

DECISION AND ORDER

Decision Issue Date Wednesday, April 18, 2018

PROCEEDING COMMENCED UNDER section 53, subsection 53(19), section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): ROBERT HISCOX

Applicant: AIRD & BERLIS LLP

Property Address/Description: 64 WOODLAWN AVE W

Committee of Adjustment Case File Number: 17 210745 STE 22 CO, 17 210753 STE 22 MV, 17 210754 STE 22 MV

TLAB Case File Number: **17 270181 S53 22 TLAB, 17 270182 S45 22 TLAB, 17 270183 S45 22 TLAB**

Motion Hearing date: Tuesday, March 27, 2018

DECISION DELIVERED BY D. Lombardi

APPEARANCES

Name	Role	Representative
Aird & Berlis LLP	Applicant	Leo Longo
Constantine Enterprises Inc.	Owner	Leo Longo
Robert Hiscox	Appellant	Leo Longo
City of Toronto	Party	Daniel Elmadany
City of Toronto	Party	Sara Amini
WeirFoulds LLP	Party's Legal Rep.	S. Rouleau

INTRODUCTION

This is a matter scheduled for a Hearing in respect of 64 Woodlawn Avenue West (the “subject property”). On the return date for the Hearing, the City of Toronto (the “City”) had filed a motion requesting an adjournment. Extensive originating and responding motion materials were filed.

BACKGROUND

On November 22, 2017, the Toronto and East York Panel of the Committee of Adjustment (the “Committee”) refused the consent application to sever the subject property into two lots and refused the associated minor variances to construct a new three-storey detached dwelling with a below-grade integral garage, front third-storey terrace and rear ground floor deck on each newly proposed severed lot.

The Applicant appealed the Committee’s decision to the Toronto Local Appeal Body (the “TLAB”) on December 1, 2017, and the TLAB set a Hearing Date, pursuant to Rule 10.1, for March 19, 2018.

The Notice of Hearing issued on December 21, 2017, included the following dates for the required filings:

- Applicant Disclosure as per Rule 11 (form 3) DUE no later than January 5, 2018;
- Notice of Intention to be a Party as per Rule 12 (Form 4) DUE no later than January 10, 2018;
- Notice of Intention to be a Participant as per Rule 13 (Form 4) DUE no later than January 10, 2018;
- Document Disclosure as per Rule 16 DUE no later than January 22, 2018;
- Witness Statement as per Rule 16.4 (Form 12) DUE no later than February 5, 2018;
- Participant Statement as per Rule 16.5 (Form 13) DUE no later than February 5, 2018;
- Expert Witness Statement as per Rule 16.6 (Form 14) DUE no later than February 5, 2018; and
- Notice of Motion as per Rule 17 (Form 7) DUE no later than February 2, 2018.

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In November 2017, the City Solicitor, along with the appropriate City Staff, were directed to attend the TLAB hearing for the appeals. The City also disclosed its intent to oppose the Applicant's appeal respecting the Consent and Variances Decisions, and also its intent to be a Party to the proceedings.

On January 29, 2018, the City served the Parties and Participants with the City's Document Disclosure, acknowledging that its disclosure was one week later than the deadline of January 22, 2018 on the Notice of Hearing. The City stated that it intended to submit a forestry Expert Witness Statement on or before February 5, 2018. It noted that it did not receive any objection to filing its documents one week later than required by the TLAB Rules.

The City recognized that the Appellant and the other parties required the opportunity to respond to the City's documentary evidence and witness statements and, therefore, consented to any changes other Parties may make to their documents and witnesses statements. In this regard, the City proposed a deadline for such filings to be on or before February 12, 2018.

On February 5, 2018, the City filed its Expert Witness Statement's for the City's Forestry Witness with the TLAB and, by email, provided copies of same to the Parties and Participants. The City later confirmed that it had not received an Expert Witness Statement from any party for urban forestry related matters on or before February 12, 2018.

On March 9, 2018, the City received a letter from the Appellant's legal representatives stating that the Appellant/owner (Constantine Enterprises Inc.) intended to file documents and Expert Witness Statements of two new experts (Michael Presutti and Rachael Kowaleski) on March 12, 2018. Subsequently, the subject documents were filed with the TLAB on March 12th and all parties were copied.

