Toronto Local Appeal Body

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REVIEW REQUEST-DECISION AND ORDER

Decision Issue Date Friday, October 14, 2022

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

Appellant(s): RUBINOFF DESIGN GROUP

Applicant: CITY OF TORONTO

Property Address/Description: 65 Fortieth Street

Committee of Adjustment Case File: 18 113995 WET 06 CO (B0016/18EYK), 18 113998 WET 06 MV (A0137/18EYK), 18 113999 WET 06 MV (A0127/18EYK).

TLAB Case File Number: 19 114883 S53 03 TLAB, 19 114888 S45 03 TLAB, 19 114890 S45 03 TLAB

Hearing date: August 06, 2019, August 07, 2019, November 18, 2020, January 13, 2021, February 9, 2021

DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

NAME	ROLE	REPRESENTATIVE
SARVIN MAYSAMI	OWNER/PARTY	AMBER STEWART
RUBINOFF DESIGN GROUP	APPLICANT	
LBNA - LONG BRANCH	PARTY	JUDY GIBSON
LIZ EDWARDS	PARTICIPANT	
RANDY MCWATTERS	PARTICIPANT	
RUTH WEINER	PARTICIPANT	
STEVEN JOHN VELLA	PARTICIPANT	
ALEXANDER DONALD	PARTICIPANT	
DAVID GODLEY	PARTICIPANT	
RON JAMIESON	PARTICIPANT	
LIZ EDWARDS	PARTICIPANT	
CITY OF TORONTO	APPELLANT (CITY)	ADERINSOLA ABIMBOLA
JULIAN AMBROSII	EXPERT WITNESS	
FRANCO ROMANO	EXPERT WITNESS	
PETER WYNNYCZUK	EXPERT WITNESS	

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This matter involves the request to review (Review/Request) a Decision and Order of the Toronto Local Appeal Body (TLAB) issued January 13, 2022 ("Decision") where Panel Chair Shaheynoor Talukder ("Chair") allowed an Appeal respecting 65 Fortieth Street, refusing both the Consent to Sever, as well as the variances requested for the houses to built on the lots resulting from the severance. The Applicant requested a Review of the Decision on February 10, 2022**.**

The Request was subject to an Administrative Review pursuant to Rule 31 of the Rules of Practice and Procedure (Rules) of the TLAB and reported as having no procedural issues. The Request qualified to be conducted pursuant to Rule 31 as it has existed after May 6, 2019, when the revised Rules were promulgated

BACKGROUND

Sarvin Maysami is the owner of 65 Fortieth Street, located in Ward 3 (Etobicoke-Laeshore) of the City of Toronto. She applied to the Committee of Adjustment (COA) to sever the property located at 65 Fortieth Street (Subject Property/Site) into two lots. The owner planned to demolish the existing house on the subject property and build a detached dwelling with an integral garage on each of the severed lots.

The COA approved the Owner's applications for severance and variances. The City of Toronto (City) appealed the COA's decision, to the TLAB. The Long Branch Neighbourhood Association (LBNA) elected for Party status, while many residents in the Long Branch area elected to be Participants.

After hearing the matter over 8 days from August 19, 2019, to February 9, 2021, the Panel Chair, Ms. Shaheynoor Talukder (the "Chair") delivered her Decision on January 13, 2022 (the "Decision") , where she allowed the Appeals, refusing both the severance, as well as the variances to build the houses on the two lots.

The Applicants requested for a review of the Decision on February 10, 2022. The Appeal fulfilled administrative screening, resulting in the Decision being assigned to me for Review. I advised the Parties in opposition to the Application that they had until March 25, 2022, to make submissions. The City, and the LBNA made submissions on March 25, 2022.

MATTERS IN ISSUE

The request was made pursuant to **Rules 31.25 and 31.7** of the TLAB Rules; the questions put forward by the requestor are:

a. Whether there is an error of fact in the Chair's understanding of the Applicant's evidence regarding the "dimensions and shapes" of the proposed lots, and the consequences for analyzing the evidence respecting Section 51(24) of the Planning Act, and its conformity with Policy 4.1.5 of the OP;

b. Is there sufficient explanation on whether the Decision is clear about how the findings respecting Policies 3.1.2.1 and 3.4.1(d) of the Official Policy, were reached

c. Whether the lack of analysis of the requested variances under the four tests seen in Section 45.1 constitutes a reviewable error.

It is important to note that the Chair in disagreed with the Study Area put forward by the Applicants on the basis of her analysis, discussed later in this Decision, and finds that the lots to be formed don't satisfy Policy 4.1.5 of the OP. The Applicants allege that the Chair misunderstood the evidence, and misidentified the Study Area, which means that all the findings made on the basis of the misunderstanding are erroneous.

The Chair disagreed with the evidence of the Applicants regarding the removal of trees, with respect to a White Fir tree on the lot, and found that the "Tree should be saved". The Applicants claim that the Chair misunderstood the Applicant's evidence regarding Policies 3.1.2.1 (d) and 3.4.1(d), and did not make an explicit finding regarding their evidence.

Lastly, they quote the introduction of the Decision, to illustrate how the Panel Chair said that she would answer the question of whether the requested variances fulfilled the tests under Section 45.1, but failed to say so.

JURISDICTION

Section 31.7

In considering whether to grant any remedy the Chair shall consider whether the reasons and evidence provided by the Requesting Party are compelling and demonstrate the TLAB:
a) acted outside of its jurisdiction;
b) violated the rules of natural justice or procedural fairness;
c) made an error of law or fact which would likely have resulted in a different Final Decision or final order;
d) was deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different Final Decision or final order; or
e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the Final Decision or final order which is the subject of the Review.

