):

> *"Mr. Cheeseman stated that the Municipal Code regulations were "not in my bailiwick."[4] I disagree; the regulations work together with the zoning prohibition and may be considered in assessing the general intent of the prohibition. Municipal Code chapters 925 and 918, to be discussed in the next section, were passed under the Municipal Act, 2001, which is such predecessor. In R v Big M Drug Mart, the Supreme Court of Canada said:*
>
> > *All legislation is animated by an object the legislation intends to achieve. This object is realized through the impact produced by the **operation and application** of the legislation."*
>
> *Contrary to what Mr. Cheeseman says, the case directs me to look at the "operation", that is, the "nuts and bolts" of the Municipal Code."*

The Requestor submits that the decision-maker concluded that the variances were not minor because the proposed driveway would impact the public realm by removing public parking from the street in front of the subject property. However, the Requestor argues that the degree to which the driveway would impact public parking and whether there was a curb cut was not a detail on which any evidence was provided by the Parties and, therefore, the Member's decision to rely on this point constituted an error of law.

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 also respectfully submits that the TLAB acted outside of its authority and breached the rules of procedural fairness and natural justice.

For the purpose of this analysis, I will undertake the review request utilizing the grounds under Rule 31.16 (c) put forward in the Request. The Owners of 324 and 324A

High Park Avenue submit that the Decision should be overturned and that a fresh hearing be held before a different Panel Member to make a full determination in this matter.

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 a measure of confidence, whether in agreement or disagreement, that a formal and proper evaluation was given and made of the materials and 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.

Did the Decision-maker Act Outside of the TLAB's Jurisdiction?

I do not agree with the Requestor's assertion that the Decision-maker exceeded his jurisdiction by referring to case law that was not submitted by the Parties and by referring to the specific provisions of the City's Municipal Code.

I agree with the submissions made by the City in its Response to Request for Review (Response) that the Member's jurisdiction does include the application of the statutory test out in s.45(1) of the *Act.* As the Requestor himself notes in the Request, the TLAB executes its mandate pursuant to the *SPPA* which permits (in Section 16) a tribunal to (a) take notice of facts that may be judicially noticed and (b) to take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge.

I find that the Member's written reasons in the Decision demonstrate that his analysis remained focused on the matters properly within his jurisdiction, namely the factors relevant to assessing minor variance applications as set out in the *Act.*

I am also of the opinion that taking judicial notice of certain matters in accordance with the *SPPA,* and common law is within the TLAB's jurisdiction, and it is within the scope of judicial notice to recognize that a statutory provision was enacted as part of the legislative scheme aimed at a particular remedial purpose.

In referring *to R v. Big M Drug Mart Ltd.* in his Decision, the Member did so for the Court's comments on determining the object of a statutory scheme and as a general explanatory aid; he did not, in my mind, apply it to the relevant legal tests in the facts of the application. The Member stated in his written reasons in the Decision that the matter rested on the four statutory planning tests set out in the *Act* and I see nothing in the reasons outlined in the Decision that suggest that the matter turned on the above-referenced Court case.

Additionally, the Requestor submits that the decision-maker in making references in a footnote to past TLAB decisions not cited by the Parties exceeded the TLAB's jurisdiction. For example, in the **'Analysis, Findings Reasons'** section of the Decision, on page 4, the decision-maker makes the following statement after acknowledging that the solicitors have agreed that the correct approach in this matter is to treat the Application *"as if construction has not yet occurred."*

> *"Thus, I am to only consider the application on its merits, and neither penalize the owner for having constructed without permission nor grant leniency because of the expense of removing the construction. This has been followed in other TLAB cases[2] and I adopt this approach."*

Footnote**[2]** at the bottom of Page 4 in the Decision cites four (4) previous Tribunal decisions where the TLAB employed the above-noted approach to 'after-the-fact' variance applications with similar issues. References to these cases were brief and the decision-maker did not specifically rely upon them elsewhere under the **'Analysis, Findings, Reasons'** section in his Decision. In fact, they were used simply to support an approach to the Application already agreed to by the lawyers in this matter.

I note the TLAB Review Request decision *Re: Deane 2020 CarswellOnt 13123, 13 O.M.T.R. 139 (Re: Deane),* also cited in the City's Response as a source of support that more would be required to demonstrate that a footnote reference to previous TLAB decisions that had considered the same issues rises to the level of unduly influencing a decision.

In *Re: Deane*, former Chair Lord concluded that a mere reference to earlier TLAB jurisprudence does not rise to the level of *"…a factor that casts a shadow over the Decision, either from the perspective of jurisdictional error or, later, procedural fairness" (Re: Deane*, at para. 29). Furthermore, the Chair acknowledged that the applicant in that decision had not established that references to prior decisions were employed to reach any conclusion adverse to the applicant, writing the following at paragraph 29,

> *"…Beyond the Applicant's assertion of concern, there is nothing to support that the reference formed any part of the ratio decidendi in the matter before the Member."*

Similarly, I find that in the matter at hand, Member Yao did not exceed his jurisdiction in making the references he did, and I am satisfied that the Requestor has not established this ground. By citing the decisions, the Member did not import facts or take precedent but, rather, referred to the cases to illustrate that there are other

examples within the body of TLAB decisions that are consistent with the approach that the decision-maker came to on the unique facts of this matter.

Did the Decision-maker violate the Rules of Procedural Fairness and Natural Justice?

a) As above-noted, the Requestor asserts that Decision-maker contravened the rules of natural justice and procedural fairness by citing case law independently of and not submitting those to the Parties. For the reasons noted above, I find that the cases cited did not form part of the central reasoning of the Decision and the conclusions reached in the Decision were based on the four tests in the ***Act***., Therefore, I find there was no breach.

b) Concerning the issue of a recording and/or transcript referenced by the Decision-maker not being provided to the Parties to ensure the accuracy of any quotations, I note that the TLAB's Rules establish clearly that any Party can request a recording of a Hearing and in doing so it is a Party's responsibility to notify other Parties when it has made its own transcript of the proceedings.

   This is not TLAB's responsibility nor has the TLAB adopted a rule requiring the Tribunal to provide Parties with recordings and transcripts for every hearing event.

   Furthermore, presiding Members in a hearing event often review the digital recording (DAR) of proceeding following the conclusion of a Hearing to augment written notes the Member has taken, and many refer to quotes in their decisions.

I find no error in the Decision-maker's use of the recording in this instance, and including statements made by counsel and witnesses during the proceedings in the written reasons in the Decision do not breach procedural fairness or natural justice. The duties of a Member are premised on a careful and accurate recollection of the evidence presented at the Hearing and it is common practice for Members to review the recordings in the same way they would review their notes in drafting their decision.

Did the TLAB make an error of Law or Fact?

The Requestor asserts that the Decision-maker's reference to the *Toronto Municipal Code* specifically dealing with on-street and off-street parking constitutes an error of law within the ground contemplated in 31.17 c) which would have likely resulted in a different Final Decision and Order.

Discussion of the evolution of subclause (3) in the Zoning By-law and the Municipal Code and the evidence heard by the Decision-maker commences on Page 4 of the Decision and continues to Page 10. In those pages, the Decision-maker provides context to this regulatory regime and includes a subheading **'The Operation and application of front yard legislation'**.

At the bottom of Page 9 in the Decision, the Member includes the following footnote

> "**15** *The Zoning By-law explicitly prohibits front yard parking at the Subject Property (as does 438- 86). Policy 4.1.8 of the Official Plan provides that zoning by-laws applicable to Neighbourhoods will establish numerical site standards that respect and reinforce the prevailing neighbourhood character. Therefore, following the Official Plan Neighbourhoods policies mentioned above, front yard parking provisions are intended to reinforce a continuous streetscape pattern throughout the neighbourhood, to promote a pedestrian-friendly environment and to assist with stormwater management. They also limit and direct where parking will occur on the site. (Nigro, par 93)*

I find that it was appropriate that the Decision-maker made the references to the Municipal Code that he did for context and to clarify the concept of the general intent and purpose of the Zoning By-law and the Official Plan, and that he applied the appropriate tests correctly.

Furthermore, the Decision-maker clearly states at various points in his Decision that the decision he arrived at was based on the four statutory tests in the *Ac*t, none more directed than on Page 12 under the subheading '**Conclusion'**, where the Member writes, *"I have applied the four tests under s.45(1) of the Planning Act and each fails."*

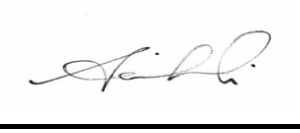
I agree with the City in its Response that it is appropriate and proper for the TLAB to take judicial notice of information within the specialized knowledge of the Tribunal, including municipal by-laws and policies relating to areas such as transportation, parking, public realm, etc. These are often relevant in assisting the TLAB and decision-makers in interpreting whether the variances requested maintain the general intent and purpose of the Zoning By-law and Official Plan, are minor and desirable, and represent good planning.

The Decision-maker, in the examples above-cited, has understood and recited the evidence provided at the Hearing. The fact is that he heard extensive evidence on this topic, the witness was cross-examined by counsel for the Applicants on these points, and the Decision-maker arrived at a different finding than that preferred by the Requestor. This does not constitute an error of law.

Therefore, I find that the Requestor has failed to make the case to prove that the approach in this matter reaches the threshold required to establish that the Decision-maker made an error of law which would have likely resulted in a different Final Decision and Order.

DECISION AND ORDER

The Review Request is refused, and I confirm the Final Decision and Order of May 3, 2022.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body
Signed by: dlombar