The TLAB also received correspondence from counsel representing 14 other Parties, all of whom filed a Notice of Intention (Form 4) to be a Party to the subject proceeding. In that document, counsel indicated that the Parties intended to call the following three expert witnesses with respect to heritage matters related to the subject property: David Winterton, Heritage Architect; Marcus Letourneau, Heritage Planner; and Dr. Carl Bray, Heritage Planner.

The Notice of Intention also indicated that the Parties intended to rely on the documents filed to date with TLAB, together with the documents filed by the Appellant and the City, and further documents to be delivered at the time of their expert statements.

After receiving a request from residents and the local Councillor, on March 6, 2018, Heritage Preservation Services Staff ("HPS") met with the residents and the local Councillor on that date, where Staff were presented with photos of the existing property and renderings prepared and disclosed by a Party to the TLAB hearing, as well as the

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applicant's rendering of the proposal and the original building permit for the property. At that meeting, HPS Staff were also provided with and reviewed the Expert Witness Statement of Dr. Carl Bray, which had previously been filed with the TLAB. After reviewing Dr. Bray's Statement and the information presented at the meeting, HPS agreed with Dr. Bray's findings that the subject property appeared to have potential cultural heritage value.

In its Notice of Motion of March 9, 2018 (Exhibit 2), the City acknowledged that this was the first opportunity it had to consider the heritage value of the subject property as prior to February 28, 2018, it had no history with the property. In fact, it noted that HPS Staff had not reviewed the Committee application, which confirmed that HPS did not have an opportunity to evaluate any aspect of this application before it went before the Committee.

On March 9, 2018, the City filed a Notice of Motion with the TLAB, pursuant to Rule 17.2 (Form 7) requesting the following relief:

- A. To adjourn the hearing date in this matter to a date to be determined by the TLAB, after July 25, 2018, to permit HPS to assess whether the subject property should be listed or designated under the Ontario Heritage Act;
- B. Should the property be determined by City Council and/or HPS to have cultural heritage value or interest, that the City be permitted to enter heritage planning evidence to this TLAB proceeding;
- C. Should the TLAB grant the above-referenced relief, that the TLAB determine appropriate dates for Document Disclosure and a Heritage Planner's Expert Witness Statement after the July 23-25 City Council meeting;
- D. Given the late notice of disclosure by the Appellant, should the TLAB permit the Appellant to file and serve their two (2) new Expert Witness Statements and associated documents, the City be granted relief to file and serve a Reply Witness and/or Reply Expert Witness Statement to respond to any new issue raised;
- E. Should the TLAB grant the requested adjournment, the City requests that the TLAB schedule four (4) consecutive hearing dates given the number of parties, participants and Expert Witnesses involved in this proceeding; and,
- F. That this motion be heard orally on the first day of the Hearing scheduled for March 19, 2018.

The City acknowledged that the Motion was submitted after the Notice of Motion due date of February 2, 2018, as required in the Notice of Hearing. However, the City noted that the Notice of Motion date was prior to the due date for the submission of Witness Statements. The Notice of Hearing required Expert Witness Statements to be

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filed on February 5, 2018 and Dr. Carl Bray's Expert Witness Statement was filed on that date. As HPS was not presented with Dr. Bray's Statement until March 6, 2018, this was the earliest opportunity the City could bring its motion to request an adjournment.

In its Notice of Motion, the City's solicitor, Daniel Elmadany, argued that HPS Staff requires time to conduct an independent analysis under the Ontario Heritage Act to determine whether the subject property should be listed or designated. It argued that if HPS is not granted time to determine whether the subject property should be listed under the City's Heritage Register or designated under Part IV of the Ontario Heritage Act, any final ruling on related appeals before the TLAB would be premature and not in the public interest, and would be contrary to section 51(24)(b) of the Planning Act.

The City's position on the return of the Motion was that if HPS determines the subject property has cultural heritage value, it will recommend that City Council either list the property on the City's Heritage Register or request City Council state its intent to designate, on or by the Toronto City Council meeting scheduled for July 23 to 25, 2018.

It further argued that any prejudice caused by a short adjournment of the hearing to the Appellant is outweighed by the public interest in conserving the potential cultural heritage value or interest of the subject property. The City is of the opinion that it is equally important that the TLAB Panel have the decision of City Council on the subject property's cultural heritage value in order to permit the TLAB to comprehensively assess the proposed development against all relevant provincial and municipal planning policies and to have regard to matters of provincial interest under the Planning Act.