DISCUSSION AND ARGUMENTS

The documents reviewed by me as part of this Review Request are as follows:

- Decision released by Member Shaheynoor Talukder, dated January 19, 2022, regarding the Appeal respecting 65 Fortieth Street
- Factum filed by Ms. Amber Stewart, lawyer, for the Applicant, dated February 10, 2022
- Affidavit filed by Mr. Franco Romano, Planner for the Applicants and Expert Witness, dated February 8, 2022

- The Expert Witness Statement of Mr. Franco Romano, Planner for the Applicants, Expert Witness
- Factum submitted by Ms. Aderinsola Abimbola, Counsel for the City, dated March 25, 2022
- Affidavit submitted by Mr. Julian Ambrossi, Witness for the City, dated March 25, 2022
- Factum submitted by Long Branch Neighbourhood Association, dated March 25, 2022
-

The Appellant expanded on the issues raised in the "Matters in Issue" Section above, as described below:

1. Alleged mistakes made with respect to the issue of Lot Size:

According to the Applicant's factum, the principal basis for refusal of their applications is that the Chair disagreed with the Study Area that Mr. Romano (Planner for the Applicants) "purportedly" selected. The Chair's disagreement with the Applicant's study area, resulted in a finding that the Applicant had not satisfied the burden of demonstrating that the proposed lot frontages respected and reinforced the character of the neighbourhood, as required by policy 4.1.5 of the OP.

At Paragraph 21 of the Decision, the Chair indicates that Mr. Romano described the neighbourhood as being bounded by *"**Lakeshore Boulevard West to Lake Promenade (North to South) and Forty Second Street to Fortieth Street (West to East)**"*. She states that Mr. Romano's reason, by way of evidence, for using these boundaries was that the properties have the same RM – Multiple Residential zoning, where properties east of Fortieth Street have RD – Residential Detached zoning. At Paragraph 24, the Decision states that the Applicants' description of the neighbourhood is "troubling" for several reasons, before making the following finding at Paragraph 25:

Taking into account all of these concerns, I find that Mr. Romano's limited assessment of the neighbourhood can result in skewed statistics for the physical characteristics that I am required to review under OP 4.1.5 (such as lot size, massing of building).

By way on editorial note, Paragraph 24 is not recited here, because it appears later in this Section.

The Appellants take issue with the "single" statistical reference cited in the Decision regarding the Applicants' ("purported") Neighbourhood Study Area that appears in Paragraph 30, before making the following finding:

30. I do not find these statistics convincing because the calculations are based on a

smaller conceptualization of the neighbourhood, which as I've noted, is not an appropriate understanding of the neighbourhood for the subject property. I find that the Applicant has not succeeded in establishing a properly defined neighbourhood for the subject property, and as a result, the statistical analysis based on Mr. Romano's neighbourhood definition is not helpful or accurate in determining whether the proposal respects and reinforces the existing physical character, such as the lot frontage of the neighbourhood

After pointing out that the Chair made findings in Paragraphs 31, and 36 that the Applicant had not succeeded in proving that the proposed lot frontages satisfy Policy 4.1.5 of the Official Plan, and had consequently not met their onus, the Applicants state that it is" *clear that the Chair reached the fundamental conclusion that the lot sizes did not meet the applicable tests because she found that the neighbourhood study area that Mr. Romano selected, purportedly based only on the RM zoned lots on Fortieth Street and to the west, was not the proper "neighbourhood" to use as a basis of assessment of the proposal*". After commenting that no analysis was presented with respect the evidence of LBNA's Witness regarding the frontages, the Applicants claim that the very nature of their Neighbourhood Study Area (NSA) was misunderstood by the Chair:

Respectfully, the Chair has erred in her description of Mr. Romano's neighbourhood study area and has consequently misconstrued his evidence in the Decision. At Schedule D to the Decision, the Chair included an excerpt from his EWS labelled "Mr. Romano's Neighbourhood Context Map." This map includes the portion of the neighbourhood that is zoned RM on Fortieth Street and to the west, as described by the Chair. However, this map is only part of Mr. Romano's neighbourhood study area.

On Pages 37 and 38 of their Factum, the Applicants provide Neighbourhood Context Maps, with an accompanying note that "Refer to Complete Table (attached) and Expert Witness Statement."- by way of an editorial note, this note appears in the original Expert Witness Statement This submission included smaller key maps from the Official Plan (OP) and Zoning By-law, with arrows to indicate the general location of each of the two study area maps within the Neighbourhood Study Area. Mr. Romano included additional information on the map in question, showing the westerly portion of the neighbourhood because the subject site is" *located within the RM zone, variances were only sought to the RM zone standards, and that map illustrated the RM zoned lands most proximate to the site"*.

I recite the statistical conclusions seen in the Expert Witness Statement below:

a. In the RM zone, 91 or 39.4% of lots are 7.62 m or smaller (representing the most frequently occurring lot size).
b. In the entire neighbourhood, 195 lots or 28.8% are 7.62 m or smaller (representing the second most frequently occurring lot size).
c. On Fortieth Street, 15 lots or 32.6% are 7.62 m or smaller (representing the most

frequently occurring lot size).
d. On the Fortieth Street block where the Subject Property is located, 7 lots or 26.9% are 7.62 m or smaller (representing the second most frequently occurring lot size).
e. 56.3% of lots are smaller than the zoning by-law base permission

The factum then recites **Paragraphs 21, 24 and 25** from the Decision, before pointing out that in Paragraph 17 of the Expert Witness Statement, Mr. Romano says:

"While I have reviewed the Long Branch neighbourhood for physical character as a whole, I have more particularly undertaken a review of the area starting at Marie Curtis Park to Long Branch Avenue, south of Lake Shore Boulevard West. I have also undertaken a more detailed review, at least from a statistical perspective, of properties that have the same applicable planning instruments with similar underlying multiple residential zoning. This latter area has a generally defined boundary interior to the neighbourhood south from the Lake Shore Boulevard West to Lake Promenade, Forty Second Street to Fortieth Street. Individually and/or together, these form my neighbourhood study area."

