Toronto Local Appeal Body

40 Orchard View Blvd, Suite 211
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

REVIEW REQUEST ORDER

Review Issue Date: Monday, May 28, 2018

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

Appellant(s): BRENTLANE DEVELOPMENTS INC

Applicant: RICHARD WENGLE ARCHITECT INC

Property Address/Description: 49 & 51 SPRINGMOUNT AVE

Committee of Adjustment Case File Number: 17 168004 WET 17 CO, 17 168020 WET 17 MV, 17 168021 WET 17 MV, 17 168022 WET 17 MV

TLAB Case File Number: **17 256606 S53 17 TLAB, 17 256610 S45 17 TLAB, 17 256612 S45 17 TLAB, 17 256613 S45 17 TLAB**

Decision Order Issue Date: Thursday, March 29, 2018

DECISION DELIVERED BY Ian James Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE-

This is a request for a review ('Request') under Rule 31.1 of the Rules of Practice and Procedure ('Rules') of the Toronto Local Appeal Body ('the TLAB') made by or on behalf of Brentlane Developments Inc., by its agent, Daniel Shields ('Requestor').

The Request was made by affidavit (Form 10) sworn April 30, 2018 and was received by the TLAB on the last extended day eligible under the Rules.

The matter that is the subject of the Request concerned the Decision and Order of Member S. Makuch ('Member') issued March 29, 2018 ('Decision') in respect of property located at 49 and 51 Springmount Ave., ('subject property') in the City of Toronto ('City'). The Decision refused the appeals of the Requestor for severance and variance relief that would have enabled the construction of three dwellings on the subject property.

The Requestor asserts that the Member had a 'direct relationship, professional and personal, with opposing counsel' for the City, a fact that was not disclosed to the Parties and Participants present. It is further asserted that the failure of disclosure deprived the Parties, particularly the Requestor, from the opportunity to question or challenge the impartiality of the Member to conduct the Hearing. As such, the Request asserts that the relationship and the failure to disclosure amounts to a perception of a reasonable apprehension for bias and a denial of natural justice by depriving the parties of the opportunity to explore the issue.

BACKGROUND

In accordance with the Rules, the Decision followed a day-long Hearing which engaged two parties (the Requestor and the City), multiple participants and two expert witnesses. For the purposes of the Request, this proceeding itself is relevant to understand that it was convened in full compliance with the TLAB Rules, including a lengthy Notice and preparation period and the exchange of multiple submissions.

What is instructive is that the City, while identified as a Party, was represented during this extended period by counsel, Alexander Suriano.

The City position was in opposition to the requested severance and variances and supportive of area residents. It was effectively adverse in interest to the applicant/appellant, although the City had not indicated an intention to call any direct evidence of its own.

At some point preceding the return date for the Hearing on March 14, 2018, Mr. Suriano identified that he was otherwise engaged in another forum. As a consequence, by a noon e-mail dated March 13, 2018, Matthew Schuman ('Solicitor') first identified himself to the parties and the participants that due to the late revealed scheduling conflict, he would be attending the Hearing <u>on the next day</u> on behalf of the City, instead of Mr. Suriano. If there were questions, he invited contact.

At the time of this communication, the identity of the TLAB Member conducting the Hearing was unknown.

It is the prior association between the Member and the Solicitor that the Requestor identifies as an unknown through to and including the Decision.

JURISDICTION

These are the TLAB Rules:

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

The nature of the Request is somewhat unique. While reference is made to the Hearing itself, the essential allegation is as above stated and only secondarily engages the hearing event, its conduct, the Decision and its result.

The primary issue, plainly stated, is whether there existed a duty or obligation on the part of the Member (or the Solicitor) to disclose at the outset, upon the persons present being identified, the existence of a prior business or professional relationship that might give rise to the apprehension of bias, such that persons of interest in the issue of impartiality might have the opportunity to explore the relationship and take a position on the continuation of the Hearing, an adjournment or recusal of the Member.

The secondary issue is whether there were indicia of bias that followed the failure to disclose.

The issues are not trifling ones but strike at the essence of the responsibilities of the tribunal to the public in terms of both the appearance and substance of the conduct and integrity of the appeals process. On the one hand, parties to a proceeding need to be afforded the assurance of a fair and impartial assessment of the merits and demerits of an appeal. On the other hand, the public investment in time, resources and engagement by the public should not be lightly disregarded where the conduct of a Hearing and the formality of a decision has demonstrated the exhaustion of a substantive process. Both constitute serious considerations.

The request asserts two fundamental grounds or issues :

1. Because of a prior business, professional and personal relationship between the Member and the Solicitor, **was there a duty to disclose the circumstances and offer the opportunity for submissions**? The prior history consists of an 'employer/employee' relationship (indicated in the Request to have commenced in 'August, 2013 and continued for 4 years and 9 months'); and professional associations through co-authorship of an article and co-instruction of a planning law course, at the University of Toronto, 2016- April, 2017.

2. At the Hearing, **were there aspects of the conduct and rulings of the Member constituting 'examples of' "bias and questionable fairness in this case?**"

In reviewing the latter and in being acutely aware of the developing practices of the TLAB as a new tribunal replacing the former Ontario Municipal Board in the City (with more limited jurisdiction in the TLAB), I place no weight on the Requestor's submissions on that second issue. The leniency afforded the participants that is raised (permission to ask questions, etc.) is wholly consistent with multiple decisions of the TLAB on the interpretation and application of its Rules. Those Rules are currently undergoing a full public review process. Determinations by the Member to elicit a full exposure of relevant considerations is perfectly consistent with the practice and experience of the tribunal to encourage public participation and for it not to be seen as exclusionary, unduly pedantic or driven by constraints - but always ensuring the rights of natural justice are protected and undue prejudice is prevented.

I do not give the slightest countenance to the suggestions raised in this component of the Request as a basis for Review relief of any form. That case for bias or

its reasonable apprehension arising in the conduct of the Hearing is simply not made out.

I find that there is no evidence of actual bias, real or perceived, in any of the matters raised respecting the conduct of the hearing. I come to this conclusion not only on a review of the material submitted by the Requestor and others, but also on the applicable legal principles discussed below. As well, I have commentary from the parties and participants as to their perception of the conduct of the Hearing, although this aspect of the responses was not specifically invited.

I was advised the Requestor was not himself present at the hearing, a fact neither admitted nor denied in his affidavit. If the Requestor was not present throughout, submissions as to the conduct of the hearing would amount to hearsay at best. It raises the question of how an affiant can swear an affidavit not based on own observation and not reported to be based upon information and belief.

Rule 31.6, above, permits the TLAB in conducting a Review to elect from a series of action permissions. I elected to seek written submissions from the parties and, by extension, the representative of the participants on specific questions. I received responses from:

a) Mr. Ian Andres, counsel for the Requestor (but not the identified author of the Request);
b) Mr. Matthew Schuman, Solicitor (for the City);
c) Mr. Andrew Manson, on behalf of himself as Representative and named Participants, being tenants, owners and neighbours of the subject property.

I did not communicate with the Member beyond identifying the non-disclosure allegation, to address, reduce and avoid the circumstance of any possible future review request arising on the same grounds, under the Rules.

The responses were full, complete and timely. They were instructive and confirmatory of the factual aspects relevant to both identified issues. They are not repeated here by fulsome attribution or quotation, for length and the obvious differing positions taken respecting the Decision. Of interest are the following points raised by the responders, without controversy:

1. At no time before, during or after the Hearing was there ever disclosure by either the Member or the Solicitor of any prior mutual business, professional or personal relationship.
2. Had the opportunity been afforded to request further details of the nature, scope, timeframe and extent of the relationship, it would have been accessed for assessment and instructions.
3. A professional relationship had existed as above described; however, the Solicitor had been a full time employee of the City since August, 2015.
4. The opportunity to request the Member to recuse himself to avoid any possible perception of bias or unfairness was a known remedy available to counsel. It was not exercised for the lack of awareness of a prior relationship.

5. The Canadian Judicial Council in its publication "Ethical Standards for Judges" provides this extract:

> '…a judge's disqualification would be justified where the judge has a close family, personal or professional relationship with a litigant, counsel or witness. The test is not whether actual bias exists in the mind of the adjudicator, but whether the circumstances "would give rise to a reasonable, fair minded and informed person, to reasonable suspicion that the judge would not act impartially".' Section 6, E.2.; Commentary, A.3.)).

6. The issue of disclosure, or not, arose on the morning of the hearing, not earlier.
7. The Solicitor, based on the nature of prior professional interactions with the Member, the subject matter of the Hearing and the time that had elapsed since any professional involvement, consciously determined not to advise the panel or the persons present of previous interactions with the Member.
8. Had disclosure occurred there would have been differing opinions and argument expressed as to the continuation of the Hearing.
9. No regular consultation with the TLAB website could have revealed the possibility of a conflict.

