

TLAB CHAIR MEMORANDUM

To: City of Toronto Planning & Housing Committee

Date: March 25, 2022

Subject: TLAB Chair's Response to the Deputy City Manager's Report to City Council's Direction

I would like to take this opportunity to thank the City Manager's Office for preparing the Report '*Response to City Council's Directions Arising from the Toronto Local Appeal Body Chair's 2020 Annual Report*' (Report) dated March 11, 2022.

However, I would be remiss in my role as the TLAB Chair, if I did not provide a response on behalf of the Tribunal at this time. In doing so, I hope that the Planning and Housing Committee (Committee) will take the time to consider the matters raised by the Chair of the Toronto Local Appeal Body (TLAB) in this Memorandum.

I am disappointed that the City Manager's Office did not contact me to understand the challenges that precipitated the Council directives. Despite my repeated approaches, I was not consulted at all regarding this Report and was only provided with a copy after it was made public on March 18, 2022.

I am also disappointed that some of the concerns which I raised in my 2020 Annual Report have once again not been addressed. The TLAB is experiencing a very high degree of Member turnover that reflects what I believe are structural problems in the mandate and operation of the Tribunal.

TLAB Chair's Response

The Deputy City Manager's Report, under the 'COMMENTS' section, addresses various issues; I provide my comments on each in the same order as in that Report:

A. Toronto Local Appeal Body Operations Relative to its Original Intent

I. Guiding Principles 1 & 2 – Member Appointments

The appointment of qualified TLAB Panel Members is the most important component to guaranteeing that the Tribunal meets its mandate to provide decisions to parties, participants and the public in a cost-effective and timely manner. The responsibility of recommending candidates has been conferred to the Nominating Panel – Toronto Local Appeal Body and the Panel's vetting of potential, qualified candidates for appointment by City Council is crucial to maintaining the integrity and adjudicative experience of the Tribunal.

The core component of a TLAB Member's accountability is that of providing a service to City residents. In performing their duties, Members are subjected to public scrutiny and accountability and long work hours while at the same time removing them from elements of society, family and other work endeavours.

The representations made by the City in the selection of new Members warrant oversight, consideration and input by the Tribunal. I believe that the Chair is in the best position to do so and I submit that the Chair's participation should be broadened.

To date, the TLAB Chair's role in the appointment process has been inconsequential, typically involving monitoring the appointments renewal process externally to ensure that the TLAB Member complement is kept full and functioning. Although this monitoring oversight by the Chair is helpful, the reality is that the Tribunal Chair continues to have minimal consultation which is insufficient to assure quality in the selection process.

There is little merit in having a person stand for appointment to the TLAB only to learn that the demands and the tasks of membership are too great. Given that the criteria for selection of a new Member are under constant review, the Tribunal Chair should be provided more opportunity to identify and communicate his or her Tribunal's needs and criteria and to make that known directly to the Selection Advisory Committee.

In 2021, I took the initiative as the TLAB Chair to contact the City Department responsible for undertaking this process, Public Appointments Office, and I suggested that the Office consider giving the Chair a more prominent role in assisting with identifying potential candidates. I also requested that the Chair be considered as a relevant resource so that shortlisted candidates can learn more about the Tribunal's operations and better understand trends or emerging issues at the TLAB.

Although my suggestions were considered, no further action was taken in that regard. However, the Chair's role should not end here. Ongoing and continued dialogue between the Tribunal Chair and the Public Appointment Secretariate is essential to understanding the type of candidates best suited to succeed as TLAB Panel Members given the demands placed on each through the acceptance of a 4-year term appointment. These meetings would allow the Chair to more directly monitor the appointment renewal process to ensure that it is engaged in a timely fashion and to facilitate transparent discussions regarding the TLAB Member complement to assist the Secretariate in achieving and maintaining a full and functioning panel of Members representing the highest quality of appointments.

I suggest that the Tribunal Chair, along with staff from Court Services, also be invited to the shortlisting of candidates to brief the Nominating Panel on any current, relevant trends or emerging issues that panel members may need to know about on an ongoing basis.

II. Guiding Principle 3 – Remuneration

The topic of TLAB Member remuneration has been revisited in each of the Chair's Annual Reports, indicating areas of concern in the Tribunal's compensation scheme. While some resistance is present, it is acknowledged that since its inception, multiple minor adjustments have been made to recognize eligible expenses, disbursement qualifications, equipment, Member stipends and the description of contract versus employee status, of Members; this has been appreciated.

Concerning Member remuneration, City Council recently adopted a Variable Decision rate structure through the 2022 budget for certain types of decisions and orders (e.g., final and review request decisions only) instituting a maximum \$400 rate. That rate was adopted by Council on February 17, 2022, as part of Court Service's 2022 Operating Budget and the TLAB is grateful for that increase in compensation.

However, although the City Manager's Report states that the TLAB Chair was consulted on the variable decision compensation rates, I must clarify that that model originated with and was developed largely by Court Services staff and I had very minimal input in drafting and refining this

particular remuneration model. Furthermore, when initially apprised of the proposed varied rates by Court Services, I immediately expressed my disagreement with the rate structure being considered on the basis that it failed to adequately recognize the level of effort required by Members to draft and finalize the various types of decisions the TLAB issues.

The TLAB job function is equivalent to adjudication by public bodies such as the Ontario Land Tribunal (formerly the Local Planning Appeal Tribunal) and other tribunals of the Environmental cluster. I respectfully disagree with the conclusion in the Deputy City Manager's Report on page 5 that "*They (remuneration rates) also align with provincial comparators. This has resulted in rates that enable Members to effectively perform their roles.*"

I would argue that the 'comparator' rates for the Province of Ontario highlighted in the Report, most commonly associated with the Ontario Land Tribunal (OLT), are somewhat misleading. They are not, in my opinion, an 'apples to apples' comparison with the TLAB. Although the Province has adopted a standardized per diem rate of \$472 to \$744 for full-day hearings there I note that there is also a standardized \$788 'Prof & Labour' rate applicable across all position types.

More importantly, comparisons of the TLAB to the OLT are unfair given that the OLT has significantly more resources and staff, the majority of OLT Members are full-time and those few part-time Appointees are assigned to multiple Boards/Tribunals.

I believe that the TLAB Chair is in the best position to describe the value for services rendered for all positions that make up the TLAB. The Chair is responsible for maintaining reputational integrity, Member discipline, liaison with all City Staff and Tribunal counsel, and must report annually to Council via an Annual Report. Additionally, he/she is responsible for Business Meeting agendas, chairing Business Meetings, training and on-boarding of new Members, ensuring the quality of decisions, as well as conducting hearings and issuing decisions.

I continue to hold the opinion, as expressed in the Chair's 2020 Annual Report, that except for Withdrawal Decisions, all other decisions and orders issued by TLAB Members should be compensated at a rate of \$400.

III. Guiding Principles 4 & 5: Oversight and Accountability

The TLAB's mandate as an independent, quasi-judicial adjudication body dealing with land use planning appeals of decisions from the City Committee of Adjustment is to dispose of those appeals in an efficient, timely, cost-effective, open, and fair process.

In adjudicating and making determinations on minor variances and consent appeals, the TLAB has all the powers and duties of the local planning appeal tribunal under section 115 of the *City of Toronto Act, 2006* and the relevant provisions of the *Planning Act*. City Council, in creating the TLAB, explicitly acknowledged that the TLAB is an independent decision-making body free from political interference. In doing so, Council empowered the Members of the Tribunal to exercise all the powers defined in the relevant provincial legislation to issue decisions and to reform or refine the procedures of the Tribunal.

To assist the TLAB in this framework, Court Services was tasked with and continues to fulfill its mandate vis a vis the Tribunal of providing administrative support to the Tribunal as codified in Section 142.7 of Municipal Code Chapter 142 and as further clarified and confirmed in the document "*Foundations of the Administrative Support for the Toronto Local Appeal Body*" (revised July 17, 2019).

The structured separation and clarification of these clear mandates are essential if the TLAB is to continue to be able to provide efficient and timely due process with administrative support from the City.

IV. *Guiding Principle 6 – Structure and Relationship with the City*

As noted above, the TLAB's mandate is to provide efficient and timely due process and the Tribunal has established practices and protocols aimed at supporting that process. Over time, the TLAB's operations have been reviewed and there has been some recalibration of its original rules and practices. At its inception, the TLAB complement was composed of 7 Members including the Chair. This initial Member complement seemed to function well but following several resignations and a recommendation from the TLAB Chair in 2018, City Council increased the membership to the current complement of 10 'part-time' Members.

While that complement of 10 Members has worked well, the emergence of and consequences associated with COVID-19 over the past two years have tested the resolve of the Membership. Nevertheless, the TLAB was able to adapt quickly and proficiently to what has now become essentially our 'new reality'.

That resolve was further tested in the fall of 2021 with the emergence of the Omicron Variant and 2022 has commenced with the TLAB experiencing significant and unprecedented Member capacity constraints due to various factors which have contributed to this situation. These constraints can be explained as follows:

1. The TLAB Member complement was again recently reduced through the resignation of two members. However, Council recently appointed 2 new Members whose appointment commenced on March 10, 2022, bringing the TLAB back to a full complement.
2. The time that it takes to complete a Hearing and issue a decision has increased and continues to stretch the 'part-time' commitment made by appointed Members.
 - City Council's objective of establishing the TLAB in part to create a more accessible forum for the public has been achieved, and many more Parties and Participants are engaging in the adjudication appeals process. These individuals are being respectfully heard.
 - The disclosure and evidence provided for most matters are extensive and in the opinion of most Members, the time required by each case to review documents and undertake case management is increasing.
 - The time required to prepare for a Hearing, chair the Hearing, (often for more than a single day), and write a Decision has historically been underestimated by the City.
 - In a simple matter, requiring a single day of Hearing time, a Member requires at least three to four full working days to complete the Decision with a fulsome and appropriate degree of reasoning and explanation. In the best of scenarios, at least a full working week is required to complete both the hearing and issue the decision.
3. Members are appointed on a '*part-time*' basis. Previously, Members were expected to preside over one (1) to two (2) Hearings per week. That expectation was recently revised by the Public Appointments Office for future appointments and new Members are now required to assume two (2) to three (3) hearing events per week.

- Realistically, in the current circumstances, Members are significantly challenged in fulfilling such a schedule, week over week, and also producing timely Decisions, all on a **part-time** basis.
- This demand is especially challenging for Members who have other formal, primary employment and must balance competing responsibilities but also have the flexibility to dedicate sufficient time to the writing of Decisions within the key service level expectations set by the City.
- The Tribunal believes that this underestimation of the time that it takes to fulfill TLAB Member duties is a primary reason that the turnover of Members is as high as it is and why it has become increasingly problematic.

The TLAB's operation was also adversely impacted in 2021 by the reduction in Court Services Administrative staff support to the Tribunal. Beginning in the summer of 2021, the number of staff supporting the TLAB was significantly reduced due to various factors and that staffing complement continues to fluctuate. This is an issue that the TLAB believes requires further review and consideration and it is hoped that the Tribunal can expect a consistent and full administrative staff complement going forward.

On the issue of the TLAB Member complement, the Deputy Manager's Report is recommending that City Council approve an increase in the number of TLAB Members from ten (10) to fourteen (14) part-time Members, including the Chair and Vice-Chair.

In support, the Deputy City Manager concludes on page 6 of the Report that,

“While the TLAB is structured to provide efficient and timely due process, public deputations at business meetings reveal frustration at the complexity of TLAB proceedings and dissatisfaction with decision turnaround times. A further increase in tribunal members and a reduction in the number of hearings per member will alleviate the workload of individual TLAB Members and is expected to result in more timely outcomes.”

While this conclusion may seem logical, the reality is that the TLAB has listened to residents' groups and the public and the Tribunal Membership has attempted to address the concerns raised by those groups through service improvement initiatives to make the appeal process less complex and more accessible to unrepresented parties. However, we have been advised by staff that such efforts are “outside the mandate of TLAB Members” even if undertaken on an unpaid basis. If the mandate of the TLAB is to remain unchanged and is to be confined strictly to the transactional duties of hearing cases, then that narrowly defined mandate must be communicated to the public by City Council and the public's requests for improvements to the appeal process directed elsewhere.

Increasing the Tribunal complement by 4 new Members to a total of fourteen (14) may appear to be the most appropriate solution to improving efficiency and timeliness at the TLAB but I would argue that it is not the panacea that one might believe. As the Chair, I believe that the quality and abilities of Members put forward for appointment to the TLAB, and their capacity to undertake the number of assignments allocated and to draft decisions, are of more significance than the number of Members appointed to the Tribunal.

In my opinion, simply increasing the quantity of Members will not solve the Tribunal issues I've identified as the Chair nor is it a recommendation or request I put forward to Court Services as a solution to address our ongoing issues. I would submit that rather than consider increasing the

Member complement, both the Member selection/appointment process and compensation packages should be re-examined and readjusted to reflect the reality of the experience.

I would caution the Committee to reconsider this recommendation given that the recent Council appointments of two new Members bring the Tribunal back to a full complement. Therefore, it may be more prudent at this time to defer the consideration of an increase in the number of TLAB Members and to allow the TLAB to monitor its continuing operation with 10 Members for 2022, after which a reassessment can be undertaken.

Tangentially, I would submit that an increase in the TLAB Membership compliment to 14 Members being recommended would require City Council to reconsider the Chair's current annual stipend. I note that the Chair's current annual stipend was established when the Tribunal was constituted in 2017 and was initially calculated based on a complement of seven (7) Members.

B. Compensation for the Chair and Vice-Chair for Hearing Time in Review Requests

I am thankful that the Deputy City Manager has recognized that a Review Request is a distinct written hearing and is recommending that the Chair and Vice-Chair receive the half-day per diem. Members, including the Chair and Vice-Chair, who are tasked with completing this duty, according to Rule 31 of the TLAB's *Rules of Practice and Procedure (Rules)*, must complete a detailed analysis of materials submitted during the original hearing including reviewing the DAR recording(s) of the original hearing event.

I would, however, like to offer a point of clarification regarding a statement made in the Report on page 8 (in the 2nd paragraph). The Report states that "*when the TLAB was first implemented in 2017, Review Requests were completed by the TLAB Chair only.*" Although this is factually correct, the Tribunal's Rules did not preclude the Chair from assigning Review Request files to other Members on an informal, voluntary basis. Furthermore, the Chair's annual stipend never included a consideration that he/she would be solely required to undertake Review Requests, an oversight that now appears to be corrected by the recommendation in the Report.

C. Consultation with the Chair in the Preparation of the TLAB's Annual Budget

A significant detail overlooked in the creation of the TLAB is its funding and Tribunal engagement.

The setting of a Budget is the responsibility, ostensibly, of Court Services. Understandably, the Tribunal should have a Budget for City accounting purposes; however, there is no provision for input by the Tribunal to this Budget and any input to date has been nominal. Although Court Services has been amenable to the discussion of needs, that has generally been limited to such issues as 'continuing education' and 'additional business meetings'. A line-by-line budget consideration has not been shared or invited.

At the moment, the timing of the preparation of the Budget and any engagement of the Tribunal is entirely at the knowledge and discretion of Court Services.

I submit that the TLAB Chair should be engaged with City representatives, including Court Services, in the determination of a Budget and should include discussion on an entire revamp of the current "piecemeal" approach to Tribunal funding.

I do acknowledge that following numerous requests from the TLAB Chair, Court Services did coordinate a meeting with the Chair and members of Court Service's Tribunal Operations and Finance & Administrative staff on June 25, 2021. That meeting was communicated as a 'Kick Off' meeting to budget discussions and while the purpose was to obtain feedback from the Chair regarding Tribunal needs, discussions were superficial.

I was advised that it was also to be one of a series of iterative budget discussion sessions to be scheduled with the Tribunal to refine budget needs. Unfortunately, no additional sessions were scheduled with the Chair and my exposure and input to the Budget were therefore extremely limited.

Given that the Tribunal budget is most sensitive to the number of Hearings, Hearing days, and the cost of external legal services, there is no reason as to why the Tribunal and its Chair/Vice-Chair should not be represented and included in the preparation and submission of the annual TLAB Budget.

D. Amend Fees, Licenses and Charges By-law to Incorporate a TLAB Review Request Fee.

The Report notes that in 2020, the TLAB received a total of seven (7) Review Requests which was characterized as a significant reduction from the total received in 2019. While comparatively a smaller number, I would suggest that this reduction was most likely due to the impacts of the COVID-19 pandemic and should not be viewed as the norm going forward. In fact, I note that the number of Review Requests received by the Tribunal in 2021 doubled and I believe this trend is likely to continue in 2022.

The disposition of a Review Request involves full attention to all previous findings, the decision of the Member and the potentially voluminous submissions of the Parties. The opportunity to question a Member's decision is governed only by the language of the *Rule*.

Currently, Council has no fee for invoking a Review Request under Rule 31 of the TLAB. As I submitted in my 2020 Annual Report, the lack of a requisite fee undermines the '*gravitas*' associated with filing a request to review a Member's 'Final Decision' and is ineffective in discouraging the filing of a Review Request based solely on the fact that a Party does not 'like' the decision issued.

I continue to hold the position that the imposition of a Review Request fee would act to cause Parties to 'pause' and give serious thought before considering whether a Review Request is appropriate and justifiable in the circumstances. I submit that instituting a fee of \$300 for filing a Review Request, to be incorporated within the City Charges, Fees and Levies By-law, could help deter frivolous, ill-advised or speculative Review Requests which require the engagement of Member resources better redirected to Hearings and issuing decisions.

I also respectfully disagree that the addition of a new fee would negatively impact access to the Review Request process. The TLAB is not the only opportunity that Parties have to request a decision of a Member to be reviewed. Parties have the option to file a Motion with the Divisional Court for a Leave to Appeal a TLAB decision and in many cases, they often do so in parallel with filing a Review Request with the TLAB.

Conclusion

The TLAB is grateful for the City Manager's Office's consideration of the Tribunal Chair's Recommendations as outlined in the 2020 Annual Report. The TLAB remains hopeful that the challenges that the Chair has repeatedly raised in the TLAB's Annual Reports and highlighted in

this Memorandum will be fully considered by the Planning and Housing Committee and by Council.

Respectfully,

Dino Lombardi, RPP, MCIP, MLAI
Chair, Toronto Local Appeal Body

X 

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

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