

DECISION AND ORDER

Decision Issue Date Friday, September 15, 2017

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

Appellant(s): MARY LAM

Applicant: NORSEMAN CONSTRUCTION

Counsel or Agent: D. ARTENOSI (APPLICANT)

Property Address/Description: 66 Virginia Avenue

Committee of Adjustment Case File Number: 17 105479 STE 31 MV (A0047/17TEY)

TLAB Case File Number: 17 160622 S45 31 TLAB

Hearing date: Monday, September 11, 2017

DECISION DELIVERED BY T. YAO

INTRODUCTION AND MATTERS IN ISSUE

This is a decision on two preliminary motions, the first brought by Mr. Artenosi, lawyer for the owners; the second by the appellant, Ms. Lam. Mr. Artenosi wishes to be allowed to use numerous late filed documents at the hearing. If allowed, he asks that this hearing be adjourned to allow Ms. Lam to respond to his documents. The motion is allowed.

Ms. Lam's motion is in effect a motion for summary judgement. The grounds are that the Committee of Adjustment's decision is both wrong and without jurisdiction because it granted certain variances to the owners, the Hastings, but those variances encroach on a right of way belonging to her clients. I dismiss Ms. Lam's motion, without prejudice to raising encroachment issues at the hearing.

There were also two other issues: witnesses and mediation , which I treat by way of addendum,

BACKGROUND

On May 10, 2017 Rick and Lisa Hastings, owners of 66 Virginia Ave, obtained 6 minor variances at the Committee of Adjustment. Virginia Ave is an east west street; with even numbers on the north side; no. 64 is to the west of no. 66. No 64 Virginia Ave is owned by Ms. Lam's parents, Kim Hong Lam and Ngang Chang Lam. Both houses face south.

The Lams are particularly concerned with the Hastings' roof eaves and platform coverings at the south west corner of the Hastings home. These are not only allegedly too close to their lot line under the zoning by-law, but also allegedly encroach on a .46 m wide right of way over the Hastings property in favour of the Lams.

On May 12, 2017, Ms. Lam appealed on behalf of her parents. On June 1, 2017, the TLAB sent both the Hastings, who were represented by their contractor —the agent is not named — and Ms. Lam a notice of hearing for today, Sept. 11, 2017. This document is “populated”; that is, the parties receive a customized notice with deadlines unique to their own case. This notice set the deadline for document disclosure at July 4, 2017, some two months before today.

In about the third week of August, the Hastings' “contractor” came to the realization that he was “in over his head” and suggested that a lawyer be retained. Once retained by Mr. Hastings, Mr. Artenosi contacted Ms. Lam, and Mr. Artenosi also retained an urban planner, with instructions to prepare a case without delay. The planner produced a list of documents to be used at the hearing and Mr. Artenosi filed these with the TLAB on Sept. 7, 2017. Ms. Lam says she has had only one business day to review all those documents.

This is a broad overview of the filings. I will retrace these events in more detail. The TLAB notice also required the parties file witness statements by July 17, 2017 and that no notices of motion be filed after July 28, 2017. The next events were three filings by Ms. Lam on August 8 and 9, 2017. One of the documents is an intention to file an audio recording of the May 11, 2017 Committee of Adjustment hearing. The next filing is a request by Mr. Artenosi, (by now retained), on Sept 5, 2017 for a copy of this audio recording. On September 7, 2017, Mr. Artenosi filed numerous documents including the David Falletta, (his planner)'s expert witness statement, the Notice of Motion, and the affidavit of owner Richard Hasting. The latter concludes with this paragraph:

I am not a sophisticated developer. . .My spouse and I have been awaiting triplets and this has been a considerable focus for our family. . . I relied entirely on (the contractor) to advise what steps I was required to take. . .

I now turn to Ms. Lam's Notice of Motion served and filed Sept 8, 2017. The relief claimed is:

An order allowing the appeal against the decision dated May 10, 2017 from the Committee of Adjustment - which granted variances to 66 Virginia Avenue on the west lot line which encroach on the right of way as set out in Instrument 126898; specifically, the following variances:

a) eaves projecting 0.18 m from (sic.) the west lot line; and b) the platform that encroaches 0.14m beyond covering to the west lot line.

The supporting affidavit contains these paragraphs:

11. The Order to Comply dated January 5, 2017 from building inspector Jahgaroo indicates as follows:

a) the eaves are on the right of way and are .18 M from the west lot line but the prebuild variance was for .21 M from the west lot line;

b) the front porch/canopy eaves are on the right of way and are .01 from the west lot line but the pre-build variances were for .19M from the west lot line.

12. . . . As such 66 Virginia Avenue is now in trespass of the right of way and seeks to legitimize these encroachments. . . .

16. It is my understanding that there is no jurisdiction to allow encroachments or variances on a right of way. To allow minor variances to encroach on a right of way is in fact trespass and exceeds the jurisdiction of the Committee of Adjustment and this Board as found in the case of Moroz.

No attempt has been made to cross examine or file affidavits in response but under the regular time limits a respondent would have an opportunity to do so. Clearly, the issues raised in Ms. Lam's motion are complex and serious.

ANALYSIS and REASONS

It is helpful to consider both motions together because while different in substance both require leave by me since both are late. Rule 17.1 states no motions can be filed 30 days before the hearing and Rules 17.5 to 17.10 envisage the following process:

Day 1 – service of Notice of Motion

Day 7- service of Response to Motion

Day 11- Service of Reply to Response to Motion, (if any)

Day 15- hearing of the motion.

In this case, one moving party has given the responding party four days before the motion day and the other has given three days' notice. If I refused to hear either motion, I would then hear Ms. Lam's appeal on the three documents she filed in August or possibly no documents at all since even these are late. This would serve no purpose. Both parties argue from a position of defectiveness according to the Rules.

I want to underscore that this decision is not a precedent. This hearing has more than the usual difficult issues, such as an already built structure and issues of jurisdiction. Timelines have to be interpreted in the context of the TLAB Rules, which are different from the Committee of Adjustment or the Ontario Municipal Board; specifically:

- electronic filing (see Introduction to Rules of Practice and Procedure, May 3, 2017),
- fixed hearing dates (Rule 2.1),
- fairly quick setting of these fixed hearing dates (May 12, 2017 Notice of Appeal- Sept 11, 2017, today's hearing date).

I think a pragmatic approach to the Rules should be taken and times should be extended.

Finally, I have comments specific to Ms. Lam's motion and to Ms. Lam, who may feel that a differential standard is being applied to the two motions. The primordial consideration for both motions is to ensure "the just, most expeditious, and cost-effective determination of every Proceeding on its merits" (Rule 2.2).

To proceed, Ms. Lam should be permitted to establish the factual basis for her position within the framework of a fixed hearing date. Although the facts as alleged in her supporting affidavit seem to her today to establish the relief she seeks, for timing reasons, the Hastings have not had an opportunity to respond. It is doubtful that there is agreement on the applicable law, so a hearing is also a good place for facts and inferences from those facts to be determined in a cost-effective way. I hope I make it clear that no evidence has been received and Ms. Lam is at complete liberty to put forward every position she deems in her clients' best interest. In my mind, the fairest thing is to allow both parties, after some preliminary missteps, to be placed back on a path of full and timely disclosure leading to a fair and full hearing on all the issues.

. Rule 2.10 states that exceptions may be made to the Rules and Rule 4.4 allows the TLAB to extend a time limit. I rely on these in making the relevant orders.

ORDER AND DECISION ON THE FIRST MOTION

Documents already filed may be used at the hearing notwithstanding the deadlines set out in the June 1, 2017 TLAB Notice of Hearing. I alter future filing dates as follows:

- Ms. Lam shall have until 4:30 P.M., Friday, Dec 1, 2017 to file any additional documents, if there are any;
- Mr. Artenosi shall have until 4:30 P.M., Tuesday, Dec 19, 2017, to file his reply material, if any. If he has additional material in addition to what has been filed, it should be filed as soon as it is available

The TLAB will convene a conference call at 9:30 A.M., Wednesday, December 20, 2017 to check that things are going smoothly.

The hearing will take place 9:00 A.M., Jan. 11, 2018, and staff will send out new notices for both the conference call and hearing. In case of discrepancy, the staff notice will govern.

ORDER AND DECISION ON THE SECOND MOTION

The motion for allowing Ms. Lam's appeal is dismissed, but without prejudice to her raising any matter therein at the hearing.

Addendum 1 – the summonsed witnesses

The final matter is the position of the two summonsed witnesses, Valerio Papa and Dino Giuletti. They have been properly summonsed by Ms. Lam and appeared in obedience to the summons. We would all like to inconvenience them as little as possible and both parties agree that they will come to the hearing January 11, 2018, only if Ms. Lam deems it necessary, and she undertakes to give them 24 hours' notice of this need.

Addendum 2- mediation

We discussed possible mediation in an informal way on September 11, 2017. It would not be appropriate for me to be involved with mediation when I am seized. I would encourage ongoing discussion and resolution of issues with or without the use of TLAB mediation.

X

Ted Yao

Ted Yao
Chair, Toronto Local Appeal Body
Signed by: Ted Yao

