TORONTO

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DECISION AND ORDER

Decision Issue Date Wednesday, March 28, 2018

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

Appellant(s): NARENDRA ARMOGAN

Applicant: VELTA MUSSELLAM

Property Address/Description: 31 MAPLE AVE

Committee of Adjustment Case File Number: 16 248550 STE 27 MV

TLAB Case File Number: 17 188180 S45 27 TLAB

Motion date: Monday, March 26, 2018

DECISION DELIVERED BY S. Gopikrishna

INTRODUCTION AND BACKGROUND

The Appeal to the Toronto Local Appeal Body (TLAB) respecting 31 Maple Avenue involves several groups: The Appellants Armogan; Neighbours/Respondents Senst and Labrecque; PartiesCarr and Henderson and more than 20 Participants. Of these, the first three had retained legal counsel and land-use planners in advance of the hearing originally scheduled for 27 November, 2017. Given that this is the 2nd adjournment request for this appeal, it may be pertinent to outline the circumstances behind the first adjournment granted on 27 November, 2017

The Appellants brought forward a Motion to request for substitution or addition of an Expert Witness as well as submit modified drawings (where appropriate) on the morning of the hearing on 27 November, 2017. TLAB set a Motion hearing date for 27 October, 2017 to hear the Motion orally. Parties Senst and Carr responded by stating their unavailability on 27 October, 2017. Party Senst also requested that the Motion be heard in writing and that the hearing scheduled for the 27th of November, 2017 be postponed to a three day hearing in early 2018. Party Labrecque objected to the Appellant's Motion

and asked that it be refused. In their Reply, the Appellants agreed with the suggestion that the Motion originally scheduled to be heard orally on 27 October, 2017 could be heard in writing as well as adjourning the one day hearing scheduled for 27 November to a three day hearing in January or February, 2018.

After deciding to hear the Motion in writing, I granted the requested adjournment and cancelled the hearing scheduled for 27 November and granted the request for a hearing lasting three continuous days, now scheduled for 10-12 April, 2018.

This decision addresses a Motion brought forward by Party Labrecque on 9 March, 2018 for an adjournment for the dates of April 10-12 , 2018 with a request that dates for a 3 day hearing be scheduled for later this year.

MATTERS IN ISSUE

The main questions, based on the information provided in the Motion, Responses and Reply may be framed as:

1) Is the Motion admissible under the Rules and Practice Directions of the TLAB?
2) Given that both the Moving Party and Appellants assert prejudice as the basis for supporting or opposing the Motion, who would be more prejudiced if the Motion were approved or refused? In other words, where is the balance of prejudice?

JURISDICTION

Rule 2.1 states that The Local Appeal Body is committed to fixed and definite Hearing dates. These Rules shall be interpreted in a manner which facilitates that objective.

Rule 2.2 states that These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits.

Rule 2.3 states that The Local Appeal Body may exercise any of its powers under these Rules or applicable law, on its own initiative or at the request of any Person.

Rule 2.9 states that Substantial compliance with the requirements of these Rules is sufficient.

Rule 2.10 states The Local Appeal Body may grant all necessary exceptions to these Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner.

Rule 2.11 states that Where a Party or Participant to a Proceeding has not complied with a requirement of these Rules or a procedural order, the Local Appeal Body may:
a) grant all necessary relief, including amending or granting relief from any procedural order on such conditions as the Local Appeal Body considers appropriate;
b) adjourn the Proceeding until the Local Appeal Body is satisfied that there is compliance;
c) order the payment of costs; or

d) refuse to grant the relief in part or whole.

Rule 17.1 states that "No Motion, except a Motion brought under Rule 28, shall be heard later than 30 Days before the Hearing, unless the Local Appeal Body orders otherwise".

Rule 23.3 states that " In deciding whether or not to grant a Motion for an adjournment the Local Appeal Body may, among other things, consider:

a) reasons for an adjournment;
b) interests of the Parties in having a full and fair Proceeding;
c) integrity of the Local Appeal Body's process;
d) timeliness of an adjournment;
e) position of the other Parties on the request;
f) whether an adjournment will cause or contribute to any existing or potential harm or prejudice to others, including possible expense to other Parties;
g) effect an adjournment may have on Parties, Participants or other Persons; and
h) the effect an adjournment may have on the ability of the Local Appeal Body to conduct a Proceeding in a just, timely and cost effective manner."

Practice Direction 2: Default Format of Specific Motion Hearings

Unless otherwise directed by TLAB, where a Party requests a date to file a Motion for a Written or Electronic Hearing (telephone or video conference) or the adjournment of a Hearing Date, or both, TLAB will treat and require the request to be conducted as a written Motion. The Party will be provided with a date for a Written Hearing motion for service. In the case of a Hearing Date adjournment request, the TLAB shall supply alternative hearing dates and the parties shall indicate their availability for those dates, in the event that the Motion may be granted. The default form of Hearing for these two specific Motion requests will not be Oral, as specified in Rule 17.3. The timeline for Motion responses outlined in the Rules for Motions will apply.

EVIDENCE

It is important to note that soon after my earlier decision adjourning the hearing scheduled for 27 November, 2017 was released, various Parties had indicated their inability to attend the hearing scheduled for 10-12 April through email exchanges with the TLAB. Mr. Ian Flett, Counsel for Party Labrecque had indicated his inability to attend the scheduled hearing in April because of his expecting to be on parental leave between 15 March and 15 May, 2018. Mr. Alan Heisey, Counsel for Party Senst, had indicated his unavailability since he was already scheduled to appear before the Ontario Municipal Board (OMB) on the 11th of April. The Appellants indicated through an email exchange that they wouldn't consent to further adjournments. The TLAB staff advised the Parties that any request for changing the dates would have to be by way of Motion.

No Motions were received by the TLAB till 9 March, 2018. However, a Mediation was attempted by the TLAB on 2 March, 2018 and wasn't successful. On 9 March, 2018, Mr. Flett filed a Notice of Motion to be argued as per Practice Direction 2 and an order to adjourn the hearing to one of the 3 following three day consecutive blocks:

- July 10-12, 2018
- July 17-19, 2018
- July 24-26, 2018

In the Notice of Motion, Mr. Flett explained that they had hoped for a settlement as a result of the attempted mediation on 2 March, 2018. Had the Mediation been successful, one of the junior lawyers in Mr. Flett's firm could have substituted for him if the hearing were to proceed as originally scheduled. The request for an adjournment was linked to the mediation being unsuccessful. In support of his Motion, Mr. Flett highlighted the natural justice principle and discussed the possible prejudice to his client if the Motion were refused. He alluded to the financial impact if his client were forced to retain another counsel at this late hour. Apparently, Mr. Flett's Partner, Mr. Eric Gillespie, was the only other lawyer in their law firm with the experience to argue such a complex case but was unavailable because of a previous commitment before the OMB..

In his Response to the Motion on behalf of Party Senst dated 20 March, 2018, Mr. Heisey supported the request for an adjournment because of his previous commitment on 11 April, 2018. After pointing out that the Parties were not consulted by TLAB when the new hearing dates were scheduled, he stated that Party Senst was comfortable with a hearing scheduled between the 4th and 6th of September, 2018 though their Expert Witness, Mr. Bruce would not be available on September 5, 2018. He suggested that the new dates for the hearing be set after consultation with Counsel and Consultants, and then be made peremptory Lastly, Mr. Heisey stated that he was on vacation until 16 March which precluded him from responding earlier to the Motion.

On 19 March 2018, Party Carr sent in documentation stating that they would be represented by Party Labrecque. This was accompanied by a note which supported the request for an adjournment because Party Carr opined that Mr. Flett's involvement was very important given how much time he had invested in the case.

In their Response to Motion dated 20 March, 2018, the Appellants (Party Armogan) submitted that the Motion ought to fail on both procedural issues and merit. The Appellants pointed out that according to Rule 17.1, the last date for hearing a Motion is 30 days before the hearing or the 9th of March, 2018 in this case. The Appellants then stated that the Motion should have been served 15 days before the 9th of March, 2018 whereas the Moving Party didn't file their Motion till 9 March 2018. Further, the Moving Party did not request for an exemption from Rule 17.1 in the Motion, which states that "no motion, except a Motion brought under Rule 28, shall be heard later than 30 days before the hearing."

The Appellants then state that the "Motion also fails on its merits." They discuss Rule 2.1 and how it states that TLAB is "committed to fixed and definite Hearing dates. These Rules shall be interpreted in a manner which facilitates that objective." They then discuss Rule 23.3 and its application to whether or not to grant a Motion for an adjournment. Beginning with Section (c) of the Rule, they list

c) the integrity of the TLAB's process
d) the timeliness of the adjournment

e) Position of the other Parties on the request
f) Whether an adjournment will cause or contribute to any existing or potential harm or prejudice to others, including possible expense to other Parties
g) The effect an adjournment may have on Parties, Participants or other Persons
h) The effect an adjournment may have on the ability of the TLAB to conduct a proceeding in a just, timely and cost effective manner.

The Notice of Response then pointed out that notwithstanding Mr. Flett's awareness of having to be Parental leave between March and May 2018 and being advised by the tribunal staff about the need to file Motions to change hearing dates, neither he nor his clients filed any Motion. Mr. Flett's stated nexus between the lack of filing a Motion in time and a successful mediation outcome, the Appellants claimed, is not convincing given counsel's experience. Responding to the Moving Party's stated concern about costs to Party Labrecque in finding alternative counsel if the Motion were refused, the Appellants point out that the Respondents had time since November 2017 to find alternative counsel; in other words " they have nobody but themselves to blame". The Appellants then point out that notwithstanding being on Parental Leave, Mr. Flett was ready to respond to the Notice of Motion on 26 March.

The Appellants claimed prejudice through a second adjournment of the proceedings, particularly since this is being requested during the 30 day cooling off period before the Hearing. They claim that prejudice is caused to them through additional costs spent on responding to a Motion not brought in accordance with TLAB's Rules coupled with an adjournment , and the consequent postponements to commencing work on the proposed addition to their house till spring of 2019.

Lastly, the Appellantsed discuss how the TLAB's ability to conduct proceedings in a timely, just and cost effective manner contrasts with the timelines for the Hearing if the adjournment is granted because the elapsed time is well in excess of a year of the original COA decision. This Response to the Motion is accompanied by an Affidavit by Mr. Michael Goldberg, Registered Professional Planner and a consultant for the Appellants, which agrees with the Appellants' Reply, including asserted prejudice, as discussed herein. It expresses concern about the possibility of the hearings being adjourned to as late as October 2018 on the basis of an email from Mr. Flett.

On 22 March, 2018, Ms. Katherine Coulter sent in a Notice of Reply to Response to Motion on behalf of Party Labrecque. Expressing disagreement with the Appellant's submissions of 20 March 2018, Ms. Coulter argues that Rule 17.1, which the Appellants relied on to argue that the Motion was late and to be consequently denied, does not apply to their Motion because their motion was to be heard in writing. Section 17.1, according to Ms. Coulter, applies to oral hearings and not to written hearings.

She then stated that the tribunal required the inclusion of the March 26 date for its own reasons unknown to the Moving Party. However, the reason could be the distinction between a written and an oral hearing because the tribunal's Practice Direction indicates a Motion for adjournment shall be in writing precluding the need for a "hearing" and consequently, the restrictions imposed by Section 17.1. She went on to stat that even if the above reasons were incorrect, the Tribunal allowed itself great flexibility to allow motions in spite of Rule 17.1 because fairness is its overreaching mandate.

Ms. Coulter then stated that the Appellants' allegations about the integrity of the process being compromised call into question the process followed by the tribunal for setting dates "without consultation". According to Ms. Coulter, the Tribunal ought not to schedule multi-day hearings without input from counsel and consultants. She then agreed with Party Senst's suggestion that a mutually agreed date be made peremptory upon adjournment and believes that this would resolve any questions about the Tribunal's commitment to fairness and efficiency.

On the issue of balance of prejudice, Ms. Coulter stated that the Appellant had not provided any evidence of " an existing or potential harm or prejudice" while asserting prejudice , pointing merely to the" passage of time without demonstrating any nexus between the passage of time and how it may prejudice" them. Pointing out that this is not a matter involving witness recollection nor health of any individual, Ms. Coulter asserted that the "prejudice" asserted by the Appellants is more a case of their desire to enlarge "an already enormous home taking longer" than they wish. Ms. Coulter contrasted this prejudice with the potential prejudice to Party Labrecque in finding new counsel or representing themselves, implying that the latter constitutes greater prejudice.

Ms. Coulter then reviews the reasons for their not taking a position on the Motion by Party Senst before the earlier adjournment for the hearing scheduled for November 2017 and explains how this request was reasonable given the number of Parties, Counsel and Consultants involved.

ANALYSIS, FINDINGS, REASONS

The request for adjournment raises a number of interesting questions of which the most important are listed in the "Matters in Issue" Section which appears earlier in this decision.

The Motion for an adjournment relies on Practice Direction 2 and has been supported by two other Parties, Senst and Carr. The Appellants argue that that the Motion is not allowable under Section 17.1 while Party Labrecque argues that Section 17.1 does not apply because of the written nature of the Motion and speculates that the Tribunal probably established the returnable date of 26 March for the Motion given the larger implications of the Motion. Further, the Appellants also agree that the Motion ought to fail for "merit" related grounds in addition to the procedural reason discussed.

It is my firm belief that while both procedure and natural justice principles are important, the former looks to manifest and codify the latter and translate lofty principles into practical processes. Ensuring natural justice is the driving force behind any tribunal's attempts to negotiate nebulous or unchartered waters even when the interpretation of rules is contested and in question. Given this perspective, natural justice principles are the primary basis for my resolution and conclusions.

I note that the Moving Party relied on Practice Direction 2 and that none of the other Parties besides the Appellants have disagreed with this approach. While the Appellants have discussed the Moving Party's not adhering to Section 17 at some length in their submissions, they have not challenged the applicability of Practice Direction 2 for bringing the Motion forward. Given the provisions of Practice Direction 2, the Motion is therefore admissible, without having to interpret Section 17 or invoking, where necessary, the considerable powers of the Tribunal under Sections 2.2, 2.3 and 2.9 of the Rules. The Motion to consider the adjournment is therefore admissible ; a decision therefore needs to be made on the request for an Adjournment.

Of the Natural justice issues canvassed, the most important issue is the possible prejudice caused to Parties, and where the balance of prejudice lies if the Motion were denied or granted

The Moving Party Labrecque states that their lawyer, Mr. Flett, will be on parental leave between 15 March and 15 May, 2018 which means that they can't access the legal representation of their choice if the hearing were to proceed as scheduled. The Motion also states why Mr. Flett can't be replaced given prior commitments and the experiences of other lawyers in his office. The fact that Party Carr has stated that they will be represented by Party Labrecque through their Response means that two of the Parties will have to either find competent counsel or be unrepresented if the hearing were to held between April 10-12, 2018. Mr. Heisey, Counsel for Party Senst, has provided us with two commitments with which he will be preoccupied on the 11th of April, 2018. Based on these submissions, I conclude that if the hearing were held between 10-12 April, 2018, then three of the five Parties **will not be able to exercise their right for appropriate representation for either part of the hearing or the whole hearing** (my emphasis), notwithstanding their earlier efforts to be diligent and retain counsel

While forcing Parties to proceed with a hearing without the benefit of their favoured counsel is significant enough to warrant close attention, it becomes decisive when we realize that all the Parties impacted by the decision to continue with a hearing between the 10-12th of April, 2018 are the Respondents opposing the Appeal. The opposition would have no access to counsel despite their best efforts while the Appellants would still be able to argue their case ably, thereby tilting the balance in favour of the Appellants. I believe that allowing the TLAB' to ensure such a scenario to unfold would be contrary to its stated goal of ensuring procedural fairness.

Should the opposition find suitable legal counsel to represent them at such short notice, there is a reasonable chance that the Hearing would still commence on 10 April, 2018 with Motions requesting adjournment in order to allow new counsel to familiarize themselves with the case, bringing us back to exactly where we are now. Such a scenario detracts from the efficiency of the overall process and is detrimental to the Parties, Participants and the TLAB.

The Appellants, on the other hand, claim prejudice because another adjournment would constitute delay and make it difficult for them to complete the project in a timely fashion. They also state that the added cost of payments to counsel and consultants constitute

prejudice. While I don't doubt that there could be significant costs to argue Motions and that the delay may stand in the way of their intended improvements, it does not interfere with their fundamental right to reasonable enjoyment of their property. Even if Ms. Coulter's comments about "enlarging an already enormous house" are discounted, the fact is that the Appellants are able to remain their present dwelling on Maple Avenue. This conclusion is supported by my site visit as well as pictures submitted by the Parties.

Determining the balance of prejudice, in this case, involves weighing the difficulty of a time delay and increased expenses for the Appellants and others against denying 4 out of 5 Parties (and 3 out of 4 Respondents) access to the counsel of their choice for either part of, or the full Hearing. Given that the former is an inconvenience without demonstrable violation of a right and that the latter impacts fundamental rights, I conclude that the balance of prejudice favours the Moving Party and Respondents.

This conclusion, along with the reasoning, is consistent with Rule 23.3 (c), (d) (e) and (f) listed by the Appellants in their Response. The clauses are listed below:

c) *the integrity of the TLAB's process*
e) *Position of the other Parties on the request* adjournment
d) *Timeliness of the adjournment*
f) Whether an adjournment will cause or contribute to any existing or potential harm or prejudice to others, including possible expense to other Parties

Since the answers to Sections (c), (e) and (f) are stated explicitly in the paragraphs above, they will not be repeated. The timeliness of the adjournment encompasses a number of subjective matters such as how realistic were the Moving Party's expectations of the success of Mediation and the Appellants' expectations of what an experienced lawyer ought to know about Mediation. However, counsel's having to proceed on parental leave is part of the test of Timeliness. Since parental leave is arguably an accessible right to all parents under federal and provincial law, its nexus with depriving Parties of their right to representation is made and outweighs other subjective components, and strongly supports the Moving Party.

On the basis of natural justice principles and application of pertinent clauses of Rule 23.3, the hearing is therefore adjourned, and the hearing dates of 10, 11 and 12 April are herewith vacated. No appearances by Parties or Participants are necessary on these dates.

.It is not possible to come to a conclusion about the appropriateness of the Moving Party waiting until 9 March to bring their motion forward, it is important to note that approval of such Motions is not to be taken for granted irrespective of how many Parties are impacted and the nature of stated prejudice.

Parties have indicated that they would like to be consulted in order to identify dates for the Hearing which may then be considered peremptory. The TLAB will endeavor to accommodate reasonable input..

I will request the TLAB staff to follow up on this issue and provide three date groupings based on the earliest calendar of TLAB availability, beginning in June, 2018. A new Notice will issue the dates selected by the Parties or appointed by the TLAB will be considered peremptory.

DECISION AND ORDER

The Toronto Local Appeal Body orders that:

1) The Motion for adjournment put forward by Party Labrecque is allowed.

2) The Hearing Date is therefore adjourned, and the hearing dates of 10, 11 and 12 April, 2018 are herewith vacated. No appearances by Parties or Participants are necessary on these dates

3) The TLAB staff will follow up on rescheduling the hearing for a continuous three day block, after consulting with counsel on three available periods commencing June, 2018.

4) A new hearing Notice of Hearing will be issued based on the process in (3) above or as determined by the TLAB; the dates selected by the TLAB are considered peremptory.

5) There is no order about the change or extension of dates of submission of documents and materials specified in the Notice of Hearing; none was requested.

X

S. Gopikrishna
Chair, Toronto Local Appeal Body