Toronto Local Appeal Body

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REVIEW REQUEST ORDER

Review Issue Date: Friday, August 03, 2018

PROCEEDING COMMENCED UNDER section 53, subsection 53(19), section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant(s): CITY OF TORONTO

Applicant: ATA ARCHITECTS INC, ATA ARCHITECTS INC

Property Address/Description: 9 THIRTY EIGHTH ST

Committee of Adjustment Case File Number: 16 113489 000 00 CO, 16 113498 000 00 MV, 16 113499 000 00 MV

TLAB Case File Number: 17 165404 S53 06 TLAB, 17 165406 S45 06 TLAB, 17 165408 S45 06 TLAB

Decision Order Date: Monday, April 16, 2018

DECISION DELIVERED BY Ian James Lord, Chair

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This is a request for a review (Request/ Request for Review) under Rule 31.1 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB) made by Ronald G. Jamieson, a Party to the above noted matter (Requestor).

The Request was made by affidavit sworn June 14, 2018. The Request was preceded by and supplemented by an affidavit of David Godley (Godley), Participant.

Both Mr. Jamieson and Mr. Godley were present for portions of the two day Hearing; Mr. Godley gave oral evidence and Mr. Jamieson participated as a Party calling evidence and asking questions. Both made extensive filings supplemented by other extensive filings by the Parties and other Participants.

The City of Toronto (City), a Party and Appellant, was both present at the Hearing throughout and called evidence in support of its appeal. The City did not file a Request for Review or participate therein.

The Applicant responded through its counsel to the Request, also in writing, by correspondence dated June 26, 2018.

I am of the view that the Request was in proper form and am prepared to modify and relieve from a strict application of the Rules and do so for the Request to be given fulsome consideration.

The matter that is the subject of the Request concerned the Decision and Order of Member G. Burton (Member) issued May 15, 2018 (Decision) in respect of the property located at 9 Thirty Eighth Street (subject property) in the City and in the former Village of Long Branch (Long Branch). The Decision refused the City appeal of severance and variance approvals (Applications) that had been granted by the Etobicoke and York Panel of the City's Committee of Adjustment (COA). The Decision thereby confirmed and enabled the severance of the subject property and granted variance relief from applicable zoning by-laws so as to permit the construction of a single detached dwelling on each of the two lots so created (Proposal).

The Proposal had been the subject of modifications by the Applicant to better ensure acceptability of the proposed built form.

This Review Request Order constitutes my review of the Decision.

The Requestor asserts multiple deficiencies in the Decision as grounds for the Request:

A). that it was based on faulty assumptions and is contrary to the evidence;
B). there are demonstrable inconsistencies and errors in the receipt and application of evidence;
C). there are errors of natural justice visited on the Requestor relating to procedure, conduct and the circumscription of that Parties evidence.

I have considered the supplemental and somewhat overlapping assertions of the Participant, Godley, not from the perspective of the Request itself – as a Participant is not entitled, under the Rules, to initiate a review request – but simply as an added filing to the Request.

The TLAB Rules do not prescribe or limit the materials under consideration in a Request for Review; however, the materials filed and referenced through the issues raised provide some guidance as to the scope of required reference materials necessary for assessment.

The Applicants response dealt with the submissions of the Requestor; it did not address those of Godley.

BACKGROUND

In accordance with the Rules, the Decision followed almost two days of hearing (Hearing) involving six witnesses:

1. Godley, opposed to the Proposal
2. Planner D. Huynh, for the Applicant
3. C. Glenn, 11 Thirty Eighth Street, opposed to the Proposal
4. Dr. M. Dida, Supervisor, Urban Forestry, for the City Appellant
5. Planner T. Skelton, for the City Appellant
6. R. Addis, 10 Thirty Eighth Street, opposed to the Proposal.

Previously, I had declined to issue Summons made at the request of the Requestor. That application was to compel identified members of the COA to attend and give evidence on its decision. My reasons were provided in the refusal to issue a summons to these individuals.

Despite filings to the contrary, the Applicant declined or was unable to call evidence from its Arborist, C. Gavin.

For the purposes of the Request, the proceeding itself was convened in full compliance with the TLAB Rules, including a lengthy Notice and preparation period, very extensive filings in respect of the requirements to effect the Proposal and a rescheduled date, made by Motion request of the City, and granted by the Member.

Nothing in this Review turns on any allegation of procedural or other improprieties antecedent to the Hearing; indeed, there were none.

The Decision by the Member encompasses 26 pages of text, with attachments consisting of evidentiary summaries and findings. It is thorough in detail and consistent in format to the standard template of the TLAB. It acknowledged, under **Jurisdiction,** the statutory, policy and applicable tests engaged by the Proposal.

The first 17 pages of the Decision are descriptive of the evidence heard, albeit abbreviated as can be expected. The Requestor does not take general issue with these descriptive pages and nor can I, in large measure. I accept the general accuracy of the recitation of the evidence, factual and opinion, as detailed by the Member. I describe, below, any distinctions or differences considered worthy of note. The Member does not recite having herself visited the subject property; however, a site visit is the expectation of Council on appointments to the TLAB, and it is expected that that had occurred. No contact with the Member has occurred in relation to any aspect of the Request.

In considering the Request, I have attended the site, thoroughly read the materials submitted to the TLAB by the Requestor, Godley, and Mr. Ketcheson for the Applicant, and read (and reread) the Decision, independently and in the context of the materials filed and submissions raised attendant to the filings.

Again, the TLAB Rules do not address the scope of the Request beyond the submissions of the Parties. I find that it is open to me to define the scope of the review of the submissions, above, as well as direct references and Exhibits filed and supplied by those participating in the Request, inclusive, of course, of the Decision. In this case, I find diligence was warranted arising from the topics the Requestor raised: first, because of the TLAB's engagement, referenced in decisions on appeals within the Long Branch 'community' and their consideration; second, resulting from specific references in the Decision to a final 'Decision and Order' recently rendered by myself, as Panel Chair, in respect of a property two streets to the east, at No. 38 Thirty Sixth Street; and third, due to the issues themselves, warranting close attention to the evidence actually heard by the Member.

The Request makes multiple challenges to the alleged accuracy and inconsistencies employed by the Member in respect of the evidence and testimony at the Hearing.

I have listened to all auditable material in the TLAB digital audio recordings for April 16 and 17th (in excess of 10 hours of recording time), 2018, from opening remarks to the close of submissions by the three Parties. This exercise, while numbing, also caused reference to the Exhibits and materials identified to and posted by the Member and on the TLAB website.

Having reference to the digital audio recording was helpful in sorting the representations made by or on behalf of the Parties respecting eligible grounds under the Rules related to the Review. It also assisted and permitted me to make findings on the evidence related to the Review.

JURISDICTION

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

> "31.4 A Party requesting a review shall do so in writing by way an Affidavit which provides:
>
> a) the reasons for the request;
>
> b) the grounds for the request;
>
> c) any new evidence supporting the request; and
>
> d) any applicable Rules or law supporting the request.
>
> 31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:

a) seek written submissions from the Parties on the issue raised in the request;

b) grant or direct a Motion to argue the issue raised in the request;

c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or

d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

a) acted outside of its jurisdiction;

b) violated the rules of natural justice and procedural fairness;

c) made an error of law or fact which would likely have resulted in a different order or decision;

d) been deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision; or

e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

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

CONSIDERATIONS AND COMMENTARY

1. Introduction

a) *De Novo*

It is trite law that an administrative body, such as the TLAB, is obliged to consider each originating matter on appeal to it as *de novo*. Namely, a first instance hearing to be considered and decided on its merits. Any decision must be consistent, as appropriate, with the evidence, adhering to the principles of natural justice and tracking

principles of good community planning, but it is an administrative decision and includes the consideration and application of "the larger considerations of administrative policy" (*Re Cloverdale Shopping Centre Ltd. Et al. and Township of Etobicoke et al.* [1966] 2 O.R. 429, per Aylesworth, J.A.).

With similar considerations in mind, the Request, in my view, needs to be approached and resolved with regard to these principles of inclusiveness.

As such, any decision of the TLAB can rarely be confined strictly to a weighing of the evidence, professional or lay, of the persons who appear on a matter. This is because of the panoply of considerations that must be brought to bear on the matters put in issue. Members are charged with a number of considerations that are not strictly '*viva voce'* evidence related and which even may never be addressed by direct testimony. The TLAB decision must, by statute, 'be consistent with' Provincial Policy and 'conform to' the Growth Plan for the Greater Golden Horseshoe at the time of the decision; it must 'have regard for' the decision of the tribunal of first instance and the material before it; it must consider and apply statutory directions, in this case related to the statutory list of consent/severance considerations and the 'Four Tests' made applicable to each variance request, individually and cumulatively. Policy considerations and their interpretation and application play a significant role in the TLAB decision making process. The Applications and the Decision are in line for these considerations.

In addition, the TLAB must respect and follow judicial determinations and guidance, the statutory rights of the parties and participants and it must be open to moral suasion arguments seeking consistency in approach, application and standards to decisions of equal or parallel tribunals, on similar subject matter. Of course, the TLAB is not bound to follow precedent decisions of like tribunals in the nature of judicial adherence to the principle of precedent, *stare decisis.*

The term *'de novo'* is therefore an unfortunate short form for a set of considerations that cannot be neatly defined or placed in a file folder and bound by a ribbon and seal. Decisions of the TLAB, ultimately, involve the discretionary application of these considerations and are administrative, but in the sense of requiring a strong adherence to the rules of evidence. In a very real sense, lay descriptions commonly attributed '*de novo'* belies the requirement of an unduly strict reliance on 'evidence'; rather, it opens a hearing to a broad range of relevant considerations.

It follows that the Decision to which the Request applies must be read as a whole, with openness and with due regard to the fact that the decision maker is presumed to be alert to the relevant considerations. It also follows that the Rules applicable to a Request be observed in scope and application and that there be demonstrable grounds supportive of any intervention.

Where the TLAB Member has provided replicable and reasonable grounds for evidentiary findings, absent any of the identified constraints above and in the Rules, the decision is to be supported. An important tenet of administrative law is respect for the decision making process, including its reliability and consistency.

I also agree with the submission of the Applicant through its counsel, Mr. Ketcheson, that a request for a review under the TLAB Rules is not intended simply as an opportunity to re-argue an issue that was put before the Member to achieve a different result. A review is not a re-hearing of the appeal, although it is patent that the relief available under the Rules on a request for review can result in that very remedy. A review is limited to the grounds set out in Rule 31 of the TLAB Rules. Where none of these grounds are properly addressed and met by the Requestor, the review should be dismissed.

b) Matters Not Worthy of Review Consideration

The Requestor raises a variety of issues which I can dispose of as not meeting the standard demanded of the task I am invited to perform.

First, a section of the Request, commencing on page 10, purports to present "what I was prevented from presenting during the hearing." This is part of the third 'ground' for the Request, identified above.

I have listened to the digital audio recording on the very few instances where the rights and privileges of the Party are addressed or alleged to be infringed. I note in several instances admissions by the Requestor as to unfamiliarity with the Rules of the TLAB, administrative hearing procedures in general and a general expectation that it is the obligation of the Hearing Officer, the Member, to educate the lay citizen on all such matters. I do not agree; moreover, the Requestor has been before the TLAB on other occasions and has access to knowledgeable resources in the community, Staff of the TLAB and in the on-line Public Guide, Rules, Practice Directions and decisions of the tribunal.

The TLAB is a relatively new tribunal and there are undoubtedly growing pains in knowing its practices and responses to novel fact situations. This is as much an incentive for diligence in actively exploring rights and privileges as it is an impediment to active, effective participation.

I find nothing in either the nature of an error in the Decision or the audio record of the proceeding that would permit me to conclude other than that the Requestor undertook an informed course of action and was not prevented, in any substantive way, from carrying it out. It is not appropriate to assert, after the fact and as part of the Request, that a lack of knowledge, which could have been derived and delivered procedurally through due diligence, is a rationale for relief. The Request asserts error in the Member curtailing the introduction of facts and evidence in argument, a proper foundation for which had not been laid in the Hearing.

As stated, it is not the purpose of a Review to permit a re-argument of the case in a strict sense. Although Rule 31.4 contemplates the Requestor may provide "c) any new evidence supporting the request', I do not take this to be an open invitation to introduce material known at the time of the Hearing and ruled inadmissible in the argument phase, absent an error of law on the face of the record.

I find that the Member properly excluded the introduction of evidence in the argument phase of the Hearing that could have been tendered through a witness at the Hearing. It is not appropriate to challenge the Member, after the fact, for not informing the Requestor of a right to call evidence, including through himself, in the case of lay citizen evidence. The responsibilities and the rights of a Party are well documented in the Rules and the Public Guide.

I find that the attempt to characterize the distinction between allowing counsel to refer to legal authorities in the argument phase as 'new evidence' and prohibiting new direct evidence in argument as being unfair, is both incomparable and without merit.

I agree with the submissions of the Applicant on the point. A Party "had a duty and obligation to familiarize himself with the TLAB Rules of Practice and Procedure…in advance of the Hearing". I find no error by the Member or any substance in this challenge.

A second circumstance of inapplicability or insufficiency in the Request, is the Requestors' assertions, pages 5-7, respecting some aspects of the role of the COA decision.