Paragraphs 21 and 24-25 from the Decision, referenced above, are recited below:

21. *The subject property is located in the Long Branch neighbourhood. For the purposes of statistical analysis, Mr. Romano described the neighbourhood of the subject property as being bounded by Lake Shore Boulevard West to Lake Promenade (North to South) and Forty Second Street to Fortieth Street (West to East). Mr. Romano's reason for using these boundaries was that the properties within these boundaries have the same RM – Multiple Residential zoning, where properties east of Fortieth Street have RD – Residential Detached zoning. Please refer to Schedule D for the Neighbourhood Context Map, which is reproduced from Mr. Romano's witness statement.*

24. I find Mr. Romano's description of the neighbourhood for statistical analysis to be troubling for several reasons. First, Mr. Romano's neighbourhood ignores his own acknowledgement that a neighbourhood should be a broader geographic area taking into consideration various factors. Second, the subject property is on the far right of Mr. Romano's neighbourhood. I cannot find any reasons, such as a physical barrier, that will preclude the inclusion of the immediate neighbouring street, such as Thirty-Nineth Street, as being within the neighbourhood of the subject property. It is unlikely that a resident, absent any other prohibiting factors, would not consider houses on the next street to their home as part of their neighbourhood because the zoning has changed from RM to RD.

25. Delineation of a neighbourhood solely based on applicable zoning parameters in this matter is not the best and most accurate way to determine a neighbourhood. Zoning should be considered along with other factors, such as physical barriers, including for example, a transit corridor, commercial areas, etc. Taking into account all of these concerns, I find that Mr. Romano's limited assessment of the neighbourhood can result

in skewed statistics for the physical characteristics that I am required to review under OP 4.1.5 (such as lot size, massing of building).

The Applicants add that Mr. Romano completed a statistical analysis of lot size for the entire Neighbourhood Study Area,, as well as several maps illustrating the eastern portion of his neighbourhood study area, extending from Thirty Ninth Street to Long Branch Avenue to the east, "*which is nowhere acknowledged by the Chair in the Decision*". In addition, the Applicants also point to the inclusion of "*several maps illustrating the eastern portion of his neighbourhood study area, extending from Thirty Ninth Street to Long Branch Avenue to the east", as addenda to the Expert Witness Statement, " which is nowhere acknowleged by the Chair in the Decision*". In addition to the maps, photos from the eastern portion of the Neighbourhood Study Area, including a key map showing the location of each photo, were also included in the Witness Statement. These include photos of James Street east of Fortieth Street, Thirty Ninth Street, and Thirty Eighth Street, found at pages 95 to 106 of Mr. Romano's Statement. Every photo page included a key map showing both Neighbourhood Context Maps – to the west of Fortieth Street and to the east. The Applicants state that the maps state clearly that properties east of Fortieth Street have RD- Residential Detached zoning,while properties to the east o have RM- Multiple Residential Zoning.

The Applicants take specific issue with the Decision's finding that "*the subject property is on the far right of Mr. Romano's neighbourhood*:, and that no " *reason, such as a physical barrier, that will preclude the inclusion of the immediate neighrbouring street, such as Thirty Ninth Street*, ", and state that these statements are inaccurate, because the Site is "roughly in the middle" of the NSA, on the basis of the Neighbourhood Study Area's extending six blocks to the east of Fortieth Street. On the basis of this submission, the Applicants and concluded that "Clearly, the immediate neighbouring street, Thirty Ninth Street, was included in his neighbourhood study area".

The Applicants recite Paragraph 30 of the Decision, and question the usage of the statistic about 91 out of 231 properties having frontages of 7.62 metres, or less, in the Decision to making a finding about how they are not convincing, because of a smaller conceptualization of the neighbourhood. The Applicants state that their evidence provided other statistics such as 195 out of 677 lots in the larger neighbourhood, were 7.62 metres, or smaller. Paragraph 30 of the Decision is reproduced below:

Mr. Romano also produced a detailed lot frontage analysis based on his neighbourhood description. According to Mr. Romano, the 91 properties out of 231 properties (39.4%) in his neighbourhood description have lot frontages of 7.62 m or less. I do not find these statistics convincing because the calculations are based on a smaller conceptualization of the neighbourhood, which as I've noted, is not an appropriate understanding of the neighbourhood for the subject property. I find that the Applicant has not succeeded in establishing a properly defined neighbourhood for the subject property, and as a result, the statistical analysis based on Mr. Romano's neighbourhood definition is not helpful or

accurate in determining whether the proposal respects and reinforces the existing physical character, such as the lot frontage of the neighbourhood

The Applicants then state their conclusion by saying that "*the Chair believed that Mr. Romano's neighbourhood study area stopped at Fortieth Street, and did not extend east into the RD zoned lands. This was a fundamental error of fact, which would likely have led to a different outcome had the error not been made*. "

Key Issue No. 2 – Whether Tree Protection Policies are Satisfied

The Applicants state that the Decision does not provide adequate reasons to support the conclusion that policies 3.1.2.1(d) and 3.4.1(d) were not satisfied. They point out that at Paragraph 38 of the Decision, the Chair refers briefly to Ms. Mercado's (Witness for the LBNA) evidence that the tree in question was a "landmark", and the "biggest tree on Fortieth Street". However, in paragraph 39, the Chair states that she could not determine whether the tree is the biggest tree on Fortieth Street. At Paragraph 40, the Chair refers briefly to the evidence provided by Mr. Peter Wynnyczuk, an Expert Witness and Arborist, who testified in support of the Application, "*that the tree would interfere with the maintenance of the existing house".* They complain that the Chair does not refer to the substantial evidence provided by Mr. Wynnyczuk that the tree could not be retained through the demolition of the existing house, nor does she refer to Mr. Wynnycuk's evidence that it would be possible to plant additional replacement trees on the property. By way of an editorial note, Paragraphs 38-40, where the aforementioned findings can be found, are recited below:

38. Ms. Mercado testified that the white fir is a landmark on Fortieth Street. It was the subject of two separate neighbourhood guided tours that were set up by students interning with LBNA.8 Ms. Mercado considered this tree to be the biggest on Fortieth Street and as the tree being a conifer, it retains its large foliage during the winter, which adds to the physical character of the street.

