

## DECISION AND ORDER

**Decision Issue Date** Thursday, February 22, 2018

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

Appellant(s): MELISSA JAYNE MARTIN

Applicant: KATIE TRANTER

Property Address/Description: 61 CLUNY DR

Committee of Adjustment Case File Number: 17 196039 NNY 24 MV

TLAB Case File Number: 17 254433 S45 27 TLAB

**Motion date:** Wednesday, February 21, 2018

### INTRODUCTION

This is a written motion brought by the owner of 61 Cluny Drive, Melissa Martin. Ms. Martin filed one Applicant's Disclosure, on November 20, 2017. She wishes an order permitting her to file a second Applicant's Disclosure, consisting of seven further engineering plans or reports. Ms. Martin has already filed at least nine plans or reports and four Expert Witness Statements in timely fashion as part of her case for the March 14, 2018 hearing. Rule 11 contemplates one Applicant's Disclosure; Rules 2.10 and 4.4 allow the TLAB to make exceptions to Rule 11.

### BACKGROUND

Ms. Martin seeks to alter an existing 2½storey dwelling at 61 Cluny Drive by constructing a below grade garage with a "lift entrance enclosed in an attached single car garage".

During the circulation before the Committee of Adjustment hearing, the Manager, Development Engineering, advised Ms. Martin that he could not support the variance regarding the below grade garage since the proposed driveway leading to the garage had a "reverse slope". The reverse slope was eliminated and Ms. Martin's planning report to the Committee stated:

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The proposal has been revised since the initial application filed on June 5th. The original application proposed a reverse slope driveway. A revised set of plans was sent to the Committee on August 14, which eliminated the reverse slope driveway by introducing a single-storey side-lift garage structure. The Public Hearing Notice that was circulated for 11 variances reflected these August 14th plans. . . . The plans to be considered by the Committee on October 11th, now provide for a garage which is completely below grade. Other variances have been eliminated as a result of this fundamental change.

. . . . HPS now supports the application as the garage and the lift are below grade.

On October 11, 2017, the Committee of Adjustment denied the variances (11 in total). Ms. Martin appealed. Her lawyer's cover letter to the appeal stated that the Committee "refused to entertain the revised application . . . [and the Committee] considered only the original proposal that our clients no longer had any intention of constructing, and rejected that application." The letter went on say, "In the result, 5 of the original 11 variances were entirely eliminated prior to the [Committee of Adjustment] hearing. In addition, the below grade garage was pulled 1 metre in from the easterly (rear yard) setback, thereby reducing the variances required for building depth and length"

The TLAB sent out a Notice of Hearing on November 3, 2017 mandating the following deadlines:

Applicant Disclosure, November 20, 2017; (114 days to hearing).  
Notice of Intention to be a Party or a Participant, November 23, 2017 (111 days to hearing).  
Document Disclosure, December 4, 2017; (100 days to hearing).  
Witness, Participant Statements, Expert statements, December 18, 2017; (86 days to hearing).  
Last date for notice of motion, January 29, 2018; (44 days to hearing)

Ms. Martin's Notice of Motion is dated February 5, 2018 (37 days to hearing).  
The hearing date for motion is February 21, 2018 (21 days to hearing).

The Applicant's Disclosure form "box" has these instructions:

Provide all the intended alterations, changes, revisions or modifications to the application that was made to the Committee of Adjustment together with a brief explanation. Applicants are responsible for identifying variances correctly and fully.

The purpose of this disclosure is to identify changes that may be relevant to a party or participant in assessing their position.

Note: Materials in support must be served and filed electronically in accordance with TLAB Rules and Practice Directions.

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Ms. Martin's Applicant's Disclosure states:

All above grade variances have been eliminated and the remainder have been lessened in extent. Please see appeal letter as well as the attached supporting materials and list of requested variances.