As indicated above, the TLAB is obliged by statute to give regard to the decision of the COA and the materials it had before it. Both the COA decisions and the materials it had before are carried forward to the TLAB appeal files and are a matter of accessible public record on them. Moreover, it is clear that the Member was alert to those decisions as being supportive of the Applications, as well as the materials and their revisions that were before the COA.

I agree with the Requestor that there was nothing apparent in the testimony or evidence to support the Members reference to "an experienced COA panel" (Decision, page 18); however, the membership of the panel was in evidence and the Member had had past experience and membership with City COA panels. I see nothing of substance in the remark and the decision of the COA, to which the TLAB is to have regard, which decision clearly found conformity with the City Official Plan, the severance/consent and the variance tests – albeit without a scintilla of elaboration as to its reasons why.

What I find as irrelevant and insufficient in the Request are the submissions that the Requestor sought to bring forward respecting what occurred at the COA Hearing, with particular reference to the content of the oral deputations and purported remarks of some named COA members. The inquiry of the TLAB, although an appeal from the decision of the COA, is not an inquiry into the conduct of that proceeding, its propriety, content, comprehensiveness or otherwise. An entirely different statutory direction would be required to provide jurisdiction to the TLAB to examine the conduct of the COA, its proceeding and adjudication, or the propriety of its decision making acumen. Rather, the statutory duty on the TLAB is to consider the Proposal on appeal afresh, with inputs and considerations which I have above identified.

Had the COA enunciated reasons for its decision, the TLAB might have had greater detail to assist in its obligations to have regard for the COA decision.

However, despite the plea in the Request, it is also not the duty of the TLAB to require, implore, direct or inquire of the COA or individual members, by way of summons or otherwise, as to what went into its deliberations and reasons. Similarly, the practices of other COA's around the Province are not germane, in my view, to a consideration of the Request. That role and the petition objective of the Requestor, namely, to perfect the performance of COA's, is more the prerogative of the legislature, the judiciary or the Council responsible for the appointment of the COA panels.

I find the attempt in the Request to introduce evidence as to what occurred before the COA and the video recording of that proceeding to be irrelevant and not a part of (or relevant to) the 'full consideration' that the TLAB must apply to its responsibility to hear and determine the appeal before it. So, too, with the Request for Review of the Decision. The COA's decision is what it is, in this case a bald approval without substantive reasons.

In my view, there is no need or basis to adjudicate this aspect of the Requestors' petition; namely, that the Member erred and that the Decision should be declared faulty and inadmissible for the failure of it, or the Review, to inquire into the conduct of the COA.

Further, I do not see that the Decision attributed an inordinate weight to the decision of the COA or the materials before it, with the possible exception, described below, respecting issues around a revised site plan. The COA decision, as directed by statute, is a mere consideration for the TLAB, both on appeal and in this Request, without the necessity of further inquiry into its foundations.

I generally agree with the submissions of the Applicant on this point as well, namely that: "No weight can be given to the CofA decision in relation to this matter." I agree and find no error of substance in this challenge.

A third aspect of the Request relates to the assertions on pages 9 and 10, as to matters of the Member's conduct.

Again, I have listened to the digital audio recording, read the submissions of counsel for the Applicant and find the representations of the Requestor in this regard to be unsubstantiated, unhelpful and somewhat self-serving.

The TLAB Rules make the appointment of Hearing dates essentially peremptory, absent the consideration of Motions for adjournment. Both the Rules and the Public Guide underscore the importance of administrative hearing efficiency. It is not for the TLAB Staff or the Member to make inquiries as to the whereabouts or attendance of persons having an interest in a matter for which a Notice of Hearing is properly served. Rather the responsibility lies with the Parties and Participants to attend at the set times, to refresh themselves as to their roles and the filings, including the manner and timing of the introduction of evidence, and to prepare and provide for the smooth progress of the

hearing. One responsibility of the hearing officer is to attempt to conclude the sitting in the appointment time allotted.

I agree with the Applicant's submissions in this regard. I do not find it to be an error or discourteous to commence a sitting in the circumstance even where a Party is absent, in this case for 18 minutes – or to fail to inform or prompt Parties throughout, in respect of the scope of, or the exercise of their rights. I have addressed, above, the allegation of discourtesy in refusing the introduction of new evidence in the argument phase of the Hearing.

I attribute no weight to the matters raised above in considering and disposing of the Request.

c) Hearing and Review Context

In reading the Decision, I am struck as much by what is not said as I am by the thoroughness of the description of the evidence.

Several factors are present that are not acknowledged in the Decision or are only summarily noted and not further considered:

1. City Council instructed the appeal and sent two professional witnesses to participate;
2. The record demonstrates "significant opposition" (Decision, page 3) and local notoriety in opposition to the COA decision and in support of the appeal, including two neighbour residents;
3. Five of the six witnesses testifying opposed the Proposal;
4. The Applicant called one planning witness; yet, despite direct Urban Forestry opposition, the Applicant twice announced that it declined to call its Expert Witness arborist; the Member simply noted that this witness was "unavailable" (Decision, page 14).
5. The TLAB and the former Ontario Municipal Board (OMB) had recently and, in close geographic proximity, considered and rejected applications for identical or analogous relief as sought by the Proposal; while recognized, promised consideration was absent and proximity was not factored in while decisions more distant in geography, circumstance and time were followed.
6. Council had previously, prior and contemporaneously addressed and amplified policy direction (and materials in support thereof) in the form of OPA 320 and the Long Branch Urban Design Guidelines, to which the TLAB might have been expected 'to have regard to', as 'decisions of council'.

While nothing in itself is determinative in any of these considerations, at the very least they provide a context and signal within which the Member's function is to focus and address, on the real matters in issue.

That same focus is required in this application of Rule 31, which involves examining the 'reasons for the request' and the 'grounds for the request'.

In that same context, I am satisfied that the Request, its supporting documentation and the response of the Applicant provide a suitable backdrop for the performance of the Review. I find no basis to seek further written submissions from the Parties on the issues raised in the Request; the Decision is thorough insofar as it refers to the evidence and correctly recites the issues before the Member (Decision, page 3); and, no real challenge is asserted to that recitation. The Request focuses on the propriety of the Decisions' **Analysis, Findings and Reasons** (pages 18-26), and challenges its authenticity to the evidence, its alleged inconsistencies and errors of appreciation and use.

For similar reasons, I see no issue in dispute upon which further written submissions, or a Motion filter should be requested or argued or a rehearing ordered.

Certainly no such submission or request has been made by any of the Parties addressing the Request.

It is of passing interest that the Appellant City takes no position on the Request. I can draw no inference or conclusion from that silence; certainly the position of the City is well documented and expressed in the evidence and argument, all digitally recorded. One would hope that the silence reflects a respect for the Decision process rather than a mere intransigence, lack of oversight or lack of energy to mount a position statement.

The City has provided no contribution or submissions on the considerations to be brought to bear on the Request.

I am left, in the application of the remaining considerations as to whether, in the language of Rule 31.6 d), to: "confirm, vary, suspend or cancel the order or decision."

I approach this task by asking, via Rule 31.7, if the reasons and evidence provided are "compelling and demonstrate grounds" which show that the Decision of the TLAB:

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

By his own admission, the Requestor is a lay person and was unrepresented by counsel. Mr. Ketcheson, on the other hand, asserted in the Applicant's response that: "Mr. Jamieson is a sophisticated lay person." Under either description, I do not find it

fatal that the Request fails to specify under which of the above headings, the assertions in the reasons for requesting the Review, fall.

In a purposive reading of the Request materials, given the sorting advanced above in Rule 31.7 and the considerations above identified, I find that grounds b), d) and e) are either not present in the Request or present no basis for further consideration.

The balance of the considerations in Rule 31.7 raised in the Request are discussed under discrete topics with reference to the Decision.

2. Treatment of Evidence

a) Misunderstanding, Misinterpretation

i) Neighbourhood 'Study Area'

The Member recites that 'the evidence required almost two full days to complete'. The digital audio recording confirms this description.

The Requestor challenges the Decision in respect of the accepted 'study area'. On the surface, this challenge could be dismissed as an attempt to reargue the evidence. However, the choice of a relevant study area and its use and deployment in weighing the evidence and the application of policy direction is a matter that goes directly to the authenticity of the Decision.

Almost every appeal before the TLAB engages potentially conflicting opinion evidence on the need, extent and relevance of a selected study area upon which area assessments of 'physical character' are derived for Official Plan policy conformity. Sometimes this area is described, as here, as a 'dog walk', a 'walkable distance', a '5 or 10 minute walk' or some more precise boundary description.

The detail or vagueness of the description becomes germane as to its use for it is the source of many statistical assertions as to character elements.

Consequentially, the examination of this issue of the 'study area' as a generator of attributes of the 'physical character of a neighbourhood' is the subject of countless planning law decisions.

The practicing professionals, predominantly the land use planners, define a 'study area' for the 'physical character of the area' assessment required by the Official Plan, by drawing a line premised upon various criteria. In the Decision, three 'study areas' are acknowledged, two being the product of the work of professional planners, Mssrs. Huynh and Skelton. All three, including that of Ms. Addis, are acknowledged to differ; the Member collapses their distinctions on some measures to be of relative similarity, apparently preferring the argument submission of the Applicants counsel.

The purpose of a 'study area' is to determine relative physical character for the purpose of addressing the statutory tests in s. 51(24) and 45(1) of the Planning Act,

both in relation to the Official Plan policy criteria and measures of zoning intent, and the tests of 'minor' and 'desirable', expressly. Where so employed, the characteristics identified also become comparative ingredients in the policy directives of the City Official Plan for the Proposal to 'respect and reinforce' (said to be used 12 times), 'fit' and present similarity to proximate properties in defined characteristics identified in s. 4.1.5 of the Official Plan.

The definition of area character is therefore, among other matters, central to the analysis of the policy intent, for the severance (whether the plan conforms to the Official Plan (s. 51(24)(c)) and for the variance approvals (whether the relief sought maintains the intent and purpose of the Official Plan (s.45(1)). (Underlining added from statute)

Where, as here, there was disagreement as to the relevant 'study area' extent and its derivative characteristics, it is incumbent on the Hearing officer to critically assess the differences and their employment. That assessment is assisted by experience, evidence, site and vicinity attendance, case law, the scope of criteria examined and the use and deployment of that evidence in the more demanding school of policy and regulatory application, notably including aforesaid s. 4.1.5, the variance tests and including applicable zoning.

Moreover, the evidence of professionals qualified to conduct assessments, notably qualified land use planners, is instructive and can be compelling. However, in my view, it is not open to the tribunal to exclude, or ignore, or entirely disregard consideration of the evidence on study area character assessments by persons having local knowledge expertise, who may be lay citizens, without affording cogent reasons.

It is the duty of a Hearing officer under modern conventions to describe, with some particularity, the reasons why evidence is accepted or rejected. In the vernacular, the judiciary and the pundits explain this responsibility as a matter going to jurisdiction, and perhaps as an area of fairness, so as to describe to the 'losers' why they 'lost', not only to the winners why they 'won'.

In the Decision, the Member identifies as a 'main issue' the "existing physical character of the neighbourhood, noting that the "planners disagreed" (Decision, p.18), and apparently accepts that the 'existing physical character' is one of three issues for resolution (Decision, page 20).

It was acknowledged in the evidence that no definition of 'the physical character of the area' is provided in statutory, provincial or local planning legislation or the policy documents approved thereunder.

Local policy does not extend to a full definition, though elements of character assessment are identified. Methodology, as a different aspect, is discussed more fully, below, under the subtitle: **OPA 320 and the Long Branch Urban Design Guidelines.**

In assessing area ('neighbourhood') character, the Member must not, in my view, misstate the evidence, consider irrelevant considerations, or fail to consider relevant considerations**.**

In the absence of a specifically directed definition, it is incumbent on the Member to assess, describe and accept a compliant description of the 'physical character of the area' for the purpose of evaluating the Proposal for policy and other compliance.

In my view, there are parameters to a fair assessment of the 'study area' and the resultant delineation of the 'physical character of the area'. To choose some that are relevant to the Decision, these include, but are not limited to:

1. Areal extent, so as not to be too large or too small to be amorphous or unrepresentative for the assessment of the Applications;
2. The exclusion of physical features not germane to the Applications;
3. In the use of statistics, the disqualification of uses or land parcels not relevant to the statistical measures being generated and employed; and
4. The notation of features and functions contributing to the environment, including but not limited to topography, ecology, development patterns (such as road rights of way and travelled alignments, lot characteristics), monuments and other physical features of note.

This is not an exhaustive list. In point is the acknowledged element in the Decision that mere numbers and statistics cannot properly define the 'physical character of the area'. Something significantly more is required and where the evidence differs of that description, the Hearing Officer must choose the comparative descriptions most appropriate and applicable to the Proposal. That choice, in my view, must be astute, neither favouring one nor ignoring or refuting another, or limiting the inquiry without explaining the favouritism or exclusion, and must not close one's eyes to the whole.

In my view, with the benefit of listening to the evidence, the Decision commits multiple fundamental errors in the treatment of assessing the 'study area' and its consequent 'physical character of the area' acceptance for the purpose of defining the characteristics of the "neighbourhood", for comparison and application to assessing the Proposal.

