

DECISION AND ORDER

Decision Issue Date Friday, February 23, 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): FARHAN KASSAM

Applicant: KATE COOPER

Property Address/Description: 216-218 BATHURST ST & 5 ROBINSON ST

Committee of Adjustment Case File Number: 17 128847 STE 19 MV

TLAB Case File Number: **17 274561 S45 19 TLAB**

Motion Hearing date: Thursday, February 22, 2018

DECISION DELIVERED BY Ian James Lord

INTRODUCTION

This matter involves Motion requests by the City of Toronto ('City'), supported by the applicant/appellant, for relief from the filing obligations set out in the Notice of Hearing, pending mediation consented to by the parties. The request that the Motion be heard in writing was granted in an Order and Decision of the Toronto Local Appeal Body (the 'TLAB'), dated February 8, 2018. This decision addresses the relief requested that was not dealt with earlier, pending the receipt by February 15, 2018 of Motion responses by interested persons.

BACKGROUND

The February 8, 2018 Decision and Order sets out the context of the City request and the specific relief requested and is incorporated herein by reference. It acknowledges that a Mediation Date of March 6, 2018 has been consented to by relevant parties and that the Hearing date of April 3, 2018 remains fixed. That Decision further recites that the TLAB Rules set Hearing and exchange dates for the purpose of evidentiary exposition, to provide advance notice as to positions and alterations, if any, to applications on appeal, and to afford a reasonable opportunity for the parties to take counsel and consider whether a settlement of interests can be advanced, based on this knowledge. It reiterates the TLAB support for mediation.

In the City Motion, the following chronology is relevant:

December 22, 2017: TLAB 'Notice of Hearing' served requiring (Form 12) witness statement disclosure by February 5, 2018.

February 2, 2018: City (Form 7) Motion request, on consent, advising by affidavit of mediation intention and requesting relief from the exchange Rules (documents filed effective February 5, 2018).

February 3, 2018: email exchanges between parties raising questions concerning the obligation to meet the filing deadlines; inconclusive of responses.

February 8, 2018: response to Motion by Barbara Woloszczuk, inter alia consenting to mediation; the (Form 8) response by S. Woloszczuk identifies a requested 25 days to provide responding witness statements post mediation, if required, rather than the City relief of five days (paragraph 3) and supports the use of his own Witness Statement, filed February 5, 2018, in accord with the Rules (paragraphs 7, 9, 10).

February 14, 2018: the City Reply to Response to Motion (Form 9) reasserts the City position and requests, including confidentiality to prepared Mediation materials, and contains the following commentary:

“10. Given the notice of this motion was provided before the witness statement deadline, there is no prejudice to any party from an alteration in the notice of hearing deadline for witness statements to accommodate for, and allow for the most expeditious and cost-effective manner in proceeding with, mediation.

11. The City submits that Witness Statements, Expert Witness Statements and Participant Statements should be required after mediation, should mediation not resolve some or all of the parties and participants concerns.

12. To clarify, the City's requested relief does not limit or prevent any party or participant from filing earlier than required by the notice of hearing or by submission of this motion. The deadlines are the dates by which the documents

are due to be submitted. Therefore, in the City's submission, early submission is always permitted both by the Relief Requested in the original Motion and by the TLAB Rules"

February 14, 2018: correspondence from Mr. S. Woloszczuk reasserting concerns for the ability to participate due to absences and requesting relief from any acceptance of the City position that pre-filed Witness Statements not be required or used on the Mediation. Mr. Woloszczuk asserts prejudice if, having complied with the TLAB Rules and being unable to meet any Mediation Brief filings that may be ordered, if he is unable to use his Witness Statement at the Mediation or is precluded from its use after the Mediation, should the mediation prove unsuccessful, in part or whole.

February 19, 2018: Response to Motion (Form 8), late, by Mr. Bronskill in support of the City Motion and agreeing to confidentiality suggesting the preparation of Witness Statement prior to Mediation would be prejudicial (paragraph 5) but consenting to their use by those who have pre-filed (paragraph7).