The revised list of requested variances changed the variances denied by the Committee as follows:

		Extent of variance
<b>By-law 569-2013</b>		
1.	Length of building	Slightly reduced; from 28.35 to 27.39 m
2.	Depth of building	Slightly reduced; from 26.63 to 25.71 m
3.	Rear yard setback	Slightly reduced, zero setback increased to 1 m
4.	Side yard setback	Slightly reduced; north side yard setback increased from .08 to .75 m; south lot line unchanged
5.	Building height	Need for variance eliminated
6	Number of storeys	Need for variance eliminated
7.	FSI	Slightly reduced; .71 to .69 times area of lot
<b>By-law 438-86</b>		
1.	Side yard setback for portion of building	Need for variance eliminated
2.	Front wall vehicle access to integral below grade garage	Unchanged
3.	GFA	Slightly reduced from .71 to .69 times the area of the lot
4.	No below grade garage	Unchanged

Four persons, including Mr. Bowman and the South Rosedale Residents' Association, filed intention to be parties and Mr. Bowman retained three experts, one planning and two engineering, all of whom filed witness statements in a timely fashion.

An indication of what is at stake may be seen from one paragraph of Aquila's (Mr. Bowman's mechanical systems reviewer, December 18, 2017):

The south foundation wall of the proposed parking structure is located immediately adjacent to the 57 Cluny lot line [Mr. Bowman's residence] and in close proximity to the 57 Cluny structure. Due to the short distance between the two foundations, ground water accumulated in this area will be more restricted than in the existing condition. This could

lead to increased hydraulic pressure against the 57 Cluny below grade structure than that experienced under the existing condition. Increased pressure on the 57 Cluny foundation increases risk of seepage through the foundation.

The moving party, Ms. Martin, has filed a motion dated February 5, 2018:

As required by the Rule 16, disclosure and witness statements have been filed. Since that time, and in an effort to address concerns raised in the materials filed by parties opposite, our client's technical witnesses have revised certain drawings and reports already filed. As a result, we wish to provide and rely upon these revised materials in the upcoming hearing, and file revised witness statements to reference same.

Ms. Martin wishes to maintain the March 14, 2018 hearing date. The responding party, Mr. Bowman, has characterized this as a motion to admit new evidence. Mr. Bowman requests that the Relief be denied, i.e., the new documents not be permitted to be filed as a second Applicant's Disclosure, and not be referred to, or that, in the alternative, that a new date be set.

## **MATTERS IN ISSUE**

Should Ms. Martin be permitted to file the seven documents mentioned in the introduction? If so, what procedural orders should also be made? Should the March 14, 2018 hearing date be adjourned, and if so, what date should the hearing be?

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## **ANALYSIS, FINDINGS, REASONS**

The purpose of the Applicant's Disclosure is to permit possible litigants to see the full extent of the variances sought before electing to become parties or participants. The Applicant's engineers visited Mr. Bowman's property after receiving adverse witness statements and according to the Applicant's affidavit shared some of the new reports with Mr. Bowman on a without prejudice basis. The applicant suggests that the purpose of the new disclosure was to further settlement; but the real purpose of the motion is to convert without prejudice material to documents that can be used at the hearing.

The responding party argues that the TLAB Rules must be followed, citing the case of 1196158 Ontario Inc (212 ONCA 544). That was a case of delay; rather, I see this motion more like seeking to amend pleadings, which under the Rules of Civil Procedure is permitted, even at trial<sup>1</sup>.

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<sup>1</sup> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

By posting the documents on the TLAB website, they have now entered the public domain and I see no practical way of preventing anyone including the authors from referring to them. It is true that a trier of fact may ignore new evidence, but I do not think it is useful to have a hearing in which the witnesses must do so. Of course, it is open to the panel hearing this case to take into consideration how the sequence of evidence-gathering affects the panel's overall assessment of the four tests.

## **DECISION AND ORDER**

The Applicant will be permitted to file the seven documents attached to the Affidavit of Joshua Hilburt sworn February 5, 2018. The hearing of March 14, 2018 is converted to a telephone conference to set a new date for hearing. The Applicant must submit any new witness statements by Friday, March 9, 2018 and consequences for failure to do so shall be reserved to the hearing panel member.

X

*Ted Yao*

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T. Yao  
Panel Chair, Toronto Local Appeal Body  
Signed by: Ted Yao

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