These include the following:

1. The planners' employed a 'walkable' distance from the subject site. These distances and inclusions differed, with reasons, whether gauged temporally or through geographic limitations/exclusions. Ms. Glenn and Ms. Addis described their normal daily exposure as residents adjacent and opposite the subject property. The Member does not provide a rational for distinguishing the acceptance of the Applicant's 'study area' beyond the general assertion that all assessments (by narrow or undefined selected measures) are 'somewhat similar'. This finding is contrary to the direct testimony of the witnesses Skelton, Godley, Addis and Glenn. I agree with the City argument, that the 'study areas' chosen contained multiple distinguishing elements and that while some statistical measures demonstrated similarity (e.g.,

some 60% of incorporated residential lots had frontages at or exceeding the by-law standard of 12 m), the distinctions were important elements of character description.

2. The Appellant's planner included in the 'study area' significant areas that included properties in zone categories permitting different and lesser performance standards, notably lot frontage and lot area minimums', each having relevance to elements of specific policy direction for assessing the 'character of the neighbourhood': namely, the 'dimension and shape of the proposed lots (s. 51(24)(f); the 'size and configuration of lots' (Official Plan policy 4.1.5(b)). In the Decision, the Member employs the Applicant's statistics based on its 'study area' to assess the Proposal without a descriptor as to why the challenge to such distorting inclusions was rejected.

   In my view, it is not open to the Member to accept the description of an area as accommodating a variety of lots and housing as 'eclectic', where the nature and scale of inclusions to formulate that description is challenged and no response is forthcoming by the Applicant or the Member.

   Nor is it appropriate for the Member to choose evidentiary responses out of context with the evidence of a witness. On several occasions, the Decision, as raised in the Request, misstates the evidence actually advanced, in preference for cross examination that advanced suggestions and limitations never directly put to the witness and therefore not expressly endorsed:

   i) Skelton's examples on "this side of the block" (Decision, page 11);
   ii) The "neighbourhood is the very block" (Decision, page 18);
   iii) The 'neighbourhood is the "east side" of the street (Decision, page 22).

   These purported admissions as to a very narrow character assessment area, to the exclusions of other relevant considerations, never occurred in that form.

   I have listened carefully to the examination and cross examinations of the various witnesses on the subject matter of 'study area' distinctions, including 'neighbourhood' delineation and the identification of character attributes. In my view, the evidence does not support the Member's conclusion of 'similarity' or 'reasonably consistent' (Decision, page 20) between witnesses, either in areal extent or the delineation of elements of area character.

The Member accepts the Applicant planners' delineation and circumscription of area extent and derivative characteristics for application to the Proposal and prefers his evidence, without adequate or any explanation or rationale.

The Decision does so with a misstatement as to the evidence of description given by multiple other witnesses.

To emphasize, the Member does relay, at page 19, a rejection of the evidence of the planner Skelton ("shared I believe by Mr. Godley") that "the "neighbourhood" here really consists of only this east side of this particular block of 38th street."

I have listened carefully to the evidence and cross examination of both witnesses and nowhere do I find that admission to have been expressed. To the contrary, both described a structured approach to area character assessment and rejected the overly broad (zone categories incorporated) and inclusive nature (example properties outside the 'study area') of irrelevant considerations employed by the planner Huynh.

The planner Huynh used the broader 'study area', inclusive of zone categories with lot frontage and lot area standards closer to the Proposal, yet evidencing only some 12% of the sample.

3. The Member clearly accepts the Applicant's evidence concerning similar lot sizes and frontages to the Proposal derived from the 'study area' and examples in proximity (Decision, page 20), agreeing that variety is "a characteristic of the neighbourhood". This contravenes the character assessment evidence of four other witnesses (Godley, Skelton, Addis, Glenn), all of whom maintained disagreement with the eligibility of the comparative sample based on distance, zone category inclusion and originality of lot creation.

   The Member had extensive direct evidence on lot sizes, frontages, age, history of construction, floor space index measures and severance activity through Ms. Addis and others. This demonstrated a multitude of other attributes of area and neighbourhood character that is not addressed or is addressed obliquely or only by casual descriptive reference. This evidence included an assessment expanding outward from the subject property and included multiple descriptors of character attributes not parsed to a select few.

   These included:

   i) Lot sizes requested in the face of tribunal decisions finding those analogous to the Proposal to be not 'minor' or 'desirable' (Decision, page 20);

ii) Lot frontages being in multiple lesser measures of area 'study area' definitions;
iii) Presence of healthy, viable trees contributing to a common area streetscape (Decision, page 14);
iv) Relevance, numbers and distribution of narrow, older lots of record without severance activity and their location;
v) Open spatial pattern and rhythm of lots, generous landscaping spaces and built form separations and distributions that included extensive areas of green vegetation landscaping, front and side yards (Decision, page 2).

The Member advised Godley of the intent that his policy references on good urban design as expressed in s. 3.1.2.3 of the Official Plan will be addressed (Decision, page 15), but nowhere does the Decision respond to him or present an analysis of the combined considerations he raised and applied. Rather, it favours vague expressions of preference for the 'evidence' of the planner Huynh and counsel for the Applicant.

From her agreement with the Applicants planner, the Member draws on 'commentary' set out in s.2.3.1 of the Official Plan (page 20), misinterprets and calls it "policy" and concludes that the Proposal respects and reinforces the "existing physical character of the neighbourhood".

A lot severance nearby that is now constructed with two 'soldier houses', is cited as a prime example of similarity and 'fit' of the Proposal. I do not agree- more than just on the euphemism that "one swallow does not a summer make'. In my view, it is not appropriate to take an example or examples of alleged similarity as a basis to disregard multiple examples of dissimilarity.

I prefer the evidence of the specifics listed above of the observations of the witnesses in evidence and in opposition to the Proposal, over the less than concrete and selected individual findings and argument thereon by the Applicant's counsel, accepted by the Member.

In my view: the selective treatment of elements of area character; the use of discrete statistics premised upon a 'study area' and definition of the neighbourhood that was acknowledged to be in dispute; the failure to provide cogent reasons therefore, including the rejection of conflicting testimony; the misuse of commentary and preference for overly broad generalizations applied to specific policy language and statutory tests; and the acceptance of counsel's assertion as to a lack of conformity in the street and area, are all aspects that challenge the appropriate and acceptable use of evidence.

On the latter point, while counsel is allowed, in argument, to present suggested conclusions to be derived from the evidence, I find that it is not open to counsel to suggest the presence of evidence never called let alone proven; even less so is it open

to the Member to accept 'evidence' from counsel, as appears to have taken place in the manner expressed in the Decision:

i) On a revised site plan and potential tree loss: "if developed as proposed by counsel" (Decision, page 25);
ii) On conclusions respecting the loss of privacy to the Glenn property, in the absence of originating or reply evidence: "Mr. Ketcheson pointed out, and I accept his conclusion…" (Decision, page 23);
iii) On findings of a lack of street and area uniformity (Decision, page 20).

I find that these aspects, above, individually and collectively warrant the review Request, are contrary to the weight and the evidence called and bring the Decision into disrepute. They fail to consider relevant considerations and demonstrate interpretation errors of the evidence.

I am prepared to consider them as matters that go to jurisdiction and error of law or fact which would likely have resulted in a different order or decision.

b) Inconsistencies and a Failure to Provide Replicable Reasoning

i. Use of Statistical Measures

The Member appears (Decision, page 20) to accept that "40% of lots in the area of less than 12 m wide constitutes…part of the existing character." In the next paragraph, the Member eschews the argument that statistics should govern or is the result required of the Official Plan. Again, on page 22, the Member adopts language that the jurisprudence on statistical measures 'is not to be approached from a pure numeric or quantitative direction". That said, as relayed above, there is little by way of identification, dismissal or acceptance by the Member of other 'area character' elements and no employment of them in the evaluation or balancing of the use of statistics to support the consideration and ultimate finding that there are "examples" of similar lot frontages and lot areas in the area (Decision, page 9). Indeed, in contrast, the Member acknowledges but does not address the evidence that the neighbourhood is "singularly uniform" (Decision, page 16), not 'eclectic'.

I find this whipsaw of rationale to be somewhat disingenuous and unhelpful, piece meal and inconclusive as a support base or replicable reasoning consistent with the jurisprudence, for the Decision.

I agree with the Request that there is a compelling obligation to be consistent.

ii. Precedent and 'Destabilization'

As is common in TLAB Hearings, the issue of the 'precedent' role of decisions, past and pending, is raised.

The argument by those opposed to projects is that a decision supportive of intensification by severance will unleash a 'floodgate' of applications: encourage other owner and builder purchasers to attempt to realize added value in land parcels - by their division and the construction of new units.

In response, the truism exists that each owner/applicant is entitled to an assessment of their aspirations on their own merits and that each will be so considered. That is a responsibility of the COA and the TLAB.

Tribunals have not been consistent in their approach to the conundrum of the use of precedent to support approval of a project or the concern that an approval may invite, even champion, further applications from alleged similar attribute properties.

At issue is the potential for the erosion of the historical lot pattern and area character.

The Decision is no different in addressing this issue; it distresses the Requestor that the Decision is cavalier and unclear as to the distinction and use of precedent. It is patent that the planning profession, in assessing area 'character' looks for lots and block patterns and lot creation in the recent past, both in numbers and dates, usually up to 10 years, as a measure of whether the 'neighbourhood' is 'stable', in 'transition', or experiencing 'intensification'. These results are then urged on the triers of fact as conclusions in evidence. This is the use of precedent to draw conclusions on the 'character' of an area.

The Members recites and applies these considerations (Decision, page 20, 21).

Paradoxically, evidence as to the existence of the creation of similar sized lots, some 19 examples created by consent/severance in this millennium, and their increase in numbers is employed as an element of area character associated with 'stability' and gradual evolution.

By the same token, the irrational fear of lot creation and a goal of seeking cessation, if it existed, would be a move to elevate 'stability' to stagnation, save if it were not for other exigencies, such as intensification as-of-right under existing zoning performance standards. Godley and the other residents urged maintenance of area character by redevelopment 'as-of-right' on existing lots of record; none were zealots for stagnation.

The Review urges that the device of the consent/severance process has worked in the past to the disadvantage and inconvenience of area residents in Long Branch by increasingly effecting change to the lot pattern and introducing intensified demands on

area amenities, loss of character, loss of privacy and local and area impacts of substance: groundwater exceedances; loss of mature trees and the cooling effect of trees; increased on-street parking; congestion.

It labels this destabilization. It asserts that the Decision collectively ignored these impact concerns despite required consideration under both the land division and the variance aspects of the Applications.

It also asserts, very strongly, that being opposite to recent decisions of the TLAB and the OMB on applications in close proximity and for similar relief, the Decision is controversial and the foundation of an irrepressible precedent that will further escalate applications and appeals for the division of lots with widths capable of meeting the 7.62 m standard set by the Proposal and the Decision.

Mr. Jamieson asserts, at page 11 of the Request, that "39% of the properties on Thirty Eighth Street from Lake Promenade to James Street are owned by builders." From that, he asserts the Decision "will accelerate social destabilization of the neighbourhood."

This is 'new evidence' rejected by the Member on the urging of Mr. Ketcheson and arguably a bald attempt to re-argue the case heard and decided before the Member. I agree, but I am more inclined to the view that the issue of 'destabilization' is an issue raised to be examined as to its authenticity and treatment in the Decision. It is certainly a reason and ground for the Request, but are there compelling and demonstrable grounds to warrant a remedy under the Rules, as to its treatment?

The Member acknowledges that there are older bungalows either side of the subject property and many more elsewhere (Decision, page 6) and "accepts that there are indeed many properties nearby larger than the lots proposed here…" (Decision, page 18).

Contrary to the evidence heard from three witnesses with local knowledge expertise, the Member agrees with evidence heard from the planner Huynh that "gradual change by consents has not destabilized the character of this attractive neighbourhood. Redevelopment seems to be increasing throughout the area. But I do not believe this leads to the conclusion that the neighbourhood is being "destabilized" (Decision, page 20).

The Member distinguished two Ontario Municipal Board cases provided by the City with express findings that lot severance was refused because the proposed lots "did not meet the Official Plan test for meeting the "existing character of the area" (Decision, page 21), their lot frontages being, as here, in the minority. In the second decision, she relays: "It (the OMB) feared that continuing consents in the area would in fact destabilize the neighbourhood" (Decision, page 21).

I am of the view that distinguishing case law precedent on the very point in issue, using, as accepted in the Decision, extracts based on 'comparables' in different zone categories or disavowing the use of statistics except when it is convenient to do so,

constitutes legitimate and authentic grounds to challenge a decision - as not presenting reasons that are replicable and communicate a cogent rationale.

I conclude and find that the Member did not, in a substantive or adequate way, address the policy challenges raised in the evidence as to neighbourhood stability in an existing and planned sense, or the impact that precedent plays and the obligation to provide 'reasons'. The Member, on page 10, notes that the planner Huynh suggested that the severance of the subject property would not create a precedent. No concrete elaboration or connection to the Official Plan was drawn when offered the opportunity to support the suggestion, in cross examination.