39. I cannot determine whether this tree is the biggest tree on Fortieth Street. However, it is clear from my review of the various photos of the white fir and from the testimonies of the witnesses in opposition to the proposal, that this tree is visually impressive and forms part of the character of the neighbourhood and Fortieth Street. For context, I reproduce photographs from Mr. Wynnyczuk's Supplement Scoped Arborist Report (Exhibit 9) as Figure 1 and from Mr. Ambrosii's witness statement (Exhibit 12) as Figure 2.

40. Mr. Wynnyczuk testified that there are hydro wires that go into the canopy of the tree that can be abrasive to the wires. Further, because of the close proximity of the tree to the existing house, he noted that the tree will interfere with the maintenance of the house, such as repair of the foundation. Whether this tree is interfering with the upkeep

of the current house is not relevant to the proposal before me as the proposal before me contemplates the demolition of the existing house

The Applicants then take issue with how in their opinion, the Chair relied on the photographs of "*dead trees removed from severed lots" provided by Ms. Mercado*", while simultaneously acknowledging the possible lack of thoroughness in Witness' methodology i.e. "Ms. *Mercado may not have conducted a detailed scientific analysis*". They allege that the Chair relies on what she calls "*common and basic knowledge about trees*" making it "*highly plausible*" that trees on narrow lots do now have a "*suitable growing environment*" because the soils space available to them "*would be limited"*.

They conclude that the Chair does not provide any substantive rationale for the decision to "*hypothesize*" on this matter, when there was lengthy and detailed evidence from their Witness, Mr. Wynnyczuk, who was also recognized as an Expert Witness.

Analyzing Paragraph 48 of the Decision, recited below, the Applicants claim that the Chair refers to the City Arborist's evidence, Mr. Julian Ambrosii, and only recites his evidence that the tree in question "*should be preserved*", and makes no reference to the "*lengthy cross-examination completed of Ms. Mercado and Mr. Ambrosii, the City's Witness"*. They claim that *"nowhere does the Chair cite any evidence from any party that the tree could be preserved, which is the applicable policy language*".

48. *Mr. Ambrosii stated that Urban Forestry objects to the proposal. He summarized his objections as follows:*
"A) A healthy privately owned white fir tree measuring 52 cm in diameter. It has been determined that this tree is worthy of retention to provide benefits for the community for many years to come.
B) Urban Forestry's mandate is to preserve trees for public benefit and to maintain healthy trees. In this case, it is my professional opinion that this 52 cm diameter healthy white fir tree should be preserved

The Applicants then rely on the Review Request Decision respecting 111 Gough Avenue, where an approval decision of the TLAB was overturned on the basis that the original Decision did not provide adequate reasons

It may be that there was consideration, but this consideration must be supported by findings, and a reasoning process that the proposal meets the intent of the relevant policies. It is not sufficient to note evidence without making findings.

Key Issue 3: **Whether the Four Tests are Satisfied**

Lastly, the Applicants state that despite having identified "the four tests for minor variance as the third key issue", the Chair does not provide any reasons, and does not make any findings on the minor variances and whether they satisfied the four tests

under the *Planning Act*. The Chair stated at Paragraph 51 as follows:

51. Finally, I find that the variances, individually and cumulatively, are intimately connected to the proposed severance and the variance for lot frontage. In this circumstance, it is not appropriate or necessary to address the individual variances further as their respective lot severance application is not supported

The Applicants conclude by reiterating three basic reasons behind their request, lament how a "fundamental mistake of fact" is "*unfortunate given the substantial investment in time and money made by Ms. Maysami*". They end by requesting that *"that the Decision be overturned and that a new hearing be scheduled at the TLAB's earliest convenience" on the "basis of the fundamental and unmistakable error of fact*".

By way of an editorial comment, I recite only such material from the Responses provided by LBNA, and the City, (in that order) that is most relevant to the issues raised by the Applicant. Given how well the Applicants have explained their issues, I believe that a mere recital of the appropriate sections of the Responses from the Parties would be more than adequate to explain the opposing perspective, and what evidence was adduced during the Proceeding:

In their Response dated March 25, 2022, Party LBNA makes the following points:

Error of Fact

5. *In para 12 of Mr. Romano's Affidavit he reached the conclusion that inclusion of the broader study area would have changed the decision. The LBNA does not agree as the inclusion of the broader study does not bring in statistics or decision history that would favour approving the consent application at 65 Fortieth and removing the protected White Fir tree.*

6. *In reviewing Mr. Romano's EWS he provided statistics for lot characteristics, specifically frontage for two maps. Map 1 from 40th Street to 42nd Street and Map 2, described as the broader neighbourhood from 39th Street to Long Branch Avenue.*

7. *In these statistics lots with a similar lot frontage to what the Applicant was seeking (<7.62m) on Map 1 were not in significant numbers (Blue 39.4%)* [i] *and most frequently occurring was above the bylaw of 12m (Green, Yellow, Orange 43.7%)*[ii]*.*

8. *When including the Map 2, the broader neighbourhood, the percentage of lots <7.62m actually* ***decreases*** *(i.e. Blue decrease down to 28.8%) and the lots above the bylaw of 12m* ***increase*** *(Green, Yellow, Orange increase to 55.3%).*

Emphasis on Broader Neighbourhood during testimony

9. There was no emphasis on the broader neighbourhood as an important point

of fact during Mr. Romano's oral testimony.

10. During his 3 hour testimony, Mr. Romano mentioned the broader neighbourhood once and referenced the abutting street, 39th and the broader neighbourhood only once

11. A photo array was presented by Mr. Romano with a walk through the neighbourhood. The photo array[iv] of 67 properties located on Map 1 (53 photos) and Map 2 (14 photos). Mr. Romano's oral testimony was limited to only the Map 1 photos in the RM zone he did not speak to the 14 photos in the broader neighbourhood of 39th and 38th Streets.

12. The lack of emphasis on the broader neighbourhood during this testimony proves the case presented did not turn on the broader study area.

The City of Toronto confined its arguments to the preservation of the Fir Tree (the second question raised by the Applicants), and its relationship to Policies 3.1.2.1(d) and 3.4.1 (d).

Relevant Highlights from the factum submitted by Ms. Aderinsola Abimbola on behalf of the City, on March 25 2022, are as follows:

9. *It is not sufficient that a perceived or actual error of fact was made, but the error of fact is qualified with the following statement above that it would have likely resulted in a different order*

10. *In paragraphs 48-49 of the Decision, the Member accepted the evidence of the City's witness, Mr. Julian Ambrosii. Mr. Ambrosii's evidence at the hearing was that the White Fir tree, which he deemed was a healthy, by-law protected, mature and unique tree, would be destroyed if the proposal (consent and minor variance application) was approved and that the proposal was not consistent with the tree preservation policies in policy 3.4 of the Official Plan (paragraph 14 of Mr. Ambrosii's witness statement). Mr. Ambrosii also provided oral evidence that the tree could be saved if the property was redeveloped for instance using the existing foundation and footprint. Ultimately, the Member concluded at paragraphs 49-50 of the Decision that the proposal did not satisfy the tree preservation policies in the Official Plan and that the lot frontage variance (which is connected to the proposed consent to sever) did not meet the general intent and purpose of the Official Plan.*

11. *The Member at paragraph 50 of the Decision clearly stated that the tree preservation policies, which she indicated as policy 3.1.2(1)(d) and 3.4.1(d) in paragraphs 42 and 44 of the Decision, (along with reference to policy 4.1.5 of the Official Plan), were relevant in determining whether the variances satisfy the general intent and purpose of the Official Plan before ultimately concluding the lot frontage (which is connected to the proposed severance) did not satisfy the general intent and purpose of the Official Plan*.

12. *The Member ultimately determined in paragraph 50 of the Decision that the removal of the tree will result in the loss of canopy, and an established physical characteristic of the neighbourhood, which the Member deemed to be detrimental to the neighbourhood. The Member also stated in paragraph 50 that as a result of the finding stated above she also concluded that the proposal is not minor or an appropriate development of the subject property*.

13. *Regardless of any perceived or actual errors in the Member not referencing Mr. Romano's other study areas in her decision, ultimately, the Member concluded that the proposal did not satisfy the tree preservation policies indicated above and sufficiently provided rationale as to why the proposal is not minor, nor an appropriate development of the subject property, and did not meet the general intent and purpose of the Official Plan based, in part, on the tree preservation policies.*

It is also important to recite below, some of the pertinent paragraphs from the Affidavit submitted by Mr. Ambrosii, the City's Forestry Witness below- the paragraph numbers correspond to what was provided in his Witness Statement:

12. *I provided oral evidence at the hearing that at that time, there were only 32 White FirTrees in the City of Toronto's database; please note that the City of Toronto's database only includes a record of City owned trees. This tree is a healthy, by-law protected, large, unique and mature tree that is rare as there are a limited number of this tree's species in the City of Toronto. This species of tree is also unique as when other trees lose their leaves during the winter, this tree does not, thus providing natural barriers all year long.*

13. *Despite the allegation at paragraph 31 of the review request by Ms. Amber Stewart, I provided oral evidence at the hearing that there are different options to redevelop this tree without its destruction. I provided oral evidence that the tree could be preserved if redevelopment occurred using the existing foundation and footprint. These statements can be found in the City of Toronto's closing submissions at paras 3 and 29(a).*

14. *I also provided evidence that this this tree is not close enough to any existing structures tocause any issues (para 12 of my witness statement).*

15. Further, at the hearing, I also provided oral evidence that it would take an army of new trees to replace the benefit of one mature tree, like this one.

It is important to note that the Applicants did not make any submissions by way of Reply.

ANALYSIS, FINDINGS, REASONS

I will rely on the following important principles to arrive at a final Decision, regarding this Review Request:

- It would be trite law to state that for a Review Request to be successful, it is not merely necessary for the objector to raise a plausible objection to a finding, and demonstrate that it is erroneous. The objector has to demonstrate that the order of the error has to be significant enough that a different decision could have resulted had the error not been made.

  I note that both the Parties in opposition to the Application have highlighted the importance of this approach in their submissions.

- The Decision assumes that the reader has the ability to arrive at logical corollaries of the findings explicitly stated in a given Decision. In other words, if there are two Parties in opposition in a Proceeding, who are represented by Witnesses X and Y, a statement in the Decision such as "I agree with X" which results in a finding, can be safely interpreted to mean that the Chair prefers the evidence of X over Y, or disagrees with Y, or agrees more with X than Y. Irrespective of the scenario, the finding is the same in these cases- X's evidence is preferred over Y.

  While it would be ideal to have a finding that explicitly lists agreement with one Party, and disagreement with others in opposition, because such an approach dots the "i"s and crosses the "t"s, and leaves the reader without an iota of doubt about who the Chair is in agreement with , a finding that is less explicit because it merely states who the Chair is in agreement with, without naming the Parties that he or she disagrees with, is nevertheless acceptable because it clearly identifies whose evidence is "preferred"- the threshold that has to be met by the Decision with respect to acceptable findings.

- Irrespective of the quantity and quality of Witness Statements that are submitted at the beginning of any Proceeding, a Decision is ultimately driven by evidence. In other words, submissions, irrespective of their comprehensiveness, and comprehensibility, have to be given less weight from a decision making point of view, compared to evidence obtained through a *viva-voce* examination, because the latter delved into, and dwelt upon issues held to be crucial to the decision making process by the Parties.

By way of an editorial note, I have taken the liberty of repeating, and reiterating pertinent material from the "Discussion and Arguments" Section, as part of my analysis below. While I recognize that such an approach may lengthen the Decision, I believe that such repetition spares the reader, from having to jump back and forth between different parts of the Decision, since all the relevant information is compactly present in the same place.

I being by repeating the three issues raised by the Applicants that are key to this Review Request

Question 1: Whether there is an error of fact in the Chair's understanding of the Applicant's evidence regarding the "dimensions and shapes" of the proposed lots, and the consequences for analyzing the evidence respecting Policy 4.1.5 of the OP?

Question 2: ***Is there sufficient explanation on whether the Decision is clear about how the findings respecting Policies 3.1.2.1 (d) and 3.4.1(d) of the Official Policy, were reached?***

Question 3: Does the lack of analysis of the requested variances under the four tests seen in Section 45.1 constitute a reviewable error?

The analysis respecting Question 1 is presented below.

Question 1: Is there a reviewable error regarding the decision respecting the consent to sever, with reference to lot frontages, because the Chair made an error in the recognition of the Study Area?

The starting point of my analysis is Paragraph 21 of the Decision, which states:

The subject property is located in the Long Branch neighbourhood. For the purposes of statistical analysis, Mr. Romano described the neighbourhood of the subject property as being bounded by Lake Shore Boulevard West to Lake Promenade (North to South) and Forty Second Street to Fortieth Street (West to East). Mr. Romano's reason for using these boundaries was that the properties within these boundaries have the same RM – Multiple Residential zoning, where properties east of Fortieth Street have RD – Residential Detached zoning. Please refer to Schedule D for the Neighbourhood Context Map, which is reproduced from Mr. Romano's witness statement

I recite below Paragraph 15 of the Applicants' Expert Witness Statement, and have underlined phrases, or sentences, which I find to be important:

While I have reviewed the Long Branch neighbourhood for physical character as a whole, I have more particularly undertaken a review of the area starting at Marie Curtis Park to Long Branch Avenue, south of Lake Shore Boulevard West. I have also undertaken a more detailed review, at least from a statistical perspective, of properties that have the same applicable planning instruments with similar underlying multiple residential zoning. This latter area has a generally defined boundary interior to the neighbourhood south from the Lake Shore Boulevard West to Lake Promenade, Forty Second Street to Fortieth Street. Individually and/or together, these form my neighbourhood study area

The above excerpt from the Expert Witness Statement makes it clear that the zoning that governs the Site is a very important factor in shaping the evidence of the Applicants. This excerpted paragraph states that the zoning (which is RM, though not stated in this paragraph) spans from Forty Second Street to Fortieth Street.

By reading the factum submitted by the City and LBNA, I find that there is a specific reason why the area bounded by Lake Shore West to Lake Promenade, Forty Second Street to Fortieth Street was delved into, and dwelt upon at the Proceeding- this area, is subject to a common RM zoning classification, and was the subject of specific statistical analysis, as per OPA 320. There are clear references to OPA 320 in the Witness Statements of all Parties, and there is no dispute among the Parties about which OP should prevail, based on Oral Argument

The importance of the RM Zone is evident in the Applicants' Oral Argument, heard by way of written submissions, from the Applicants, as seen in Paragraph 13 of their Oral Argument recited below, with important and pertinent underlined by me:

13. Mr. Romano's review illustrates that the density characteristics of the neighbourhood are also mixed. FSI ranges from 0.04 to over 0.75 x the lot area in the RM portion of the neighbourhood, and the planned context anticipates an FSI of 0.6 x for certain building types. According to available data, 23 properties (9.9%) in the RM portion of the neighbourhood, and 4 properties (8.7%) on Fortieth Street, have a density over 0.6 x the lot area.

Paragraph 22 (b) from the same document states:

Like Mr. Godley, other Participants also acknowledged the mixed character of Fortieth Street and the west portion of the study area. Some of their admissions supported the testimony of Mr. Romano. For example, Randy McWatters resides at 1 Garden Place. He testified that all of the "mix" found in the RM zone already exists on Fortieth Street

There is a curious silence in the Applicant's Oral Argument about what conclusions were drawn by way of evidence about the other Neighbourhood Study Areas that they discuss in their Review Request, because there is a perceptible gap in information about what became of these maps by way of evidence, in an otherwise comprehensive submission.

The reason behind the perceptible gap is probably best answered in the factum of LBNA- the relevant paragraphs are recited below, and need no explanation nor commentary:

9. There was no emphasis on the broader neighbourhood as an important point of fact during Mr. Romano's oral testimony.

10. During his 3 hour testimony, Mr. Romano mentioned the broader neighbourhood once and referenced the abutting street, 39th and the broader neighbourhood only once

11. A photo array was presented by Mr. Romano with a walk through the neighbourhood. The photo array[iv] of 67 properties located on Map 1 (53 photos) and Map 2 (14 photos). Mr. Romano's oral testimony was limited to only the Map 1 photos in the RM zone he did not speak to the 14 photos in the broader neighbourhood of 39th and 38th Streets.

12. The lack of emphasis on the broader neighbourhood during this testimony proves the case presented did not turn on the broader study area.

Given that there is no Reply to address the explanation provided above by Party LBNA, I find that while the Applicants did submit other Neighbourhood Study Area Maps, there was no evidence adduced at the Proceeding regarding these maps, and the statistical conclusions that result from an analysis of these maps.

As a result, I find that the Chair worked with the evidence deemed most pertinent to the Appeal, in terms of maps, Neighbourhood Study Areas, and maps, extracted the analytical statistical table provided at the end of the Discussion Section, and relied on the statistic encompassing the entire the RM zone (from Forty Second Street to Fortieth Street) for decision making purposes.

While the Applicants also make reference to the presence of other statistics in the Decision, it is evident that the RM Zone statistics were relied on, because these are the only statistics that were discussed in detail by way of detail. It is also pertinent to note that the one and only statistic used in the Decision about 39% of the lot frontages in the RM Zone being 7.62 metres or less, would have demonstrated that this grouping of frontages (i.e. less than or equal to 7.62 metres) would have been the prevailing type, according to OPA 320- in other words, while there was only one statistic used, as the Applicants point out, it was also the most pertinent, and more importantly, the most advantageous to the Applicant's case.