MATTERS IN ISSUE

Remaining to be dealt with in the City Motion is the relief requested for permission to delay the issuance of required Witness Statements, Participants Statements and Expert Witness Statements following a period of assessment, post the March 6, 2018 Mediation Appointment.

JURISDICTION

In this matter, the parties and the TLAB reference the TLAB Rules, including Rule 1,2, 17, 17.4, 24.1.and 24.6.

EVIDENCE

The TLAB has before it two affidavits and the Motion Record submissions of the participating interests. The City, supported in part by the applicant/appellant and the party Woloszczuk, agree on a mediation effort, the appropriateness of pre-disclosure of positions either by Mediation Briefs or the use of pre-filed Witness statements and to a period of delay in articulating final positions as evidenced by formal compliance with the Rules as to filing Witness Statements (or their use), in the event the Mediation is unsuccessful, in part or whole.

Where there is apparent disagreement, it stems from the use of pre-filed Witness Statements at the Mediation and their subsequent ability to be used should the Hearing on the merits be required to deal with outstanding issues of substance.

There was some disagreement as to the timing of the deliverables of Witness Statements post Mediation.

ANALYSIS, FINDINGS, REASONS

The TLAB Rules attempt to establish a regimen for the timely disposition of matters before it. These matters are appeals in respect of land use approvals that often have great economic and enterprise value associated with the project under consideration.

In almost all cases the appeals engage public land use permissions that can endure for generations.

As such, appeal matters are not to be approached cavalierly or on the perspective of convenience to the parties or own definitions of efficiency and appropriateness. Indeed the TLAB Rules were crafted to place all with an interest in an appeal on the same footing: to be active, vigilant, attentive and compliant – all in the interests of early disclosure and advancing the identification of differences such that settlements can be considered, positions assessed in the light of realities and evidentiary opinions, issues scoped and confrontational hearings conducted to the degree necessary.

As stated in the February 8, 2018 disposition, in the main these Rules have worked to provide an appropriate template for the resolution of differences.

In this case, there is no evidence as to what led to the lateness of the City Motion. It is recited that on February 1, 2018, the City with the consent of the applicant/appellant considered that mediation was a viable option they wished to pursue. The resultant City Motion, filed effectively more than six weeks after the Notice of Hearing, fell consequentially on the due date for the essential disclosure of documents due from the Parties, Participants and the Expert Witnesses.

Rather than having prepared the requisite filings, as had Mr. Wolosczyk, the City, with the consent of the applicant/appellant sought relief from the Rules obligations premised upon the Mediation request and bolstered by the rationale that prior disclosure might 'compromise' or unduly add cost and duplication to the process.

Respectfully, I disagree.

The service of the Motion and its timing clearly caused confusion as to the responsibilities of interested persons vis-a-vis the Notice of Hearing disclosure dates.

I find that the City Motion, speculatively caused by the timelines of the TLAB Rules, seasonality and communication delays, while necessary in its eyes, fails to

respect the obligations of the appeal process, as above recited. And is without explanation.

I find that the rationale, as expressed in the above three quoted paragraphs from Mr. Elmadamy's Form 9 filing, to be disingenuous. The Motion relief was effectively requested on the exchange due date knowing there is a mandatory timeframe for Motion consideration; parties who were prepared to file would have had insufficient notice of the City request, let alone a TLAB response. A mediation date and its availability was an unknown and controlled by only a portion of the interested persons who had been identified. The disclosure principle was compromised, and sought to be maintained compromised indefinitely, except for the unknown potential of the requirement of Mediation Briefs. The suggestion that those who met the deadline were entitled to do so 'early', as the Rules so permit, smacks of a potential for the manipulation of the Rules, intentionally or not, to the advantage of the disclosure by some but not of others.