On the discrete issue related to tree preservation, on the same page, the Member recites the evidence of the Applicant's sole witness: that Mr. Huynh had "no real response concerning tree preservation" to Official Plan policy non-compliance by the proposed removal of mature healthy trees (Decision, page 10).

This acknowledges that the Member had no contrary evidence to the policy implications and conformity to the Official Plan. As discussed later, the absence of evidence and the failure to provide reasons contrary to direct, qualified professional evidence, can amount to an error of law which would likely have resulted in a different order or decision

The Official Plan, on multiple separate occasions, mandates that the Applications and the contemplated Proposal must 'respect and reinforce' the elements of the physical character of the area. The failure to properly address the progress and precedent of lot frontage and area reductions and mature tree removal by lot severance, contrary to the long established and re-confirmed by-law standards and area character attributes, is an unsupportable omission in the Decision.

The Official Plan policy supporting the stability of City *'Neighbourhoods'* and the concern for destabilizing activities is a major policy framework. It pervades multiple Chapters of the Official Plan and it was urged upon the Member as being breached by the witnesses Godley, Glenn, the City planner, and Ms. Addis.
It featured in the City's argument.

The subject is largely ignored in the Decision and the specifics are left unaddressed.

As such, in dismissal without support or the effective absence of addressing pervasive issues upon which direct evidence of non-conformity was asserted, the Decision fails to address the tests, under both separate jurisdictions, of Official Plan conformity.

This element of challenge, destabilization and its consequences, was raised in both professional and lay citizen evidence. In my view, elements of precedent are a relevant consideration that ought to be directly addressed by a replicable resolution of the evidence. In my view, the Decision failed to address this consideration in anything other than the most perfunctory way. On the evidence I come to a different

consideration and find that the potential for destabilization in Long Branch is real; there are a majority of eligible candidate lots. Their planned function is a matter of historical record of multiple measures of area character, not just lot frontage.

Applications for the consideration of severances are an entitlement as-of-right of large lot property ownership. I find that in Long Branch, the absence of a council decision to revisit zoning attributes of lot size, frontage, density, spacing, character and multiple other attributes, means the consideration and approval of such applications warrants the presentation of a unique set of circumstances not present here, to justify intervention.

The evidence was very clear, although not determinative as described herein, that Council's consideration of area character to date has evolved in the exact opposite direction and has evinced a reaffirmation of historical zoning standards and a desire to enhance greater stability through the assessment of applications. This is raised later herein with the consideration of **OPA 320 and the Long Branch Urban Design Guidelines.**

The failure to address a relevant consideration I believe to be a matter of jurisdiction.

The failure to provide reasons I believe to be a matter of law and jurisdiction.

These failures are present in the Members assessment of this issue.

iii. Qualifications Bias

The Request raises multiple issues of systemic bias against ratepayer groups, the evidence of lay citizens' vis-à-vis registered professional planners (and other professionals) and, as well, the Requestor's related procedural and conduct issues. I have dealt with the latter and attribute to them no weight.

I do note with approval one inconsistency in the Decision raised in the Request that requires comment. The Member recites the advice in evidence that the witness Godley has never, in an administrative tribunal setting, supported a severance application in Long Branch.

The Member does not, however, recite the advice, also in evidence, that the professional witness Huynh had never accepted an engagement to oppose a development application, over a lengthy career. Qualifications of a professional witness include the duty to provide independent professional advice to the client and the tribunal. This affirmation is not incumbent upon the lay citizen.

However, both are under a sworn or affirmed duty to tell the truth.

No use, weight or inclination can be attributed to the Member in not reciting the above information. As such, it appears a minor inconsistency in the recitation of evidence and it cannot be attributed the stigma of apparent bias or the failure to meet the test of impartiality pertaining to the witnesses, as urged by the Requestor.

iv. Urban Forestry.

Not formally raised in the Request but identified in my reading of the Decision and listening to the evidence, and also raised in the Godley submission attendant the Request, is the treatment of the urban forestry evidence.

I discuss separately the issue of **Misdirection** associated with urban forestry evidence as a ground for review raised by the Request.

One qualified arborist tree expert was called by the City and recognized by the Member, Dr. Max Dida.

The issue of the preservation of the urban forest arises under the City Official Plan, s. 3.1.2, s. 3.1.2.1(d) and s. 3.4.1 (d), and is engaged by its consideration both as part of the severance/consent sought, and the minor variance approval.

In my view, it is incidental with respect to the latter that no variance itself is sought of any urban forestry regulation. More germane is that both the severance and the variance approvals are required in order to permit construction on the proposed lots. This invokes zoning regulations relief that, to be effective, require the removal or injury of one or more healthy, mature trees.

The Decision recites that the Applicant's arborist was "not available" - but that elements of that person's reports were 'referenced', by the City and the Applicant (Decision, page 10).

This results in the fact that the only qualified arborists' evidence being heard by the Member, to be found in the Decision and confirmed by what I read and heard, was from the City witness.

As well, the digital voice recording is very clear, that in response to questions from counsel, the planner Huynh's evidence on all matters arboreal was admitted to be from the Applicant's arborist, who was never present.

As stated, the Applicant twice advised the Member that evidence from its arborist would not be forthcoming – without any audible (or written) explanation.

This left the professional opinion evidence on trees on the subject property and the effect, including impacts of the Proposal, resting on the professional evidence of the City witnesses, Dr. Dida and the planner Skelton.

Lay opinion evidence on the consequence of tree removal was also addressed by the neighbour, Glenn, who asserted undue adverse impact arising through tree removal, loss of the amenity feature, loss of shade currently permitting her house to avoid air conditioning, change of streetscape and change to area character, all contrary to Official Plan policies above noted to preserve, protect and enhance the Urban Forest.

This lay citizen's evidence on tree removal impact was not addressed by the Member. I find that there was an obligation to address the Official Plan policies in sections 3 and 4 on the severance implications and its intent, on the variance issues, including whether the consequence of tree removal is 'minor' and 'desirable' on the variances required. The latter arises, for example, from relief requested to accommodate the fsi and parking on the new south unit, with its integral garage requiring access by an alignment requiring removal of a significant healthy tree.

The obligation was met in the City's evidence; it was not met by the Applicant.

The issues around the Urban Forestry evidence are discussed by the Member on pages 24 and 25 of the Decision.

I accept the summary by the Member of the sole evidence on the desirability and compliance of the Proposal insofar as it affects the mandate of the Urban Forestry Department and compliance with the policies of the City Official Plan (Decision, pages 13-15).

That summary, from page 15 of the Decision, accurately describes the evidence in chief and cross examination of Dr. Dida. The extract of relevance is repeated verbatim below:

> "When questioned by Mr. Ketcheson as to whether it was possible to do any construction on the site without impacting the private trees 926 and 927, Dr. Dida stated that, considering the revised site plan with driveways to the sides of the lots, it may indeed be possible to retain tree 926 (currently at the centre of the present lot). He reiterated that different considerations applied to the two (now identified) private silver maples. Tree 927 would have to be removed, as the driveway for Part 2 to the south is in direct conflict with it. Retention of City tree 925 might provide some of the environmental benefits he cited. <u>However, he recommends against the severance, in favour of building a new single dwelling and retaining the existing driveway.</u> UF's mandate under the Guidelines in the "Every Tree Counts" is to preserve the urban canopy, and this Guideline is reinforced by the policies in section 3.4 of the OP. Dr. Dida's initial conclusion was that the minor variance and consent applications will require injury of the 69 cm City-owned Ash tree and destruction of two City-owned Silver Maple trees. Urban Forestry does not support removal of the City tree according to the City of Toronto Municipal Code Chapter 813-8 review criteria for by-law-protected, City owned trees. Approval of any application to injure a tree is based upon Urban Forestry's

> assessment that the injury cannot reasonably be avoided, and that the tree will withstand the injury and continue to survive well. He still recommended refusal of the applications. He did agree with Mr. Ketcheson that if the plans were revised to retain the current driveway to provide access to Lot 1 to the north, the central private tree, # 926, might be saved." (Underlining added)

With respect to this last sentence, I have listened carefully to the evidence. The Member restates an aspect of the evidence that was derived through a hypothetical, discussed in greater detail, below, under **Misdirection**. Suffice it to relate, that Dr. Dida at no time confined his opinion to one tree or agreed that the Proposal or the Applications could be addressed in component parts.

His opinion advice to the Member was as underlined, above.

As challenged in the Request, I am compelled to observe:

1. Dr. Dida's assessment of the subject property's trees as being healthy was unrefuted by contrary evidence and his firm recommendation was that the severance be denied (and the variances follow suit) as the injury or removal of on-site healthy trees cannot be supported either on the application of the trees assessment By-law, Chapter 8.1.3 and 4 criteria, or on a conformity assessment to the policy directions of the City Official Plan. Mr. Skelton provided confirmatory planning opinion evidence on this latter point, based on Dr. Dida's advice and that of Urban Forestry staff.
2. The Applicant called no contrary evidence; the evidence of the planner Huynh was admitted as reliant on the Applicant's professional arborist whose evidence was not called and which therefore was not subject to cross examination.
3. Dr. Dida's evidence on cross-examination was largely procedural and process oriented and is accurately described in the Decision. At no time did his principle advice, professional opinion and recommendation to the tribunal, above and underlined, change.
4. The Member failed to address the professional evidence called and left unchallenged by the Applicant. Rather, the Member accepted and followed the procedural advice, adopted the 'evidence' of the Applicant's planner and its solicitor respecting driveway alignment, and imposed a period of time to produce a definitive new site plan - one that had never been proven in evidence - prepared or described (but 'seen) by the Applicant's planner.
5. The Member, having defined that "this application hinges largely on the fate of the existing trees on the lot" (Decision, page 24), thereafter addresses procedures for the consideration of as yet unfiled or partially filed applications for the destruction, removal or injury of private and public trees.
6. While the Member acknowledges that the Official Plan is not satisfactorily addressed by the Applicant's evidence – effectively, I find that the Member's finding of non-conformity, with which I agree, fatal to the statutory tests,(Decision, page 24). Nowhere does the Member deal with the evidence

and advice of Dr. Dida recommending refusal of the Applications that require the injury or removal of healthy trees or the issue of his and Mr. Skelton's opinion advice as to non-conformity with sections of the Official Plan.

7. The Member quotes, without either application or approval, on page 24 of the Decision, from page 25 the Decision and Order respecting 38 Thirty Sixth Street wherein I found in that circumstance:

> "While tree removal alone is not a determinant of the applications, it is an element of area character that is not reinforced given the immediacy of the loss, the reduction in planting area identified by Dr. Dida and the generations or more required to replace the existing physical offering. Intensification of the housing stock should be a shield for proper environmental management, not a sword to eliminate obstacles." (Underlining added to reflect the consideration of the evidence heard in that Hearing).

I find that the quotation resolves none of the issues raised in the Request. It provides by the Member no assessment of the comparability of the issues, size or number of affected trees or the transfer of contested evidence from that proceeding to the Applications.

The quotation cannot reasonably be applied to address an assessment of the Applications, or lack thereof, or a finding on Official Plan non-conformity on the only eligible professional advice received. The evidence of Dr. Dida's opinion was ignored on one of, if not the major issue identified by the Member.

In my view, the failure to address that evidence and to provide reasons why an admitted non-conformity with expressed Official Plan policies can still meet the statutory severance and variance tests, amounts to a failure to consider relevant considerations.

The Decision fails to address the subject matter of the urban forestry evidence and fails entirely to address this subject matter in the context of the applicable statutory directions.

I find, on the evidence from the only accredited professional witness with respect to relevant urban forestry considerations, including the application of Official Plan policy, the severance and variances should not be approved. Dr. Dida's evidence, his arborist assessment practices and Official Plan policy direction to protect, preserve and enhance the urban canopy was not surmounted by any contrary assessment. Successive applications and their prospective assessment are not a substitute for direct opinion evidence and the obligation to address it.

It is in this arena that I find the Decision to be most troubling. I return to it, below, under the heading: **Misdirection**

In my opinion, in this circumstance, the failure to consider relevant considerations, Official Plan conformity on urban forestry evidence, is a matter of

jurisdiction and an error of law that would likely have resulted in a different order or decision.

3. Treatment of Jurisprudence: Mistakes of Fact and Law

a) Neighbourhood Character Decisions

In addressing elements of neighbourhood character described in the evidence, above, I left for separate consideration the use of jurisprudence. I did this for two reasons: the assessment of evidentiary burden relative to the applicable statutory and policy considerations in a particular fact situation is distinct from the following review of the use and deployment of decisions of courts and tribunals. Second, as a sitting tribunal member having dealt with a proximate property, it is appropriate to address the use and relevance of that nearby disposition, discrete from the site specific assessment obligations on the Member from other sources.

The Decision references my Decision and Order in respect of 38 Thirty Sixth Street in six separate locations (pages: 17; 18; 19 (quoted); 21(extracted); 22 and 24 (quoted).

The reference at page 22 merely states that the Member decided to "distinguish the finding of the TLAB for 38 36th Street for the purpose of evaluating this application." No further particulars are provided.

The Decision and Order on 38 Thirty Sixth Street was rendered March 19, 2018 and was clearly before the panel in evidence and the City argument by several of the witnesses appearing in opposition to the Proposal.

Being both proximate in time and location, dealing with the same statutory applications in a parallel sitting environment by the same tribunal and exercising identical powers involving some of the same witnesses (Jamieson; Godley; Dida) could reasonably be expected to elevate that Decision and Order to be of interest and relevance to the Member.

Instead, the Decision and Order is not summarized, no reasons are provided for 'distinguishing' the relevance, if any, and no analysis of any substance is undertaken, acknowledged, described or recited for its contribution - with any explanation.

This is not to suggest that the Member or the Decision is in any way bound to follow precedent of cited decisions. However, as above described, it is curious in both the use and deployment. The Member apparently closed her mind to the relevance of considerations recently adjudicated - by a panel Member of equal stature - in very close and very similar circumstances.

The Decision and Order in 38 Thirty Sixth Street dealt with severance of a single lot and variances to construct two dwelling units. Identical statutory and policy considerations were engaged by same source applications for relief from identical

zoning standards. There were many site specific similarities to the Proposal: street alignments between Lakeshore Boulevard (and James Street) and Lake Promenade; a location south of James Street; similarity in proposed lot patterns; identical lot frontage reductions proposed; greater lot areas than the Proposal; similar effective floor space index increases (0.62 v. 0.56 for the Proposal, (from 0.35x applicable lot area, permitted)); and identical minimum interior side yard setback relief was proposed.

Only building design relief differed. In the case of the Thirty Sixth Street property just a block to the east of the Proposal, a three storey design was pursued via main wall height relief sought, not present in the Proposal. Both sets of applications involved flat roof design concepts; two and three storey structures comply and are permitted in the zoning by-laws. Building façade design required no zoning relief.

The comparability of these applications for relief, in my view, patently outweigh any distinctions.

There is a distinction related to main wall height. However, this is not relevant to the severance application nor is it compelling in respect of the variance tests applicable to the multiple other variance relief sought, as they are essentially equal. None of the evidence heard underscored or purported to turn on the main wall height distinction.

There are even more modest relief differences: front yard setback relief sought for the Proposal lots; eaves projection and a ‘technical’ first floor level elevation for the parcels at 38 Thirty Sixth Street. None of these latter elements featured prominently in either decision or amount to relevant distinctions. Both complied with zoning standards for rear and exterior side yard setbacks, and landscaping/open space.

The Decision provides no summary of the Decision and Order in 38 Thirty Sixth Street and provides no basis for ‘distinguishing’ its contribution. It provides no discussion as to why the witnesses and counsel who raised and argued its consideration were left unaddressed.

This circumstance is not just curious, it contravenes the admonition to provide reasons and, in line with the elements of moral suasion raised by Parties in opposition to the Proposal, constitutes a failure to consider a relevant consideration.

Clearly, the Member was not bound to follow the reasoning in the Decision and Order in 38 Thirty Sixth Street; however, having been raised repeatedly and argued by Counsel and the Parties in opposition, it was incumbent on the Member to provide reasons as to why it was distinguished and why the common elements and findings are rejected in favour of a different result.

Those considerations, arguably obligatory on the Member to address in these circumstances, included the failure to consider the following elements quoted from the Decision and Order in 38 Thirty Sixth Street. I quote extensively both to include context and to demonstrate the inescapable parallels worthy of the Proposal’s disposition and consideration and urged, for application but not addressed in the Decision.

I also underline additional considerations raised in these reasons that warranted being addressed but which were not:

1. (At page 4) "The Parties disagreed on the applicability of OPA 320, an adopted policy initiative of the City that was under appeal, and the application of Long Branch Urban Design Guidelines approved by Community Council (and ultimately City Council), but without having any other official status. The City indicated it would not rely on this documentation, but not that it was not applicable.
   I ruled both would be admissible, that their weight was a matter for the evidence but that neither would be determinative of the matters in issue."

2. (At page 7) "There was also some similarity in the area description of character, albeit with a dramatic difference in emphasis, importance and relevance to the application of Official Plan policy:

i) single detached dwellings of 1, 11/2 and 2 stories, generally with peaked rooves;
ii) mature front and rear yard landscaping;
iii) extensive 'urban forest' canopy coverage;
iv) building forms of garage and parking location variety;
v) generous front, side and rear yard separation setbacks;
vi) variety and distribution of lot frontages and lot areas;
vii) lot pattern, lake access and streetscape grid consistency;
viii) recognizable age and size of dwellings;
ix) diverse architectural character;
x) diverse regeneration approaches;
xi) building materials and heights variety;
xii) low rise steps to the front door.

While elements of these matters were frequently referenced in the evidence of all those who spoke, the residents especially referenced and elaborated on their perception of recognition, importance and perceived value, and of others. These elements are collectively referred to here as the '**Character Attributes'** (emphasis added). I understand that another list may exist in the Long Branch Urban Design Guidelines; however, those were not specifically brought to my attention and I have not conducted any search or audit of their existence, similarity or inclusiveness."

3. (At page 22) "Both planners identified a Study Area by which they sought to assess a norm or descriptor of character. The Official Plan encourages this effort, even refines it through emphasis that the policy obligation of planning decisions is to 'respect and reinforce the existing .physical character of building, streetscapes and open space patterns'. That definition is further honed by intended reference to attributes, measures and features that are describable and replicable".

While Mr. Godley eschews the approach of the planners to focus on tangible measures of character delineation, I take his point to be more supportive of an approach that aims at a comprehensive assessment of physical character, inclusive of 'design' components – but, in my view, not to be exclusively design of built form.

I find that the delineation of a Study Area is a necessary first step by planning practitioners to attempt encapsulation of measures that replicate the existing physical character of a neighbourhood. I agree with the planners' agreement (and have so found in *Cantam, (* Re Cantam Group Ltd.TLAB (170515-17)September 21, 2017 (*'Cantam'*) re 116 Poplar Road) that character, 'existing physical character' to repeat the direction of the Official Plan, is 'what you see on the ground'.

In my view a character assessment must be open, fluid, encompassing, accurate but not prescriptive to a finite degree. The debate of whether a Study Area that is equated to a neighbourhood and whether the size of the chosen area is good or bad as a base for assessment will continue. The Official Plan, at least the version applicable to the subject applications is not prescriptive of the delineation of a 'study area'. It must be of a scale sufficient to take the pulse of physical neighbourhood's character.

In this Members view, Study Areas large and small can and have been accepted depending on their merit under the applicable policy directives to be applied. The job of the planning professionals starts with an assessment of neighbourhood character. They must gather content information on any applicable relevant parameter, omitting none, favouring none. Some elements of the 'existing physical character' lend themselves more readily to hard measurement; but too often these can become the sole support rationale for change, or resistance, masking others that are harder to define but equally open, obvious, notorious and contributory.

I have reviewed carefully the descriptors of neighbourhood character expressed by all the witnesses. Again I see a pattern of employing aspects of character for or against support of the proposal. It is fortunate that this particular hearing had the benefit of several descriptors of character from professional assessments, resident appreciations, neighbours and other inputs.

Cumulatively, these permit an appreciation of what is physically seen today.

There is no need to embark on a detailed review of each approach. Relevant considerations are stark boundaries, walking norms, measures of lot characteristics premised on comparative zoning standards, analytic measures, sample sizes, topography, geography and even geomorphology. What is germane is that the canvass be comprehensive, assembled and assimilated in a manner that the Official Plan directs. In two instances, a 'prevailing' or proximity standard is established by the Official Plan and where employed, permits anchors for assessment of 'sensitive, gradual' change and 'fit'.

On the evidence taken as a whole, including admissions in cross-examination, that amalgam of information necessary to make findings on the applications is present.

I find as a fact that the subject property is central to an established residential neighbourhood. I find that the street upon which it is located is a major residential connector directly linking Lakeshore Boulevard to Lake Ontario in a manner consistent with many such streets in the former Village of Long Branch. I find that the subject property is an existing lot of record and is of a dimension and scale consistent today with the prevalent lot pattern in the vicinity, by all measures of vicinity.

I find that there are many examples of lots similar in frontage, if not in size, to those proposed and that their distribution, while concentrated in some areas, are also geographically dispersed, including some eleven on Thirty Sixth Street itself. While relevant, I do not find this one measure as a determinant. I find a consistency, overall, in the general descriptors of the neighbourhood, large and small, identified above as 'Character Attributes. I find that of the smaller dimensioned lots, both in frontage and in lot area, a prevalence exists in being original lots of record. I find that although there are instances of severance in the neighbourhood in the manner of that proposed by the Appellant, there is no policy support for increased lot division or compelling rationale, including 'intensification', that is required to be addressed by severance.

I do not accept as a generally accepted planning principle that the mere existence of, in this case lots of record or prior severances as comparable examples to what is proposed, is a sufficient rational for additional candidate applications. I accept, of course, that a land owner is entitled as-of-right to pursue applications for intensification, including those applications that require revision to land use controls. That right is to be protected; however, with it comes the responsibility to assess the application itself and the context within which it occurs - which I have attempted to describe.

Here, the attributes of severance and the variances sought are supported by examples, the technical analysis of neighbourhood statistics and reliance on precedent. In my view, precedent is but one factor and it cuts both ways. As in *Darling (*Darling v. Toronto (City) OMB (PL151146) June 20, 2016 (*'Darling'*); re 284 Hounslow Avenue), it cannot be relied upon in support, and negated as a consequence. I do not accept that the presence of similar lot frontages, whether 19% (Jones) or 35% (Salatino) of a study area, is a compelling rationale for more such lots. The Long Branch community has an identifiable existing physical context: established lots of record, in this area predominantly of a 50 foot frontage character and with a lot size, setbacks, separation distances, mature vegetation, tree canopy and building sizes of a varied, generally pitched roof design character and size parameter –fsi. These measures of the existing physical form, I was advised, are at or below and compliant with a long establishes specific zoning regime, reasserted in the new Zoning By-law.

I recognize that the Appellant did not rely entirely on comparable examples of similar lot sizes to those proposed and some recent approvals of others (*2425456; Fabrizi (*Fabrizi v. Toronto (City) OMB (PL161248) October 24, 2017 (*'Fabrizi'*) re 40 Thirty Seventh Street). Such references were however, present in both the planning rationale and the case law references of the Appellant.

I find that the 'examples' rationale in support of the suitability of the subject property to be subdivided is more applicable in this case to the status quo, being the predominant lot pattern in the Study Areas described.

I accept as a relevant consideration, that the inability to distinguish the current application to the majority of lots in the Study Areas does have implications for the future. The City planner, Ms. Salatino, satisfactorily demonstrated the presence and growing potential for similar applications. The subject severance application today and those that follow tomorrow represent the potential for change that is neither sensitive, nor gradual. It is a form of neighbourhood evolution that is the exact opposite of the Neighbourhoods policy support for gradual change and its zoning enforcement. Planning is nothing if it turns a blind eye to the future.

I find that a consideration of that potential, the potential for the rapid elimination of the prevailing historical pattern of lot sizes, is the proper prerogative of the municipal Council whose decisions to date have been to confirm the essential performance standards of 12 m lot frontages and 370 sq m lot areas, among other measures of physical built form.

I find that the form of proposed intensification on this major street, narrow lots and taller units is not consistent with area character despite the type of dwellings proposed, single detached, being common.

I find on the evidence that the subject property, while suitable for residential redevelopment, presents no compelling rational supportive of the suitability for severance. I agree with a resident (and *Darling (*Darling v. Toronto (City) OMB (PL151146) June 20, 2016 (*'Darling'*); re 284 Hounslow Avenue*)* that marketability is not the test of compatibility, 'fit' or desirability.

I accept the importance of the referenced criteria in *2425456* to 'nearby residential properties' and the opinion evidence of the City and residents that the size of the proposed lots, their frontage, building wall height, massing, scale and separation distances are not consistent with those in the vicinity and will not respect and reinforce the existing physical character of the neighbourhood context. (2425456 Ontario Inc. v.Toronto (City) OMB (PL160520) heard November 14, 2016 (*'2425456'*) re 30 Thirty Sixth Street).

I find that the loss of healthy mature trees is not supportive of the Natural Environment protection policy of section 3.4 d) of the Official Plan. Moreover, that mere alternative replacement policies, or compensation, are intended to mitigate but not obviate the preference for preservation. While tree removal alone is not a determinant of the applications, it is an element of area character that is

not reinforced, given the immediacy of the loss, the reduction in planting area identified by Dr. Dida and the generations or more required to replace the existing physical offering. Intensification of the housing stock should be a shield for proper environmental management, not a sword to eliminate obstacles.

I accept the point made by the immediate neighbour, Robert Davis, that the reduced building separation distances which are guaranteed by the proposal, results in a loss of privacy, a reduction in landscaped space and an absolute loss of landscaping including the sense of physical openness enjoyed to date. The proposals noticeably and materially would contribute to a reduction in the prevailing patterns of side yard setbacks and landscaped open space as well as the loss of mature landscaping and representative tree canopy.

On the evidence, these are elements of physical character. They are valued by the community as a continuation of special landscape features that contribute to the unique physical character of the neighbourhood. These aspects of the proposal fail to respect and reinforce these neighbourhood attributes and its existing physical character."

(I have added full references to the case authorities quoted in the excerpts.)

While these references are extensive to a decision that was put before the Member, I find that they raise many discrete findings that are in disharmony, conflict and contradictory as between the judgements.

Also, while, respectfully, it is for the Member who heard the evidence to assess its weight, its relevance and conclude findings, I find that the degree of differing content, opinion, assessment and conclusions so extreme as to cry out for explanation.

And while not having the advantage of seeing some of the witnesses, to the extent credibility can be assessed from that sensory input, I too have listened carefully to all of the evidence with the benefit of the issues raised in the Request and its response.

I do not find it necessary to make credibility findings on any of the evidence before the Member; each witness is entitled to their opinion and each was tested, to some degree, in a trial like setting.

I confess that the evidence of Mr. Huynh, while comprehensive and thorough at a detached level, left me unsettled in the areas of controversy. Hesitancy, some unresponsiveness, the propensity to stay 'high level', state early conclusions and then generalize or gloss over the weight and application (attributed to his statistical analysis of his 'study area' and the 'neighbourhood' assessed as its existing physical character), left me unsatisfied. That said, equally dissatisfying was the somewhat stilted and constrained nature of the evidence elicited from the planner Skelton.

In my view, the evidence of both professional planners failed in their task of a comprehensive assessment of area character and its application, albeit for different reasons.

I attribute significant weight to admissions in cross examination to Ms. Bisset, as recorded at page 10 of the Decision and find these more germane to my consideration of the Request. Moreover, in his use of statistics, I place no weight on the acceptance by the Member that Mr. Huynh's statistics would likely remain unchanged if a smaller 'study area' were employed as per the planner Skelton, which excluded the RM zoned properties.

In his evidence Mr. Huynh was quite frank to say that he had not conducted that statistical analysis exercise; I find his supposition as too little change in frontage statistics was tantamount to conjecture.

I find that the absence of grounds to address or distinguish 38 Thirty Sixth Street to be an appropriate reason and ground for the Request.

I find that the quote (at page 9 of the Decision) excerpted from the Decision and Order, while acknowledged to be "not followed by the Chair" is completely out of place as part of the *ratio decidendi* of the Decision. It avoids consideration and application of the 38 Thirty Sixth Street Decision and Order while, at the same time, using and attributing to it a quotation that is expressly disavowed therein.

The quotation appears as if 'plucked out of the air' to state conclusions not otherwise substantiated by the evidence.

Moreover, I find disingenuous the treatment of other case authority cited to the Member. At page 21, the discussion of *82 27th Street* accepts the authors decision to reject a part of the 'study area' having inconsistent characteristics of 'wider lots and larger homes', but fails to apply that rigour to the Applicant's own assessment in evidence.

In the same paragraph, the Member recites, discussed above, as a summary:

> "It feared that continuing consents in the area would in fact destabilize the neighbourhood, and thus found a lack of compliance with the OP policies as required by clause 51(24) (c) of the Act."

The only 'explanation' provided to reject the application of that decision is to accept and quote the statement described above and specifically rejected in the 38 Thirty Sixth Street Decision and Order. I do not find this satisfactory; it is devoid of a reasoned, replicable assessment and is inconsistent in application.

In like manner, I have concern with the Member's acceptance of the *14 Villa Road* decision. On the evidence tendered before the Member (although argued differently), 14 Villa Road was not in the 'study area' of the Applicant, is not proximate the subject property and is in a different zone category with different regulatory standards and permitted uses than that applicable and under appeal. These distinctions alone warranted a description or justification of its acceptance and its acceptability as well as understanding the use and application of the quoted statement: "Context informs the question of desirability and whether the variance is minor." Its

application to the Proposal was not justified with any rationale. The reasons are deficient.

I find I am not comfortable with the manner, accuracy or depth with which these several examples of the jurisprudence cited to the Member are considered, applied and distinguished.

I would characterize the above assessments of the Decision, its 'Neighbourhood Character' assessment and the jurisprudence referenced for the purposes of the Request as errors of fact or law which would likely have resulted in a different order or decision.

b) Statutory Considerations

Despite the length of the evidence recited, the Decision draws little distinction between the differing statutory considerations applicable to the consent/severance file and the minor variance files. Procedurally, the sequence of consideration is up to the Member with first preference usually given to the consent/severance matter due to its specific list of public interest considerations listed in s. 51(24) of the Planning Act.

Indeed, all of the variance requests in their separate files relate to the Proposal on the assumption of a consent/severance approval. I acknowledge that, provided all of the relevant considerations are addressed, nothing may turn on the legal segregation of files. It is clear that the Member had evidence on what was felt to be the applicable statutory considerations to the separate files. Subject to the findings elsewhere in these reasons, I find no error in the failure of the Decision to consider evidence and make findings on the files specifically segregated by their statutory sources of jurisdiction.

The Decision acknowledges there is a degree of overlap in the related statutory directions, including related policy language, to the files under appeal.

c) Variance Tests, By-law Intent

The Request raises the intent of area zoning by-laws and, in the nature of re-argument, urges that its history of over 40 years of re-affirmation does not support an intention to support lot division.

Godley goes further to assert that the intent of the zoning by-laws is not mentioned in the Decision.

While I find re-arguing matters to be of little assistance, I find the topic of the need to examine the intent and purpose of applicable zoning to be germane to the inquiry and a fundamental aspect to the jurisdiction of the Member to conclude on its maintenance, in respect of each of the variances sought.

Certainly the contradictory evidence called by all parties addressed this variance 'test' and puts it in issue, *inter alia,* that the zoning standard of 12 m for minimum lot frontage was not being maintained by applications requesting 7.62 m frontages.

At best, the Member addresses this challenge obliquely.

I agree there is no discrete finding on the zoning intent 'test'. This amounts, at least technically, to an error of law and loss of jurisdiction.

Other zoning performance standards requested to be changed by the Proposal received somewhat lesser challenge and attention (front yard setbacks; interior side yard separation distances; lot area reductions; increased fsi (density). However, these are not as expressly raised in the Request and are the subject, except perhaps fsi, of discussion and findings by the Member.

I find that the intent of the zoning by-law in respect of lot frontage and area is a relevant consideration to both the jurisdiction of the TLAB on the severance/consent (s.51 (24)(f)) and the variance approval for the lot frontage reduction (s. 45(1); Policy 4.1.5 (b) of the Official Plan – dimensions, shape, size and configuration of the lots, collectively.

I am absolutely content that the Member heard and the parties provided evidence on this issue. Mr. Ketcheson achieved an admission from Mr. Skelton that the existing 'character of the area' contained example lots with comparable lot frontages, including one example nearby on the opposite side of the same street.

Ms. Addis provided a detailed analysis of lot sizes and lot frontages, construction periods, lots of record, proportionality of historical v. severed lots and other distinctions. Her evidence on these measures was not challenged and no reply evidence was called.

I find the opinion evidence called as to the non-conformity of the Proposal to the intent, purpose and historical consistency of the zoning by-law to be compelling. I reject the planner Huynh's characterization, and the Member's acceptance of it, that existing zoning performance standards were largely met. Certainly, variances sought to minimum frontage, minimum lot size, maximum permitted density, minimum required side yard separation distances are not themselves indicative of substantial compliance.

Earlier, I examined the 'context' of the Hearing and the matters before the Member. I accept the evidence that despite noted recent severance activity over the past 10 years in the Long Branch area (deliberately unrestrained by boundaries), the lot frontage intent in zoning has remained unchanged. It has been maintained at a 12 m minimum.

Indeed, affirmations of that intent became final and binding in Zoning By-law 568-2013 ('Harmonized Zoning') and arguably was reinforced by council decisions on OPA 320 (the 'prevailing' test), and acceptance and promulgation of the Long Branch Urban Design Guidelines, both of these latter documents are discussed below.

I find on the evidence and accepted by the Member, that the '12m or greater' lot frontage standard figures most frequently 'on the ground' in all the 'study area' discussions presented in the evidence by Mssrs. Godley, Huynh, Skelton and Ms. Addis.

I place no weight in the admission achieved from Mr. Skelton that the word 'predominant' or 'prevailing' is not an aspect or component element or 'test' in Official Plan policy 4.1.5 (b), despite its use in paragraph 22 of his Witness Statement. Or, that it was imported and applied as the determinant by him in formulating his opinion that the variance (and severance) sought for lot frontage was unsupportable. Certainly, he did not agree to the latter point.

Lot frontage is not to be taken as being the sole measure (or 'pampered darling') for the determination of the appropriateness of a severance, in Long Branch. It is, however, a relevant consideration to character and it does, as a standard, have a history.

I find that the issue of maintaining "the intent and purpose of the zoning by-law", is a distinct, identifiable obligation to be addressed. It is incumbent in the Decision to address this aspect. While I agree that the judicial standard of decision writing does not require that punctilious, diligent and detailed reference be made to all the evidence raised, I do agree with judicial affirmations that an obligation rests in the Decision to address the statutory directions.

The intent and purpose of this zoning performance standard was front and centre in the evidence. It is not addressed, in terms of the test of zoning intent and purpose, in the Decision and that is seen as an error of law or an excess of jurisdiction; namely, a failure to consider a statutorily mandated relevant consideration. Lot frontage is but one example required

In my view, in applying to vary a performance standard as relevant as lot frontage, with its implications on lot patterns, the multitude of factors identified in s. 51 (24) and as input into the 'character of the area' assessment, it is incumbent on the Member to address the intent and purpose of the zoning instruments. It is not, in my view, adequate to point to 'examples', nearby or otherwise, of similar frontages and to put forward statistics for 'study areas', whether or not contested, without addressing comprehensively, in the assessment of area character, where the intent and purpose of, for example, the lot frontage standard, etc., stands.

Clearly, it is one element of 'fit', of 'stable, not static', of 'respect and reinforce', of 'physical character of the area'.

In my view, it is a standard set by Council, and while the COA and TLAB have full and complete jurisdiction to vary as minor that standard in individual circumstances determined as appropriate, the TLAB at least should be hesitant to do so unless the evidence in support is persuasive. To do so without reasons applicable to the test is not appropriate and can constitute a ground for review.

Certainly, the TLAB should not on an appeal vary standards in zoning without cogent reasons and be prepared to express them to the standard expected of an administrative appeal tribunal. The same applies to a review under the Rules.

The Decision does not do this. I find that the Request to address the intention of the by-law on the discrete aspect of lot frontage is well founded.

I find that the obligation of the TLAB on this aspect has not been met. Moreover, there was nothing in the evidence to suggest that Council has altered its enactment of the appropriate lot frontage standard in the Long Branch community zoning by-laws.

With the preponderance of lots exceeding the standard and the evidence of lot severance activity on the rise, I find that it was incumbent on the Member to address the intent and purpose, rather than have the TLAB, under a single appeal, allow a severance and not raise its eyes or discuss the concerns for its implications. This aspect is addressed as well under the discussion related to **Precedent** and **Destabilization.**

I find, as well, the reduction in lot frontage, lot size and resulting fsi mass on the proposed lots to be not justified on the merits. The juxtaposition of small, narrow lots with greater than average building mass, limited separation distances and removal of vegetative landscaping and mature tree canopy, without the ability to accommodate replacement, is not a minor or desirable outcome of the Applications or within the intent and purpose of either the Official Plan or zoning By-law.

The intent and purpose of the lot frontage performance standard, as an example in the applicable zoning by-laws, is a relevant consideration and one that, in my view, as a generally accepted planning principle, should not be permitted to be sequentially eroded by individual applications in circumstances where a clear foundation has been established, as here, of areal distribution and patterns that reflect an important and consistent large lot frontage character element of the neighbourhood.

This is not to say this one standard alone, or council's intervention, is essential or a pre-condition to applications for severance or variance. That is not the submission put forward in the Request, nor my intent. Rather, all relevant considerations must be considered in an open, replicable and contemporaneous consideration of evidence, policy and law. No one considerations should be advanced as a favoured darling of the decision maker and so too should those with express policy support not be ignored or diminished. I amplify my reasons in this latter regard in the following section.

I find that the issue of the requested lot frontage, as it applies to the intent and purpose of the zoning by-law, as one example of the performance standards that have not been addressed.

I would resolve the conflicting evidence on the topic by giving weight to the local knowledge expertise of Ms. Glenn and Ms. Addis, that two lots of 7.62 m at the location proposed with their attendant consequences including the loss of the valuable tree

resource, represent such a stark departure for the site, the street and the area character generally as to not meet this specific statutory considerations.

This is not a case of accepting lay opinion over the professional assessment of a registered professional planner. The two planners are at odds on the issue and I would give additional weight to the local observation and description of area character in this circumstance.

I find that the repetition of rounded summary statements by the Applicant's planner and the one recited by the Member (Decision, page 25) on the subject of meeting the application of the zoning by-law to be insufficient and to not constitute 'reasons'.

I accept that in this circumstance there is more than adequate evidence in direct testimony, statistics, urban forestry, amenity and area character detriments at a local and neighbourhood scale to support the finding that the Applications, on the element of a lot frontage and lot area reductions, do not meet the requirements of section 51(24) (c) and (f), nor the test of maintaining the intent and purpose of the zoning by-law for these variances.

I find this conclusion appropriate on the evidence as well by having regard to other matters raised and dealt with in this Review Request.

d) Application of Policy;

i) Provincial Policy

There appears to be only one issue raised in the Request respecting the Member's use and reference to 'Provincial Policy'.

That relates to the terminology of whether the Long Branch community, including the subject property, is part of a 'Strategic Growth Area'. An adjunct to this is whether the Provincial support for intensification washes over and includes 'Neighbourhood' designations in the City Official Plan.

Both planners, perhaps the witnesses most conversant with Provincial Policy, agreed that a severance is an eligible form of modest intensification, and is supported by both the Provincial Policy Statements (PPS) and the Growth Plan for the Greater Golden Horseshoe (Growth Plan-GP).

Regretfully, the issue did not end there as Mr. Huynh opined to the Member that the subject site, being within a recognized 'Settlement Ares (the City), was also part of a Strategic Growth Area. He suggested, as such, intensification was supported by the Growth Plan, if not with reference to both Provincial Policy sources. Ultimately, through cross examination he lessened the sweep of his assertions to the rationale, he suggested, that because the site had reasonable access to higher order transit, it supported intensification.

It is true that the TLAB has recognized 'intensification' in 'built up areas' to include 'redevelopment' defined in the PPS as including new lots, or lot creation.

Thus I find that a decision that approves a consent/severance that results in 'intensification' is "consistent with" the PPS. However, I find that "consistent with" does not imply that every lot in Toronto is supportable for severance/consent.

The planners agreed that Provincial Policy appoints the municipal Official Plan as a prime vehicle, the 'most important vehicle', for implementing the PPS for the definition of areas for identified intensification. The City has done this with its designated areas, including the 'Avenues', an example of which was cited to have occurred on Lakeshore Boulevard in the Long Branch area.

It was also agreed that none of those City intensification designations extended to the subject site.

The Official Plan designates the subject property as *'Neighbourhoods'*. The OP Healthy Neighbourhoods and Built Form policies allow enhancements and additions on individual sites in *Neighbourhoods* provided they are compatible, respect and reinforce the existing physical character of the area. Although severances are not prohibited, neither are they supported by express policy intent. In this way, Neighbourhoods can remain 'stable but not static'.

What then was the purpose of Mr. Huynh's repetition of the site being within a 'Strategic Growth Area' and how was that evidence treated in the Decision?

Some observations are relevant:

1. There was no evidence of a 'Strategic Growth Area' designation applying to the subject site;
2. The 'higher order transit', analogous to that found on Lakeshore Boulevard, if allowed alone to be a qualifying criteria, would likely make every Neighbourhood in the City Official Plan to be identified as a Strategic Growth Area, encouraged to intensify by Provincial mandate. I agree and adopt the City argument by Ms. Bisset on this point.
3. The *'Neighbourhoods'* policies of the City Official Plan, especially chapters 2,3 and 4 present no such support for identifying the *Neighbourhoods* as areas of intensification. Rather, the policies, while not precluding redevelopment, encourage stability, change that is 'gradual', that 'fits' and that 'respects and reinforces' the 'existing and planned built form'.
4. Mr. Huynh acknowledged that 'planned' included the policy and zoning use and performance standards in effect and which have endured. 'Existing' is "what you see on the ground".
5. Had the Province intended its policies to override express Official Plan policies allocating intensification to include residential neighbourhoods, it could have use direct language to that effect. It has done the direct

> opposite. Moreover, as allowed, the City has targeted land use designations for intensification, excluding *Neighbourhoods*, with the consent of the Province.

These observations are elements of the context of the Applications, as above noted.

Ultimately, the issue gravitated to a consensus, at least from a select numbers perspective, that approximately 60% of the lots in the various 'study areas' met or exceeded the zoning standard of some twice the size and frontage proposed by the Applications.

The planners' suggestion that the subject site was within a 'Strategic Growth Area' was clearly designed to harness provincial support for the intensification proposed by the consent/severance, albeit of a mild form.

I find that that is not the intent of the City Official Plan *'Neighbourhoods'* policies applicable to the Long Branch community or *Neighbourhoods* generally. I would have hoped to see in the Decision a proper characterization of the term or its use of 'Strategic Growth Area'. That determination is absent. I find that it is inappropriate to characterize the Long Branch Neighbourhood designation as a strategic growth area with Provincial or City support for lot severances.

Again, it is regretful that the Member in the Hearing or the Decision did not clearly address the innuendo of labeling a 'Neighbourhood' a 'Strategic Growth Area'. At page 7, the Member dutifully recites the planner Huynh's evidence that "Strategic Growth Areas encourage intensification at nodes and corridors as identified by the municipality or the province. This is a fitting example of such intensification, where required infrastructure exists, especially public transit."

Later, at page 8, he is recorded as saying: "The site is located in proximity to transit services and is considered within a "strategic growth area"".

At page 10, the Member recites the effect of cross examination but does not fully acknowledge whether the planning assertion is effectively recanted. However, in turning to the **Analysis, Findings, Reasons**, the Member acknowledges the City argument that 'the importance of provincial policy' is one of three main issues. The Member ultimately finds, at page 24, "the development of new lots and homes in this established neighbourhood does not offend the broader policies of the PPS and GP".

The Member could have been clearer on the application of Provincial Policy insofar as it is intended to influence express implementing Official Plan policy. In my view, 'consistency' is not the same as encouragement and it would be a mistake, had the Member so found, to suggest that the applicable *'Neighbourhoods'* Official Plan designation encourages 'intensification' by severance, as a provincial priority.

However, the Request does not identify any such finding in the Decision and I am not prepared to read into the Member's failure to resolve the challenge, put by the planner Huynh, to constitute an obvious error.

I do find that the failure to consider a relevant consideration, in this case the intent of the City Official Plan related to intensification by lot severance, can and does amount to a fatality in the reasoning process.

I find that homes in this area are not densely packed. Variances to reduce lot sizes, lot frontages, interior side yard separation distances and to permit the higher deployment of density than permitted on those reduced sized lots, do not maintain the general intent and purpose of the Official Plan policies in the circumstance of the Proposal.

This variance test is offended, as well.

ii) Official Plan: OPA 320 and the Long Branch Urban Design Guidelines

Apart from the use and relevance of the term 'Strategic Growth Area' to the intent of the City Official Plan, the Request also criticises the treatment and role afforded by the Member to City Council's enactment of OPA 320, its Ministerial approval and the January, 2018 adoption by Council of the Long Branch Urban Design Guidelines.

This issue, in administrative law terms, has a long, complex and evolving set of considerations.

In context, the Applications pre-date the latter's adoption and are arguably protected from OPA 320, given its acknowledgement of being under appeal and not 'in force'.

The Request urges that I treat the Amendment and Guidelines as 'representing the intent of the Official Plan'.

I agree that Council's enactment and adoption of these instruments are indicative of Council's intent as to the interpretation and application of the *Neighbourhoods* policies of its Official Plan. And, I agree that their notoriety is such as to have been referenced, examined and cross examined upon, by the parties to this Hearing.

Both planners indicated a consideration of these instruments; neither asserted a reliance on them to determine their opinion on the merits.

I think it open, even perhaps obligatory, for a planning tribunal to consider Council decisions. I also understand the current state of the jurisprudence to be that such expressions are relevant, but cannot be determinative of an outcome. This is the

conclusion I referenced in the extracts from the 38 Thirty Sixth Street decision, contained herein. It is the conclusion argued by both counsel.

In my view, it is not open for the TLAB to discard or decline consideration of these expressions, even where the planners (but not others) declined their employment. The TLAB simply cannot, at this stage, employ the language of these instruments to determine a matter that was instituted before they either existed, or, in the case of the amendment, before come into full force and effect.

The Member addressed OPA 320 as follows (page 19): "Since OPA 320 is not in force to introduce the intent of "prevailing", or most frequently occurring, I do not accept that it would require denial of this severance application." This is appropriate.

With respect to the Long Branch Urban Design Guidelines spoken to by Godley, the Member acknowledges his evidence and cross examination responses (Decision, page 16), but nowhere comments on or applies Council's intent as expressed therein.

I find it curious that these two most recent documents expressed by the Council, one making specific reference to the very community in which activists urge their consideration, are not commented upon further by the Member. As an aside, I find it frustrating to an adjudicator that the appeal related to OPA 320 remains outstanding, years after it adoption. Not only are the Parties and the tribunals inconvenienced by this apparent apathy in determination, the public, as expressed in the Request, has a legitimate expectation of its application, not perpetual suspension.

Both OPA 320 and the Long Branch Urban Design Guidelines are relevant, but not determinative considerations. They are largely ignored in the Decision in terms of their substance and intent. Despite this, Mr. Ketcheson's cross examination that their tests, language and assessment criteria, (e.g., 'prevailing'; the 'lens' of analyses to ascertain area character), seems to have been accepted by the Member. In turn, these documents are employed against, rather than in conjunction with, the language of the City Official Plan, as is the Council's clear intent.

I find this to be a form of inconsistency, a failure to consider relevant considerations. It is an approach not widely accepted by modern Toronto based planning tribunals, even with the caveat that such considerations cannot be determinative.

As with the previous topic, Provincial Policy, the Member could have been clearer on the application of these instruments insofar as they may have expressed an intention to influence, interpret or implement Official Plan policy. In my view, I am uncomfortable with their treatment and the inconclusive nature of how they were employed as a result of the cross- examination.

However, the Request does not identify a definitive finding of misuse in the Decision and I am not prepared to read into the Member's failure to address their role a definitive matter that constitutes an express error.

4. Misdirection

On the last two pages, page 24 and 25 of the Decision, the Member deals with the Urban Forestry issue in the context of a hypothetical advanced during the Hearing,

Namely, in the event that a severance is granted by the TLAB on the appeal, a re-design of the north driveway that could avoid the removal of Tree 926 (and be approached through the submission of an application to injure, not remove, that private tree) would be an improvement, in the context of the opinions expressed on the Application of Official Plan non-conformity.

The Member introduced her analysis of this issue in the following context:

> "I find that this application hinges largely on the fate of the existing three trees on the lot."

She then constructed for resolution the following question:

> "Therefore, does the presence of three very large and healthy trees preclude this severance, with the present (revised) driveway design?"

It is instructive to review the evidence of the Hearing, not contradicted by the Decision:

1. The severance and variance applications were paralleled by two applications to the City for the removal of two private trees on the street side of the subject property, identified as Trees 926 and 927.
2. The formal evaluation of these applications was never completed, being intercepted by the final outcome of the planning approvals needed, the severance and variances, which were the sole origins of the need for the tree removal applications. The Proposal, by virtue of the severance, the provision of integral garages responsible to afford on-site parking and the resultant building footprint creates impact on these trees, and potentially the third City tree in the boulevard, identified as Tree 925, through possible encroachment on its tree projection zone, by driveway design and sidewalk improvements.
3. No application of any kind had been made or deferred in respect of Tree 925.
4. The Applicant's arborist, being "unavailable", was never called to be examined or cross examined on any aspect of evidence that he might have brought to bear on the issue of trees, their assessment, implications of the outstanding Applications, alternative driveway alignments or the parallel applications for the removal of the two private tress on the frontage of the subject property, Trees 926 and 927.
5. No driveway 'plan' was introduced and proven other than the site plan calling for the destruction and removal of Trees 926 and 927 and a sketch (revision referenced variously as occurring in November or December, 2017) of an alternative north driveway alignment.

6. Urban Forestry in its Report and assessment, attested to in the evidence of Dr. Dida and accepted, relied upon and applied by the City planner, concluded and opined that the Applications so framed did not conform to or meet the intent and purpose of the Official Plan policies, chapters 2 and 4, in respect of s. 51(24) or s. 45(1) of the Planning Act.
7. Neither City witness retrenched from their opinion on the Applications as framed and supported. There was no contrary evidence called from a qualified arborist, to that presented by Urban Forestry, through Dr. Dida.
8. At intervals throughout the Hearing, counsel for the Applicant sought to and introduced a hypothetical that was comprised, very clearly, of two components:

    a) On the assumption that a severance would be granted; and
    b) Assuming the northern most driveway could be redesigned to avoid the necessity to remove Tree 926,

…for eliciting answers as to whether there would be agreement that certain implications would follow, namely:

    i) A better potential to retain more of the tree canopy.
    ii) An opportunity to revise the one application on Tree 926 from a permit to remove to a permit to injure, for its assessment.
    iii) Better compliance with the policies of the Official Plan.
    iv) Greater consistency with area 'character' retention of components related to the urban forest and the attendant benefits it provided in terms of the policy obligations to maintain and enhance.
    v) A revised site plan could be prepared presenting a revised driveway alignment.

9. In large measure, premised on the hypothetical, the Applicant's counsel sought and obtained concurrence with these implications from the City witnesses, Dr. Dida and the planner Skelton.
10. The Applicant called no direct evidence of a revised driveway design that had been drawn or evaluated or for which resultant revised applications to Urban Forestry would or might be tendered. No related tree protection plan was in evidence, let alone evaluated by any witness; only the hypothetical was advanced. In argument, the Applicant's counsel requested a condition that a driveway plan be approved that required the Applicant to abandon the removal application for Tree 926 and replace it with an application to injure.
11. An undertaking was given by counsel on the clients' instructions that a revised site plan would be provided on a TLAB decision for approval of the severance and variances, with the evaluation of the implications to be pursued on the subsequent applications to Urban Forestry.

12. In contrast, the clear evidence of Dr. Dida, described earlier and understood and recited by the Member, was that the application of the Tree By-law Guidelines and the determination of the evaluation criteria, and the procedural route for their consideration - for all three trees - turned only upon and would follow the resultant decision of the planning review process, including appeals.

    Namely, that Urban Forestry would process an application for the injury or removal of private Tree 926 dependant on the TLAB decision on the Applications. Urban Forestry opposed the Applications and their urban forest implications. Dr. Dida opposed the removal of Trees 926 and 927 and had only applications before it for their destruction and removal.

In these circumstances, in my view, pursuit of a hypothetical and agreement with elements of its implications does not constitute evidence that can rebut the clear and unequivocal opinion evidence placed in evidence by the direct testimony of Dr. Dida, Mr. Skelton (and several others) of non-conformity with the Official Plan.

While hypotheticals can be useful to expose implications of scenarios, they are not a substitute for direct evaluation and opinion evidence, which existed in this instance.

In my opinion, if the Applicant wished to rely on the evaluation of a revised driveway alignment on its ability to avoid the removal of Tree 926, it had an obligation to provide direct evidence to that effect, its assessment and implications. No such evidence was tendered, in direct or reply evidence from the Applicant. Rather, the Applicant relied on the leap of faith that a revised site plan, assuming severance acceptance by the Member could be prepared and ultimately might survive the scrutiny of Urban Forestry, i.e., if it were in the context of a decision that mandated and approved the consent/severance and variances.

In my view, the Applicant sought to put 'the cart before the horse', asking the Member's Decision to resolve the absence of evidence and remit its implications for a later assessment in the context of a *'fait accompli'* decision, that lot division is appropriate.

Regrettably, in my view, the Member accepted this suggested resolution and failed to recognize its implications for the Hearing.

There was no support or concurrence from the witnesses in opposition that their opinion evidence could or should be subordinated to an assumption that the severance and related variances were appropriate and granted. They were present for and presented evidence to the opposite effect that was needed to be addressed.

As such, I believe the Member remitted to herself a question, above, that misdirected and reframed what was directly asked of her: to resolve on the evidence, the urban forestry evidence on Official Plan non-conformity and lack of maintenance. In

so doing, in making the 'leap', the Member declined or avoided the need to address the direct evidence.

The effect of the Applications on urban forestry policy compliance, framed by the Applicant's direct evidence to involve the removal of two large, healthy trees, was the matter remitted to the TLAB.

I find that the failure to address a relevant consideration (the direct evidence by Urban Forestry) and the addressing of irrelevant considerations (potential 'improvement' to the Applications based on the fundamental hypothetical of an approval first, then triggering tree assessments, followed by hypothetical potential benefits, but still involving the removal of one healthy tree) to be an error of law.

I find that the Member, in re-framing the matters on appeal to the TLAB by asking a question not remitted or supported by direct evidence and framed on a hypothetical that absolved her of the responsibility to adjudicate on an important aspect of TLAB's function, constituted acting outside of its jurisdiction.

There is nothing to balance; the contrast is not a matter of balancing conflicting urban forestry opinion evidence. There was no conflict.

In my view, though invited in argument to 'balance' the opinion evidence on Official Plan non-conformity against the answers to a speculative hypothetical, the Member's acceptance of this 'balance' approach, constituted a misdirection.

Asking and answering a question not remitted to the TLAB and thereby avoiding the very question remitted to it, constitutes an error of law.

I prefer the direct evidence of Dr. Dida, followed in time and supported by Mr. Skelton as to Official Plan non-conformity on urban forestry policy grounds. There was no evidence to the contrary. There were no retrenchments or admissions to the contrary.

I have considered whether this is a matter of mere semantics: whether the substance and tangibility of the potential for improvement to the Applications could be a mere site plan revision away.

I think the answer lies in the examination and the perspective engaged by the appeal. The Member ultimately is seen to have narrowed her concerns for the Applications to a matter of impact on three trees. She had acknowledged urban forestry issues as to be in non-conformity with the Official Plan, as discussed earlier, and the Member then accepted an avoidance of that evidence on the basis of a hypothetical asked. The hypothetical was largely unsupported by tangible evidence and was premised upon the exercise of her prior approval on the very issue remitted to her.

I find both the narrowing and the hypothetical unsupportable and, in my view, problematic to the fair hearing process.

The Member accepted that Urban Forestry's acknowledgement that it would perform its responsibility under the Trees By-law, in the event of an approval, as a

substitute for a changed position in opposition to the Applications. As I have found, no such evidence or admission of any changed position occurred; moreover, none is cited in the Decision.

The Member satisfied herself that "ultimate control over preservation of these trees (would be left) with City Council and UF." This obviates the fundamental matter remitted to her that the engagement of those bodies, if at all, is a function of the threshold decision made on the merits of the application, with due regard to the evidence. In the event of a refusal of the Applications, those processes are not engaged.

In my view, the addressing of this obligation did not occur and was in fact avoided by misdirection. The Member's acceptance of the first assumption (an approval of the Applications), clearly articulated repeatedly by the Applicant's counsel in framing the hypothetical, permitted the TLAB to avoid resolving singular evidence on the urban forestry issues. Namely, whether it should approve the Applications, and, second, move on to considering whether it would be a process to address impact.

The Member also appears to have acknowledged that her urban forestry conclusions on the statutory tests were founded largely on the 'evidence' of counsel, elicited on responses to counsels' hypothetical, above recited:

> "If developed as proposed by Mr. Ketcheson, the loss would be only one…" (Decision, page 25).

It is a fundamental tenant of administrative law that counsel is not the originator of evidence. Counsel have many and varied roles and in argument is charged with broad powers to urge the result pursued, but always constrained by the laws of evidence. I find that counsel constructed a careful hypothetical and properly introduced it into questioning but that such does not reset the essential characterization of the issues or obligations of the hearing officer.

In my view, it is also not proper to fail to challenge the authenticity of arguments against the actual evidence of the witnesses. There were unchanged urban forestry assessments and opinions. To avoid that responsibility and accept alternative assumptions based on that unproven hypothetical, amounts to an error of law on the face of the record.

I find this to be a misdirection for which the Request properly invites remedial action.

The Member's reasons for dismissal of the need for further Notice of the changed site plan, inherent in the hypothetical, adds nothing to the issue of a misdirection.

5. Summary

Even if I am wrong to have listened to the digital audio recording of the evidence, I find that the Member's precision in recording the accuracy of the evidence heard,

found at pages 1-17 of the Decision, supports the findings of inconsistency and misdirection in the evidence and its wrongful employment in the responsibility remitted to the TLAB.

I hope it is unnecessary, but I so record that nothing in my assessment of the Request suggests anything other than the review of a genuine attempt by the Member, in the Decision, to address the competing evidence heard. Misdirection, error and inconsistency in that regard as I have found, however, cannot be allowed to stand.

My findings relate to my appreciation of the application of the Rules, as I see them applied to the Decision.

I reject, for the reasons expressed above that the evidence, when contrasted with the **Analysis, Findings, Reasons** found in the Decision, can support the result arrived at by the Member.

In my view, the multiple cumulative errors found warrant that the Decision not be confirmed.

The *viva voce* and visual evidence shows that the severance and variances do not conform to the Official Plan requiring that new development in *Neighbourhoods* respect and reinforce the pattern, size, lot frontage, fsi and setbacks in the neighbourhood. Homes in the 'study area' are not so densely packed on narrow lots and, while examples exist, the character of the area is not replicated by the Proposal.

Moreover, while the Proposal employs modern designs with integral garages that are unlike nearby properties and older homes nearby albeit not exclusively, it is not these aspects that create the jarring juxtaposition. Rather, it is the 0.6 m lot line separation of the homes proposed, their size, proportional to their proposed lots approaching twice the by-law permission, their unrepresentative mass and scale to by-law standards, much reduced frontages and lot areas, and the offsetting dis-benefits of tree canopy removal, privacy incursions and tight built form on narrow lots that constitutes the disruption and infringement on the historical streetscape. Such units would reshape the lot pattern and evolution of Long Branch; they are without zoning support. These elements are the failures that neither respect nor reinforce the physical character of the area and they are the consequent inability for each to conform to and meet the intent and purpose of the Official Plan

The variances arise from the severance and the consequential built form of the new dwelling. Multiple key features of both zoning by-laws are not maintained and the consequent variances above required are not considered minor or desirable on the evidence above described and accepted.

I am prepared to vary the Decision and to do so with an entirely different result. Namely, that a better reflection of the weight of the evidence is to accept the appeal grounds, reiterated to a degree in the Request, and the evidence in support thereof.

The Review invites an originating jurisdiction. It permits that 'all or part of any final order or decision' (Rule 31.6) may be addressed.

I have made a number of findings in conducting the request for a review initiated by Mr. Jamieson. Some assertions have been rejected, others accepted, with reasons.

I find that the latter, based on reasons and evidence provided by the requesting Party and referenced herein, are compelling and demonstrate grounds which show that the TLAB has acted outside its jurisdiction and made errors of law or fact which would likely have resulted in a different order or decision.

On the basis of the evidence elicited by the Review, I find in favour of the Requestor. As well, I accept and prefer from listening to the full digital audio recording, the overall testimony of the witnesses Godley, Glenn, Dida, Skelton and Addis.

I am compelled on these separate considerations to allow the Request for Review. I find them compelling and demonstrable grounds for relief.

DIRECTION (IF APPLICABLE)

Rule 31.6, above, provides authorization for a series of directions. Not all of the submissions addressed this aspect and those that did had conflicting suggestions. Mr. Jamieson urged that the Applications be refused. Mr. Ketcheson submitted that “the proposed request for review be denied.”

The latter response did not address any of the substantive evidentiary matters raised in the Request.

I have found that the severance and requested variances individually and collectively do not meet the policy and statutory tests under the Planning Act. The policy imperative to respect and reinforce is not met by two dwellings on this historic lot of record. Two units are not respectful or desirable additions suitable for the subject property. I find that adverse impacts are attendant the proposal in tree removal, enhanced privacy concerns (on and offsite), streetscape interruption, the potential contribution to precedent and the deterioration caused by driveways, of streetscape character.

I find conditions as proposed for permeable pavers and the offer of translucent screening *de minimus* in comparison to the more prevalent impacts from this proposed offering for intensification.

Previously, I considered and recited that further submissions were not needed to be invited, and that no issue was raised that might be better addressed by a Motion; I so find.

I also considered whether I should grant or direct a rehearing. On this point, I note that two of the seven TLAB Members have independently heard the evidence. Despite protestations by Mr. Jamieson as to more that he might have done as a witness, I am content that all relevant considerations and evidentiary topics have been raised, explored, considered.

The responsibility of a Review is to reach a decision that fairly reflects the options available and advances the matter to a conclusion. In my view, the Parties and Participants to this matter are not advanced by wiping the slate clean and directing a new Hearing. Such does not respect the enterprise engaged in to date, the weight of the evidence, and does not reflect on the public service, with which the TLAB is charged, to dispose of matters in a fair and on a timely basis.

In any event, as earlier reported, no submission requested further written submissions, a Motion or a re-hearing even in the event I found favour with the Request, or otherwise.

Similarly, the opportunity to address the issues raised in the Request and to elaborate on a remedy has passed with no new Review submissions made.

I continue to reject viewing of the video of the COA hearing on the applications, for reasons previously expressed.

In my view, the utility, efficiency, efficacy and justification for further consideration of this matter by way of a re-hearing is not warranted.

For the reasons discussed in this determination of the Review Request, I conclude that the Decision on the Proposal in support of the Applications in the aggregate is irretrievably flawed. In so concluding, I have found that the Proposal itself is not sensitive or compatible with the surrounding neighbourhood, evidences too high an environmental and land use planning cost to principles of good community planning, and is neither appropriate nor desirable for the intensification that remains openly available on the subject property. As such, the Proposal fails to conform to the Official Plan, it fails to meet multiple identified elements listed under the Rule, and fails on statutory, policy and evidentiary considerations for a consent/severance as well as identified tests for minor variance approval.

In my view, for the above reasons and on the evidence expressed, the proposed lot frontage, lot area, separation distances and associated relief sought are simply too great to fit compatibly, on those tests, into the Long Branch neighbourhood.

The Proposal does not reflect good and proper community planning and is not in the public interest.

It is regrettable that the findings herein come about as a result of a Request to Review the Decision of a senior, valued, admired and even revered Member of the TLAB. I have exercised control to avoid that acknowledged appreciation from entering into the consideration of the Decision.

I find that the appropriate remedy is to grant the substance of the Request and issue an order that allows the appeal and dismisses and refuses the approval of the COA.

DECISION AND ORDER

1. The Request for Review of the Decision of the TLAB dated May 15, 2018 in respect of the above noted Case Files is allowed, in part, and the Decision and Order is cancelled. Staff are directed to take appropriate action to expunge it from the record.
2. The Request for Review of the Decision on the appeal is allowed, the decisions of the Committee of Adjustment are set aside, provisional consent is refused and the associated variances are not granted.

X 

Ian Lord

Chair, Toronto Local Appeal Body

Signed by: Ian Lord