However, in her Decision, the Chair disagreed with a strictly zoning based analysis of the Area, and asked if the residents who lived on 40th street, did not experience 39th street, even if had different Zoning, and disagreed with the Applicant's Study Area to which there is no demonstrable answer in the evidence. As a result, the Chair disagreed with the basis of the Applicant's analytical framework, and all the conclusions resulting from this/ framework.

As a consequence of the analysis presented with respect to this question, I find that there is no fact of error in the Chair's comprehension of the evidence regarding the Neighbourhood Study Area.

Question 2: ***Is there sufficient explanation on whether the Decision is clear about how the findings respecting Policies 3.1.2.1 (d) and 3.4.1(d) of the Official Policy, were reached***

The Applicants state that "*the TLAB Decision does not provide adequate reasons to support the conclusion that policies 3.1.2.1(d) and 3.4.1(d) were not satisfied*".

At the centre of this discussion is a White Fir tree on the existing lot at 65 Fortieth Street, whose picture has been excerpted from the Decision:

FIGURE 1- THE WHITE FIR TREE AT 65 FORTIETH STREET

In their submission, the Applicants draw attention to the Chair's reciting the evidence of Ms. Mercado (Witness for the LBNA) in Paragraph 38 of her Decision, as a "landmark", and the "biggest tree on Fortieth Street". The Applicant then points out that in Paragraph 39 of the Decision, the Chair states that she could not determine whether the "*tree is the biggest tree on Fortieth Street*".

While this may true, I find that the next sentence in the same paragraph (Paragraph 39) of the Decision, which states

"*However, it is clear from my review of the various photos of the white fir and from the testimonies of the witnesses in opposition to the proposal, that this tree is visually impressive and forms part of the character of the neighbourhood and Fortieth Street*."

The underlined portion from the excerpted sentence makes it clear that the Chair finds the tree to be an integral part of the character of the street, irrespective of whether or not it is the largest tree on the street. I note that the Chair's finding about the fir tree being *"part of the character of the neighbourhood, and Fortieth Street*" is not questioned by the Applicants.

The Applicants also complain that the Chair did not recite, much less analyze "the *substantial evidence provided by Mr. Wynnyczuk that the tree could not be retained through the demolition of the existing house",* and point out that she briefly referred to Mr. Wynnyczuk's evidence about how the tree could not be retained through the demolition of the house, or that it would be possible to plant additional replacement trees on the property.

I reproduce Paragraphs 40 and 41 from the Decision below, underlining sentences and phrases that I deem to be of interest in determining this matter:

40. Mr. Wynnyczuk testified that there are hydro wires that go into the canopy of the tree that can be abrasive to the wires. Further, because of the close proximity of the tree to the existing house, he noted that the tree will interfere with the maintenance of the house, such as repair of the foundation. Whether this tree is interfering with the upkeep of the current house is not relevant to the proposal before me as the proposal before me contemplates the demolition of the existing house.

41. Mr. Romano stated that this tree would require removal if the Applicant planned to build an "as-of-right" dwelling on the subject property. The Applicant's decision to build an "as-of-right" dwelling is not what is before me – the application to sever a lot is significantly different from a decision to build an "as-of-right" building.

The paragraphs above make it clear that the Chair's rationale for not assigning weight to the Applicant's evidence is that the evidence in question focuses on **cutting down the tree (** my emphasis), because of purported interference with the maintenance of the house, which while true, adds nothing to a discussion about the preservation of the tree if the house were demolished, as would be the case if the Applications were successful. Likewise, the discussion about tearing down the tree if an "as-of-right" house were to be constructed on the lot, is of academic interest to the determination of the Appeal, because there is no proposal to build an "as-of-right" house.

In contrast to the fulsome evidence, summarized above, which focuses on cutting down the tree, there is not much by way of evidence from the Applicants that focuses on the preservation of the tree, because the Applicants themselves discuss the planting of new

trees, in place of the existing tree- by way of an *obiter* remark, I get the impression that cutting down the fir tree is assumed to be a *fait accompli* in their discussion..

I am also surprised by the Applicant's declaration that the Chair did not refer to Mr. Wynnyczuk's evidence about the possibility of new trees to replace the removed tree because this issue is clearly discussed in Paragraph 46 of the Decision, even if Mr. Wynnyczuk is not explicitly mentioned:

46. The Applicant proposes to plant trees in the front of the proposed dwellings to address the removal of the tree. This is not an acceptable compromise. First, the new planted trees will not contribute a tree canopy to compensate for the removal of this white fir. Second, Ms. Mercado testified that based on her lived experience, trees planted on severed lots do not necessarily survive after planting. She provided photographs of dead trees removed from severed lots. Ms. Mercado may not have conducted a detailed scientific analysis, but common and basic knowledge about trees would indicate that it is highly plausible that trees on narrow lots do not have a "suitable growing environment" because the soil space available to them would be limited.

Further Paragraphs 47 and 48 state:

47. The Applicant also submitted that planting new trees is part of the re-generation process of any forest. This is correct; however, I cannot see how such re-generation process in an urban environment can be connected to or justify the destruction of a large mature tree that is labelled as a healthy tree by Urban Forestry.

48. Mr. Ambrosii stated that Urban Forestry objects to the proposal. He summarized his objections as follows:
"A) A healthy privately owned white fir tree measuring 52 cm in diameter. It has been determined that this tree is worthy of retention to provide benefits for the community for many years to come.

B) Urban Forestry's mandate is to preserve trees for public benefit and to maintain healthy trees. In this case, it is my professional opinion that this 52 cm diameter healthy white fir tree should be preserved

49. I agree with Mr. Ambrosii for the reasons stated above. I find that the proposal does not satisfy the tree preservation policies in the OP.

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While Paragraph 49 makes it very clear that the Chair prefers the evidence of Mr. Ambrosii because she "agrees" with him- I find this to mean that she gives Mr. Ambrosii's evidence, greater weight than Mr. Wynnyczuk, even if it is not stated in so many words. Paragraphs 48 and 47 provide the underlying reasoning for the Chair's providing greater weight to the evidence of Mr. Ambrosii over Mr. Wynnyczuk- the City's evidence specifically states why a 52 cm diameter white fir tree should be preserved,

whereas the evidence of the Applicants concentrated on the replacement of a health ytree, with trees, which would require time to provide the canopy presently provided by the white fir tree, best summarized in Mr. Ambrosii's evidence "*Further, at the hearing, I also provided oral evidence that it would take an army of new trees to replace the benefit of one mature tree, like this one".*

The Applicants take issue with the Chair's preferring the evidence of Ms. Mercado, even if she "*may not had conducted a detailed scientific analysis*", specifically highlight her usage of the expression "*highly plausible*", before asking why did she have to "hypothesize", instead of relying on the "*lengthy and detailed evidence of a qualified expert, Mr. Wynnyczuk",* before alleging that she did not "*make a specific finding with respect to Mr. Wynnyczuk's evidence"*.

In this context, the Applicants also assert that in Paragraph 48,(recited on the previous page), that the Chair accepted the City's evidence that the tree ""*should be preserved*", without any reference to the policy language which focuses on the verb "*could*" instead of "*should*" i.e. the tree could be preserved, which is the applicable policy language. It would have been helpful for the Applicants to recite the policy language in question, so that their argument could have been easier for me to follow.

However, notwithstanding any explicit references to the pertinent "policy language", it is important to note that a finding which says that the tree "should" be preserved, meets a higher threshold than "could", which is the preferred threshold, suggested by Applicants. Usage of the word "could" refers to "something that can happen", while "should" refers to something that "ought to happen, or must happen"- in other words, one can be more sure of what the result will be when "should" is used, instead of "could". Consequently, I find that the Chair's finding more than meets the threshold of "could", which is the appropriate threshold, based on the Applicants' factum.

In Paragraph 29 of their submission, the Applicants allege that the Chair "hypothesizes" on the basis of Ms. Mercado's evidence, even if the latter is not an "Expert", instead of their Expert, Mr. Wynnyczuk, who is a qualified Expert, before asserting that the Chair did not make a finding about his evidence.

I find that while the Applicants' factum splits the evidence against their Witness from Ms. Mercado, and Mr. Ambrosii into two parts, the first part discussing Ms. Mercado's testimony, before questioning the Chair's handling of their evidence, while the second part refers to Mr. Ambrosii's evidence. In my reading the Decision, I find that the Chair consolidated the evidence into a "for" and "against" the cutting of tree from Paragraphs 37- 49, before coming to a clear, and supportable finding in Paragraph 49, where she states that she agrees with Mr. Ambrosii. While the Applicants may be right in suggesting that no finding was made about Mr. Wynnyczuk's evidence, in the context of discussing Ms. Mercado's evidence, there is a clear finding made after analyzing Mr. Ambrosii's evidence- I note that comparing Mr. Ambrosii's evidence, with Mr. Wynnyczuk's evidence, is fair, and constitutes an "apples to apples" comparison, because both were recognized as Experts in forestry.

I reiterate what was stated at the beginning of this Section, that a clear agreement with one of the Witnesses, without a reference to other Witnesses in Opposition, leaves the reader with no doubt about whose evidence is preferred, without reference to the opposing Witness.

Before stating my finding on this matter, it would be pertinent for me to quote the very pertinent, and meaningful sentence below, from the Decision that addressed Review Request respecting 111 Gough Avenue, recited earlier in this Decision

"It is not sufficient to note evidence without making findings".

While this Decision may not have been before the Chair, I find that she nevertheless followed the advice above- she recited evidence that she found pertinent, and excluded evidence that she chose not to rely on. However, it is easy to connect the recited evidence to the analysis and then onto her findings, as has been demonstrated in this Decision.

On the basis of this analysis, I disagree with the Applicants that no finding was made with respect to their Witness's evidence, and that there is no clarity about how this finding was reached-.

I find that there no reviewable errors in the discussion regarding Forestry Policies, with a demonstrable nexus to Sections 37.1 (c) and 31.7 (d) of the Rules. .

Question 3: Does the lack of analysis of the requested variances under the four tests seen in Section 45.1 constitute a reviewable error?.

While it is true that in the "**Matters in Issue**" Section, the Chair sets out the question of "*Whether the variances individually and cumulatively satisfy the four tests*" constitute a "key test" in Paragraph 52, she also makes the following finding at Page 13 of her 19 page Decision

52. *Finally, I find that the variances, individually and cumulatively, are intimately connected to the proposed severance and the variance for lot frontage. In this circumstance, it is not appropriate or necessary to address the individual variances further as their respective lot severance application is not supported*

The reason for the Chair's not analyzing the variances, or making findings on the requests for variances is crystal clear- such analysis becomes moot because the variances, come into play if and only if the dwellings can be constructed on the severed lots, which require the severance application to be successful. Should the consent to sever not be successful, as is the case here, the question of whether the variances are approvable, or not becomes a matter of theoretical, or academic interest- from a findings perspective, the result is a difference without a distinction.

Given that the analysis preferred by the Applicants would not made any difference to the final Decision, there is no demonstrable connection between this ground and Rules

31.7 (b) and 31.7 (c), which speaks to the violation of the rules of natural justice, and procedural fairness.

On the basis of this analysis, I find that the Chair fulfilled her duty by analyzing pertinent evidence, and presented her findings such that the path can be reproduced by a different individual. There is no reviewable error committed by the Chair because there is no demonstrable nexus between the Decision, and Sections 31.7 (b) and (c) of the Rules.

Given my findings that there are no reviewable errors made with respect to each of the three questions raised in the “Matters in Issue” Section, I find that the Review Request respecting 65 Fortieth Street should be refused, and herewith confirm the Decision released by Member Shaheynoor Talukder on January 13, 2022,.

DECISION AND ORDER

1. The Request for a Review respecting 65 Fortieth Street is denied. The Decision, , issued by Member Shaheynoor Talukder dated January 13, 2022, is herewith confirmed.

So orders the Toronto Local Appeal Body.

X 

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body