The TLAB Rules are not to be manipulated even in circumstances where genuine, credible rationales are offered. It is for the TLAB to amend its Rules or their application on requests for relief properly supported, in this case as advanced by the City Motion but not its supporting materials.

This is not to say that there is any finding in this circumstance of a deliberate effort on the part of the City, supported by the applicant/appellant, to orchestrate to the disadvantage of another, self-serving relief.

While not supported by the affiant evidence, I am entirely comfortable in finding that the events that transpired in terms of timing were justified and that few options were available to achieve the timely desired result.

There was, however, one option: timely compliance.

Given the importance of the appeal to all concerned, no rationale was provided for non-compliance. Compliance with the Rules, by disclosure, would have advanced the interests and considerations of the players. It would have exposed the issues, opinions and support rationales for the relief requested on the appeal. This equally could have been a feed to mediation and a broader solicitation of interests, rather than the creation of a process where some exclusions apply.

I do not accept that the meeting of the disclosure deadlines inexorably could compromise the genuine desire to approach mediation. The mediation process is protected, confidential and the participants are at liberty to reconsidered their published positions in the spirit of compromise or education.

It is true that mediation briefs may result in some duplication of file preparation materials. That is the nature of the process once invoked: it is not a rationale to alter the process, delay or impede it. It is not to be seen as a vehicle to avoid disclosure, buy

time for witness education or preparation or develop positions. Those processes were to begin on the filing of the original application before the Committee of Adjustment.

Even where some of the parties might agree on a process that their disclosure might best be facilitated through the filing of confidential Mediation Briefs, that is not the perspective in which the drafting of the TLAB Rules have sought to protect the public interest and afford fairness to all the parties.

In this case, the willingness of those actively engaged to date to entertain settlement discussions is commendable and encouraged. TLAB is committed to advance that process and publish a brief statement as to its effectiveness or otherwise.

A Hearing Date is set for April 3, 2018, at which time the applicant/appellant carries a burden to demonstrate that the relief requested or agreed to meets the requisite considerations specified by the statute. While that obligation may, and hopefully will, be materially advanced by mediation, the obligations for disclosure remain on all who wish to participate in the resolution of these statutory appeals.

However, between now and the Hearing Date the obligations on the parties and participants remain; quite clearly some have not been met.

In the circumstances and on the principles above advanced, I am prepared to offer only minimal relief on the City Motion.

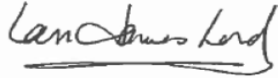
DECISION AND ORDER

The City Motion is allowed in part and the Decision and Order dated February 8, 2018 on this matter is supplement by the following:

1. The Mediation Date scheduled for March 6, 2018 is confirmed. Parties wishing to participate in the mediation shall file a **Mediation Brief** setting out their interests in the appeal and their position on the relief sought in the appeal. Mediation Briefs are to be clearly marked: '**MEDIATION BRIEF PRIVATE AND CONFIDENTIAL**' and are to be delivered or forwarded to the TLAB no later than **4:30 pm on March 1, 2018**
2. The Witness Statement and materials filed to date by Stan and Barbara Woloszczuk may be used on the mediation without prejudice to the foregoing and to their subsequent use at the hearing on the merits, as may be required.
3. Full public disclosure, including **Disclosure Statements, Witness Statements, Expert Witness Statement and Participants Statements**, whether or not their content was considered in the mediation, are to be filed electronically with the TLAB no later than **4:30 pm on March 12, 2018**. Any **Reply** to any of these materials shall be filed electronically with the TLAB no later than **4:30 pm on March 19, 2018**.

The failure to file these materials in the time allotted may result in an order for their exclusion in the subsequent proceeding.

4. A short **Statement of Mediation Outcome**, regardless of outcome but respecting disclosure obligations, is to be provided by the Mediator and posted on the TLAB website on or about March 7, 2018.
5. The Hearing scheduled for April 3, 2018 is confirmed.



X

Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord