

DELIVERED BY EMAIL TO

Mark R. Flowers, Chair
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Re: Item No. TLAB 6.1
Toronto Local Appeal Body Rules of Practice and Procedure

Dear Mr. Flowers,

This will acknowledge with thanks correspondence received under date of May 3, 2017.

In reviewing and providing comments on TLAB Rules, the contributions received are incisive, helpful and entirely appropriate to be raised.

TLAB has considered the matters raised and felt it appropriate to respond below as an aid to further and future consideration.

This response generally tracts the categories of commentary raised.

1. Timing Obligations

In general, the timeframes established by the Rules, now adopted, reflected a direction in the constitution of TLAB that the decision making process be 'expeditious', timely and responsive to the interests of the citizenry, among other matters.

Further, that there be an enhanced awareness that settlements of issues are primarily the responsibility of the interested parties, aided where possible, and that consent dispositions arrived at on a consensual basis through mediation, private or public, is preferable to confrontation in a Hearing setting.

The timeframes were taken from a canvass of tribunal best practices in Ontario and were supported by TLAB, in part, on the perspective that decisions that are delayed are a denial of administrative justice. While alternative dispute resolution is supported, with Rules provided to access same, TLAB's overall responsibility is to provide timely decisions on matters that come before it.

To that end, clear dates for deliverables were determined to be set from the outset of an appeal, rather than historical practice of attempting to achieve a consent Hearing date and thereafter working disclosure obligations back from that point.

Costs of participation in an appeal are a relevant consideration. Costs are incurred not only by Rules of disclosure, but also in the lack of clarity of procedures, opportunities for delay, uncertainty and unproductive or limited use procedural attendances.

A principle objective of the TLAB Rules is to remove uncertainty, promote disclosure, permit deliberative consideration of positions based on reliable information and expedite that consideration over established timeframes, for action and individual decision making.

The Rules express the view that the jurisdiction TLAB exercises warrant directed Hearing appointments, formalized disclosure, deliberative consideration of issues and Hearings of short duration proximate to the application, appeal and the relevant physical, temporal and economic environment.

2. Procedural Obligations

The Rules are specific as to their equal application to parties and participants with the objective of full disclosure at the earliest reasonable opportunity. To this end, applicants proposing revisions to their requested relief, gleaned following the decision of the Committee of Adjustment, must so disclose forthwith on receipt of the Notice of Hearing.

Position statements of parties and participants, focused on issues of relevance, are to be exchanged based on the appeal grounds and this disclosure.

It is the expectation of TLAB that the benefit of this disclosure, while engaging more formal, on-line fillable Form documentation with the potential of modest cost considerations, is far greater and usable as a structured discipline to enhance and encourage settlement discussions and a narrowing and focus on issues. It is intended that these objectives are accomplished without compromise to the tools and any necessary determinations of a fair Hearing process.

TLAB recognizes there may be practical difficulties experienced in achieving its intentions. It has expressed an intention, following a period of practice experience, to entertain an identification of any such issues, hear public deputations on them, and adjust the practices as determined necessary and expedient.

3. Identification of Parties and Participants

On the jurisdiction afforded TLAB and with the stakeholders being generally readily identifiable, TLAB took the view in its Rules that the stakeholders themselves should be entitled to identify and elect, in the first instance, their desired status as a party or participant.

TLAB expects and considers that in the normal course, the applicant, the appellant(s) and the City are stakeholders of such stature to warrant party status.

Should objection be taken to the election made, the right to bring a Motion to challenge status exists.

Rather than a Motion to seek party status, the Rules contemplate the vehicle of a Motion to challenge the elected status, where that challenge is felt warranted. This self-elected status recognition was viewed as less cumbersome, less intimidating and more consistent with the reality of present practice. It occurs without compromise to the right of challenge.

4. Additional Comments

These matters are canvassed below.

TIMING OBLIGATIONS

Short Time Period for Hearing Preparation

The Notice of Hearing prescribes the due dates for responsibilities and the set Hearing date, generally 90 – 100 days out from the Notice, reflecting the timeliness principle. TLAB considered the amount of time set by the Rules in relation to practices of other administrative tribunals, the direction for expeditious Hearings and the fact that the date of the determination by the Committee of Adjustment starts effective notice of the potential for an appeal. This notionally provides additional time to consider one's position on the matters in issue and should not be considered lost time in an absolute sense.

TLAB has provided in the Rules and Forms that it has adopted, several provisions to help ensure the timeframes do not work a significant hardship on individuals with a genuine intent to pursue their areas of interest. The Forms are interactive, capable of completion on-line in many instances and in short order. There is no delay occasioned by surface delivery or mailings. Transmissions are electronic. Postings on the TLAB website will be expedited and are intended to occur within one business day of receipt. Those postings are effectively available instantly and to the world.

It is an excellent point that the City, potentially trading corporations and ratepayer/community groups may have delays in seeking instructions. TLAB was made aware of instances, in the municipal world, of some municipalities having standing instructions to deal with appeals from Committees of Adjustment, either in respect of subject areas, or performance standards, use categories, Ward responsibilities, planning Report positions or other criteria.

The City solicitor, speaking to this issue indicated practice considerations can be reviewed in the manner of seeking Toronto Council instructions, if difficulties are experienced. In practical terms, given the expectation that the City has party status as of right, a significant period exists between the articulation of a Planning Report on a Committee of Adjustment application, the Committee decision, and appeal, the issuance of a TLAB Notice of Hearing and the first substantive disclosure date requiring a potential obligation of City representatives (or private interests) – likely in the order of 2-3 months.

It is important to TLAB that the identification of constraints in meeting the timelines be identified and documented. An opportunity of practice experience and exposure is proposed with the concomittent promise to review the timelines based on the advice and representations received through a formal public canvass, likely in the spring of 2018.

In jurisprudence afforded TLAB before the Ontario Municipal Board, the City has made it clear that its role is to independently assess and project the corporate interests and objectives of the City. It has represented that the City cannot be seen to, directly or indirectly, take or project a party position exclusively in the interest of some external group, or that the City's participation can be relied upon to continue if the City's interests are otherwise satisfied. To that end, TLAB does not anticipate a difficulty with the withdrawal of party status or engaging in settlement discussions, even if those events extend into a period where party status requires obligations on the parties, in most circumstances.

The approach defined by TLAB in its Rules is to depart from practices that can create delay or uncertainty, or the prolixity of proceedings, or that contemplate the necessity of consensual dates, or that can require pre-hearing conferences generally for procedural matters, all in respect of jurisdictional subject matters of finite detail that generally can require relatively short consideration time on their merits, and that are cost sensitive to the parties and participants.

The period of the Quiet Zone is as below recited: a period for sober consideration as to the necessity or advisability of a Hearing, a period for private settlement discussion and a period for technical case presentation preparation.

TLAB also views this period as a response to the possibility that the timelines established can become overly prescriptive in individual hardship circumstances. In effect, this period builds in the opportunity to use the most flexible of all devices, the Motion (whether written, oral or electronic), to resolve impasses or considerations of merit, without the necessary loss of the effective Hearing appointment. While Motions are not expected to be heard in the Quiet Zone, that period offers an opportunity for relief in circumstances that are warranted and where Motions are timely and early in the process.

Timing for Disclosure of Documents

The discussion of document disclosure is significant and may well warrant further review with practice experience. The disclosure obligation, while not confined to the applicant relative to revisions to plans proposed, is designed to identify –from the outset- the substances of the various cases to be met. All parties and participants with documents germane to their position are required to disclose these, at the outset. Some may be from a common document pool, such as policies or excerpts from provincial, City or other sources. These will be made accessible from the TLAB website.

Others will be a component of the file record imported from the appearance before a panel of the City's Committee of Adjustment.

Documents in the possession of a party or participant that are relevant to them will need to be disclosed at the earliest stage. Additional documentation that arises in response, on Motions or in affidavit attachments would need to be addressed, if challenged, in light of the early disclosure obligation. The admissibility of documents is a common function of Hearing settings. TLAB has sought to ensure by its Rules that all relevant disclosure is early, comprehensive, complete and available on-line to all with an interest. It is educational, instructive, relevant and supportive and therefore such evidence in document form is to be produced.

The Rules do not preclude the production of additional documentation, subject to the primary obligation test.

In the instance of a settlement, whether or not advanced through a Motion for an early Hearing, the Rules do not preclude the introduction of related documentation. If they do, a review is warranted but see, below, on relief from the Rules. Indeed, a comprehensive settlement package involving the parties brought on consent is an obligation and expectation on the parties that is both contemplated and encouraged.

A period of trial practice experience is recommended.

Impacts on Settlement Potential and the Quiet Zone

As described above, the receipt of settlement documentation, in part or whole, is established practice that is supported and encouraged. TLAB recognizes that the areas of its jurisdiction often result in circumstances as between neighbours and interested parties, that engender the most graphic, cogent and personal considerations over real property of all the planning instruments under the Planning Act.

It is for that reason that the TLAB Rules are express in the provision that relief from the strict application of the Rules, in circumstances such as consensual settlements between parties, will be entertained on their merits.

Ample provision is made in the Rules themselves to ensure that in proper circumstances, the goals of a just, fair and liberal approach to their application will ensure dispositions consistent with the objectives of TLAB, the statute, the rules of evidence, a fair hearing and all relevant considerations.

The case for full disclosure early in the procedures adopted by TLAB is described above, in the public 'Guide' and in other materials available on-line.

This disclosure and preparation is seen by TLAB to be far more proximate to the trial of the issues than in many practices previously in effect. The disclosure of the applicant's revisions to plans, the one disclosure of cases to be met, the one disclosure of witness opinion evidence is all proximate to the Hearing date. Those exchanges and the period of the Quiet Zone, a period of 30 days to absorb this information, is not, at this stage, viewed as counter-productive, duplicative or contributory to unnecessary costs. Indeed, it is viewed, again at this stage, as an inducement to define, refine and disclose the substances of factual and opinion based positions

on the merits and demerits of a clearly defined and disclosed proposal, for all parties and participants to assess.

The intention is to eliminate last minute revisions to plans, the need to harbour and keep on retainer expert witnesses in order that they might be needed or to be exposed to witnesses or issues never before contemplated or disclosed. These practices are inefficient, costly and lead to disputes.

Contrary to the concern expressed, TLAB took counsel on best practices and the ways and means to use the Rules and the timing constraints to reveal and enhance the potential for settlements and Hearing efficiencies.

Again, practice experience may expose benefits or flaws for which the differing objectives and concerns can fuel reconsideration.

The Quiet Zone is a passive period of inactivity intended to afford an opportunity for sober consideration as between interests. TLAB will assist initiatives to make this a productive period for discussion and dispute resolution, in the public interest. It is of substantive length to ensure such discussions can be effected with full knowledge of the matters, evidence, objectives and positions in issue.

A period of practice exposure will provide insight as to whether the provision of this space is constructive and productive.

Notice of Proposed Dismissal

This comment warrants further examination and consideration. In initial discussions and advice, this Form was envisaged – and may continue to apply – only in respect of appeals not properly instituted, i.e., are defective for timing, fees payment or the failure to survive Administrative or Adjudicative screening. Service of this documentation is a TLAB responsibility and would occur prior to the Notice of Hearing and therefore prior to any effective due dates under the Rules.

This Form may also be initiated by TLAB in clear circumstances where the grounds for appeal fail to disclose legitimate, genuine land use planning issues capable of varying the disposition by the Committee. That aspect can also and more properly be addressed by Motion, in the normal course.

There is no intention to engage a relationship between the due dates of the Rules and the process of vetting the adequacy or otherwise of an appeal. This point may have been misunderstood and a further elaboration is invited.

TLAB expresses appreciation for the detailed and constructive comments received. A further opportunity for consideration as described in the public meeting of May 3, 2017 and herein is referred to and intended.

Scheduling of Hearings

It is hoped that the TLAB scheduling practice will become somewhat predictable given the uniformity of approach anticipated to the setting of Hearing dates and associated obligations. While there is nothing to prevent a stakeholder from supplying dates not convenient to their interest, TLAB does not guarantee any such submission can be accommodated. TLAB hearing room resources are limited, member appointments are part time and the volume of appeals is unknown such that TLAB may not be able to respond to individual requests related to unavailability. Where possible, minor adjustment to Hearing dates may be accommodated in the case of clear conflict but generally not after a Notice of Hearing appointment has been served and not in the absence of a Motion.

It is anticipated that a trial period may assist in further consideration of this issue. As matters before TLAB are limited by the jurisdiction afforded it, lengthy, complex Hearings are expected to be relatively rare. TLAB Staff and member monitoring of filings may serve to receive and identify instances where more time than that allocated by the Notice of Hearing are required.

OMB practice as a guide suggests many matters can be adequately heard in one-half a day. At the outset, TLAB is proposing all appeals be allocated one full day Hearing time. It will adjust this with practical experience. Motions will receive half-day appointments, initially, whether oral or electronic.

Where a party is aware of an instance where greater than one day is felt necessary, the request to TLAB Staff will be received, referred to a Member and assessed as to whether a Motion will be required.

PROCEDURAL OBLIGATIONS

New Procedural Obligations

As described more generally above, TLAB is aware that the added procedural exchange requirements represent a change from predominant past practices before the Ontario Municipal Board. TLAB has sought to balance the burden of these added method of full disclosure, early, against the ability of the parties to have full knowledge, prepare and assess their respective positions and evidence and to encourage settlement. The added filings are a matter of practice in Hearings respecting different jurisdictions and are not unfamiliar to the professions. TLAB has attempted, in fulfilling the City mandate to provide all on-line services, to ensure that the public and the professions are not unduly inconvenienced by ensuring that the Forms themselves are clear, interactive and capable of convenient and immediate completion and electronic transfer to all parties and participants. It is the hope of TLAB that this will be a material aid to the public and to the professions in the dissemination, receipt and filing of all materials and documents, electronically, that are to form a part of the TLAB proceeding, where that is required.

A period of practice experience and feedback from stake holders will assist in determining whether there is a net cost or benefit in both time and cost of the procedures adopted, including their role in settlement of disputes.

Document Disclosure

Participants disclosure obligations, beyond statements and their content, is a request that can be put to TLAB for consideration as it is correct that it is not fully addressed to date. Form 13 does not require the specific disclosure of documentary evidence and consideration of its revision or otherwise is warranted, perhaps with practice experience.

TLAB took counsel on the detail of obligations attendant the possibly rare expectation of witnesses appearing under summons. The request for summons, Form 11, must disclose with sufficient detail the basis of the request. Whether the witness so summonsed by a party should be subject to closer scrutiny and obligations, including a witness statement and disclosure of documents are matters that TLAB can consider, perhaps with practice experience.

Large document references and disclosure is identified as having practical limitations and efficiencies. There is an excellent suggestion advanced and one that is under active consideration via an on-line 'library', DROPBOX or other storage and retrieval device. Parties are required to identify and copy the extracts to which they intend to refer in any documentation, and file that electronically. Such extracts must be clearly referenced as to their consolidation date, indicated as to whether they are draft or under appeal and any other information germane to their status and weight.

As described above, a rudimentary library of common documents is available on the TLAB website. This is intended to be expanded. URL references, with experiences, may also aid access availability and limit document constraints.

Expert Witness Statements

TLAB would be grateful for assistance in the better articulation of this standard. What was sought to be communicated was the expectation of sufficient clarity. Namely, that a person affected would understand the implications of the expert's opinion. Further, that counsel and the author as well, would comprehend the zone of risk inherent in admissibility of a failure to disclose or self-identify of relevant subject matter, documentation, etc.

Reply to Witness Statements

This is a request that can be put to TLAB for consideration. In the case of early full disclosure, the objective was to achieve a relatively expeditious and cost effective manner of disclosure, for the parties and participants to assess in their respective interests. As adopted, the Rules attempt to balance full disclosure without inviting an overly litigious or intimidating process to the public. Unlike Motions, which do provide for the exchange and evolution (reply and responses) of the discrete matters in issue, the pre-hearing procedures adopted to date do not require (but do not prevent) subsequent filings. Nor, of course, are Motions for further and other particulars precluded should unclear, obtuse or an absence of filings warrant more.

Court Reporters

This is a request for court reporter attendance directions that can be put to TLAB for further consideration. All TLAB Hearings, including Motions are to be Digitally Audio Recorded (DAR). The DAR recordings, or perhaps excerpts are to be made available, possibly on request, although transcripts will not be prepared by TLAB. It is expected that the need for formal court reporters, traditionally limited, may be reduced even further by this form of record and its accessibility. Rule 27 provides a discretion in the member on a request for special recording services.

Adjournment and Consolidation

TLAB would be grateful for a further articulation of this consideration. The relevant criteria for adjournments and consolidation matters are well documented in statute and administrative law expressions. While the Rules attempt to provide for such requests without specification as to types of potential Motions, a revision, Practice Direction or other consideration may be warranted following a period of trial practice.

Challenge of Affidavit Evidence

The right to challenge an affidavit or request further and other particulars is a request that can be put to TLAB for further consideration. If there are suggestions, these might be helpful to consider supplementing the vehicles to challenging affidavit evidence. Presently, challenges are not precluded, requests are not precluded and the device of a Motion requesting an order is available where the circumstances warrant TLAB intervention.

1. IDENTIFICATION OF PARTIES AND PARTICIPANTS

As above described, the determination to date has been to leave the obligations of choice of status to be left to the stakeholders. The Rules attempt to make it clear what those obligations are as well as the rights, privileges and limitations that come with the choice of status. In so doing, TLAB has articulated that that the choice is to be made at the convenience of the individual and not be based on identified measures of importance, weighted status or other ponderable or imponderable criteria. Some stake holders are presumed to be parties: the applicant; the appellant(s), the City. They may relinquish that status in accordance with the Rules and they need to be cognizant as to when that is attempted, as provision is made to challenge the release of party status in some circumstances if injury is alleged and accrued. TLAB, if effect, has reversed the onus of establishing party or participant status by making the same open equally to all and without a formal order, subject to challenge.

2. ADDITIONAL COMMENTS

Settlement Hearings

The request for a further elaboration on practices and disclosure Rules applicable to Settlement Hearings is a matter that can be put to TLAB for further consideration. The philosophy expressed by TLAB in the Public Guide and elsewhere is to encourage the settlement of disputes. TLAB intends to use its resources to encourage the settlement of disputes by the application of the Rules, the Forms, the offering of mediation services and the entertaining of Motions requesting early Hearing dates to effect a settlement where one has been reached. The service of a Motion may be additionally directed in the event that an earlier Settlement Hearing date than a posted Hearing date, is requested. In that event, presumably the Motion materials will disclose the essence of the settlement discussion. The posted Hearing date is not intended to be released, except perhaps in exceptional circumstances, and included in the settlement order. The scheduled Hearing date would only be changed by an order following on a Motion for Directions or Settlement Hearing. Partial settlements or Motions sought within the Quiet Zone would likely be heard on the scheduled Hearing date.

Filing Fee

Regrettably, Court Services has determined that City policy does not permit the payment of filing fees by law firm cheques.

Administrative corrections

Some comments were noted:

- In Rule 9.3 presumably the words “to the Appellant” should be added after the words “Notice of Proposed Dismissal”.
- In Rule 16.4 the word “Board” should be replaced with “Body”.
- The numbering under Rule 27 is incorrect, such that Rule 27.6 is missing.

TLAB will undertake their consideration. It is noted:

Form 16 on its face, is directed to the appellant.

‘Board’ should read ‘Body’.

On Rule 27, counsel will be contacted to ensure no omission occurred.

Timing of Amendments

TLAB will consider suggestions for modifications and accommodations in scheduling.

As earlier described, a Special Public Meeting to discuss the application of the Rules and Forms, following a period of trial practice, will be scheduled in the spring of 2018, with appropriate public notice.

Once again, the constructive contributions and observations of this and additional correspondence are welcomed and appreciated.

Except for special educational and other defined circumstances, TLAB as a committee of the whole has the obligation to meet only in open, public meetings, the Agenda's for which are established in advance.

As practice experience demonstrates, suggestions on required practice directions are welcomed as well as active participation in the upcoming Rules review is encouraged.

Sincerely,

Ian James Lord, Chair

On behalf of the Toronto Local Appeal Body