On the basis of the substance of these responses and the undisputed facts they represent, I do not consider it necessary to convene 'a Motion to argue the issue raised in the request.'

The issue of 'disclosure or not' is not isolated. Several consideration including the following come into play:

a) The appearance of impartiality must be approached from the perspective of a reasonable, fair minded and informed person.
b) As a general principle, a judge should self-disqualify if aware of any interest or relationship that to a reasonable, fair minded and informed person would give rise to a reasoned suspicion of the lack of impartiality.
c) Judicial impartiality includes both impartiality in fact and in the perception of that reasonable, fair minded, informed person.
d) In law, conflict or disqualification would be justified by a pecuniary interest in the outcome (not asserted), a close family, personal or professional relationship (asserted, but not proved).
e) Adjudication by impartial and independent judges is recognized as an essential component of the administration of justice. The right to be heard by an independent and impartial tribunal is fundamental to individual and public confidence in the administration of justice and an integral part of the principles of fundamental justice protected by section 7 of the *Charter of Rights and Freedoms.*

From these general propositions, a framework to examine the circumstances can be derived.

The leading authority on apprehension of bias, as a threshold consideration, is *Wewaykum Indian Band v. Canada* 2003 2 SCR 259, 2002 SCC 45 (Can LII):

> "Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so…In Canadian law one standard has emerged as the criterion for disqualification…the reasonable apprehension of bias:
>
> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information…what would an informed person, viewing the material realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would not decide fairly?"

It is clear that this is largely a fact specific inquiry. The nature and extent of the role or relationship is germane to the decision as to whether a reasonable apprehension of bias has been made out.

In the fact circumstance of the Request, this inquiry was not allowed to be engaged because the existence of the relationship was not revealed.

This raises the question as to whether there was a duty on the Member to raise and disclose the prior relationship acknowledged to exist.

The above excerpts from the Canadian Judicial Council lean towards the suggestion that there is such a duty. The TLAB Rules and the *Statutory Power Procedures Act* do not specify a duty. However, the *Municipal Conflict of Interest Act* and the *City of Toronto Code of Conduct* raise the responsibilities of public service to a high plane. Moreover, the City's Public Appointments list of responsibilities for members of the TLAB requires that the Members "Preside over hearings and *render a written decision based on the evidence presented"* (emphasis added). Indeed, it provides that the TLAB Chair has additional responsibility of ensuring "hearing practices of the TLAB are fair and effective."

It is clear in the profession of law that business and professional relationships can present problems for adjudicators. This may extend to other practicing professions. Both the Member and the Solicitor are licensed lawyers. The Law Society publishes a Code of Conduct for its adjudicators:

> "A significant professional relationship may include, for example, employer/employee…Significant professional relationships may also arise outside the workplace as a result of, for example, the volunteer…activities of an adjudicator. A personal relationship may include…friendship. Any conflict of interest, actual or perceived, arising from an adjudicator's professional or personal interests and the adjudicator's responsibilities as an adjudicator should be resolved in favour of the public interest."

In my view, where information is known to the adjudicator which could give rise to a reasonable apprehension of bias, the question arises as to whether there is a duty to disclose so that the parties may ask questions to assess the interest and, where appropriate, seek adjournment or recusal. Ultimately, the decision on recusal is for the adjudicator. Does that apply to disclosure?

TLAB Members in their appointment are admonished that they are subject to the *Code of Conduct of Adjudicative Boards* 'which encourages the highest standards of conduct from citizen appointees'. Members are also subject to the *Municipal Conflicts of Interest Act,* by their appointment. This statute raises, in public meetings, the duty to disclose qualifying interests and their general nature. These are intended, among other things, to protect reputation and integrity both of the system of administrative justice and of the City. In furtherance of this, on questions of doubt, the appointment permits access to the Integrity Commissioner to provide confidential advice about how to best meet the standards and principles of the *Code of Conduct*.

I inquired of the Integrity Commissioner as to whether any such contact was made. Her advice and general recommendations on such matters is to advise that the principles of administrative law and justice apply; as well, in seeking advice, the tribunal Chair would be consulted.

In this case, neither circumstance occurred.

In my view, a *prima facie* case is made in the Request that both the Member and the Solicitor had information of a concern which could give rise to a reasonable apprehension of bias and that warranted disclosure. It is this information which overcomes the strong presumption of judicial impartiality.

The establishment of the apprehension is sufficient, in my view, to have yielded the need for the opportunity to explore and canvass its reality, over perception. In my view, a reasonable, fair minded person, informed of the past association between the Member and the Solicitor, would have gone the next step of wanting to make proper inquiries, possible objection and even a request for recusal.

In addition to the objective assessment of potential for conflict or bias, I find that the adjudicator failed to provide the relevant information to the parties which deprived some or any of them the opportunity to raise the issue at the outset of the Hearing.

Nothing in this finding is meant to demonstrate that actual bias occurred, is present, was proven or is established.

Indeed, the sufficiency of the relationship, if any, that existed or is current between the Member and the Solicitor is not, in these circumstances, directly relevant or for determination. If it were found to be, I have considered below the appropriateness of a Motion Hearing on that question.

I find in the circumstance that the test, above recited, when applied, results in a reasonable apprehension of bias and that a duty, independent of statute if necessary, arose for disclosure at the commencement of the Hearing.

I find that the Member (and the Solicitor) failed, for inadvertence or on judgement, to make the disclosure. I find this failure, in the absence of any shred of evidence to the contrary, to amount to little more than a failure to exercise caution and not a matter of a wanton lack of prudence, deliberate misconduct or deliberate disregard for the responsibilities of public office.

In the result, borrowing the language of Rule 31.7 b), I find that 'the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

b) violated the rules of natural justice and procedural fairness'.

It is indeed unfortunate that such a circumstance arises and calls for a remedy.

As above recognized, a significant proceeding has concluded and that many people have been put through extraordinary effort to reach a resolution that may or may not have been premised upon a correct Hearing and conclusion.

Despite this, it is necessary and appropriate – as often recited – that not only must justice be done but it must be seen to be done. A circumstance has arisen here where that oft-cited principle has been satisfactorily raised as a threshold matter and it was not appropriately resolved. The consequence is discussed below.

DIRECTION (IF APPLICABLE)

Rule 31.6, above, also provides authorization for a series of directions. Not all of the submissions addressed this aspect and those that did had conflicting suggestions.

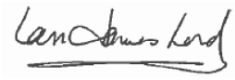
Previously, I considered that an interlocutory Motion was not necessary or appropriate to address the issue of actual bias arising in the course of the hearing. I that not only was that first issue not substantiated but also that it is not determinative to the disposition of the Request. I dismiss the request for Review based on alleged demonstrated bias.

Similarly, the opportunity to raise the issue of apprehension of bias, test it, and to request a remedy has passed and been lost; that matter is unsuited to a Motion to argue that issue at this late stage. While such an inquiry into weighing the justification for an apprehension could be pursued, on balance the utility, efficiency, efficacy and justification for such an inquiry lacks clarity.

I find that the appropriate remedy is to grant the Review and direct that a new Hearing be held before a different Member. The terms and conditions of that sitting are set out below.

DECISION AND ORDER

1. The request for a Review of the Decision and Order of the TLAB dated March 29, 2018 in respect of the above noted Case File is allowed, in part, and the said Decision and Order is cancelled. Staff are directed to take the appropriate action to expunge it from the record.
2. The appeal in the above noted Case File is remitted for a new Hearing before a different Member to be appointed by the Chair.
3. A new Notice of Hearing shall be issued on an expedited basis at the direction of the TLAB after consultation with the parties and the Representative of the participants, Mr. Andrew Manson. All documentation currently on file, with the exception of any reference to the cancelled Decision and Order, shall be available in the hearing.
4. The Notice of Hearing shall only specify dates for the following, such that all existing filings may be brought forward, as is or modified, to respect that:
    a) The Applicant /Appellant shall disclose any further or other revisions to the plan, proposal, undertaking or variances sought and associated Witness Statements, including revisions arising by virtue of the status of By-law 569-2013, not less than thirty (30) days prior to the Hearing Date;
    b) Revisions to any other documentation by a party or participant shall be disclosed not less than fifteen (15) days prior to the Hearing Date;
    c) The Hearing Date;
    d) A Motion brought within ten (10) days prior to the Hearing Date shall be heard at the outset of the Hearing.

X 

Ian James Lord

Chair, Toronto Local Appeal Body

Signed by: Ian Lord