With respect to the issue of forestry expert witness statements, it is the City's position that it is prejudiced by the Appellant's late disclosure. The City notes that the Appellant had been notified of the City's intention to call a forestry expert witness since January 29, 2018, and that it is unfair and prejudicial to the City to disclose witness statements 10 days before the scheduled hearing. The City maintains that granting the City's adjournment request and additional relief would:

- Permit the parties to have a full and fair proceeding;
- Not contribute to any existing or potential harm or prejudice to others;
- Allow all parties and participants to fully participate in the hearing;
- Permit the TLAB to conduct the proceedings in a just, timely and cost-effective manner; and
- Provide the TLAB with the evidence required to make a decision on the merits of the case.

The City relies on the TLAB Rules of Practice and Procedure, specifically Rules 2.2, 2.10, 2.11 a), 4.4, 4.5, 16, 17 and 23 in requesting the relief sought in its Notice of Motion.

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The Appellant, through solicitor Leo Longo, responded to the City's intention to bring a Motion, filing a Response to Motion (Exhibit 6), pursuant to Rule 17.7, dated March 15, 2018. In the Response to Motion, the Responding Party and Owner, Constantine Enterprises Inc., requested the following Order from the TLAB:

- A. Abridging the time, if necessary, for the service and filing of this Notice of Response to Motion;
- B. Abridging the time, if necessary, for the service and filing of the Witness Statements of Michael Presutti and Rachael Kowaleski;
- C. Dismissing the City's Motion for Adjournment; and
- D. For such further and other relief as counsel may request and the TLAB may permit.

The Appellant's materials addressed the grounds in support of their Response to Motion by addressing the City's two issues.

A) Proposed Heritage Investigation & Heritage Policies

The Appellant's solicitor substantiated that the subject property is neither listed nor designated by the City as possessing any cultural heritage value or interest, nor is the property located in an existing or proposed Heritage Conservation District. Therefore, Mr. Longo concludes that it is fair, reasonable and in the public interest that an application/appeal be considered and determined within the policy framework and context at the time of the application/appeal. In this regard, the solicitor submitted as part of the Appellant's Notice of Response to Motion a copy of the OMB Decision, 'Clergy Properties v. City of Mississauga' (December 16, 1996) in support of this proposition.

Mr. Longo argued that it would be prejudicial to the Appellant's rights and interests to delay the TLAB's consideration of the appeal. His position is premised on the notion that the City's adjournment request is unrelated to procedural aspects of the subject appeal and the hearing but rather that it is simply an attempt to create and/or change current circumstances/facts in an effort to strengthen the merits of its case. Further, Mr. Longo states that Section 30 of the Ontario Heritage Act, R.S.O. 1990, c. 0.18, as amended, provides for the potential protection of any alleged matters of cultural heritage value or interest.

B) Appellant's Arborist/Landscape Architect Witness Statements

Mr. Longo established that the Appellant was not aware of the City's intention to call an urban forestry expert witness until January 29, 2018 and was unaware of the City's urban forestry issues until receipt of their Expert Witness Statement on February 5, 2018. As a result, the Appellant and its consultants reached out to a select group of

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arborists and landscape architects, many of whom were unavailable on the hearing date and/or were unable to produce the necessary reports/plans within a short time frame.

The Appellant was eventually able to retain two forestry expert witnesses, Michael Presutti, landscape architect at MEP Design Inc., and Rachael Kowaleski, arborist at Cohen and Master Tree and Shrub Ltd., and provided the City with their Expert Witness Statements on March 12, 2018. Given these circumstances, Mr. Longo maintains that it is fair, just, reasonable and in the public interest that the Appellant be permitted to respond to matters that have been raised related to existing trees on or near the subject property, and to address the current and proposed landscaping of the property.

Further, Mr. Longo notes that the City's witness, Lisa Carson, would be able to address and respond to the witness statements that the Appellant has already submitted. Mr. Longo contends that the City is not prejudiced by these witness statements being filed and being considered by the TLAB.

The Appellant relies on the Toronto Local Appeal Body Rules of Practice and Procedure, Rules 2.2, 2.3, 2.5, 2.9, 2.10, 2.11 a), 4.4, 16, 17 and 23.

Rescheduled Hearing Date

This matter was scheduled to be heard on March 19, 2018. On the return date for the Hearing, the Member assigned was unavailable and the TLAB Chair, Ian Lord, heard the matter.

At the outset of the sitting on March 19th, counsel, consisting of Ms. Amini and Mssrs. Longo, Engell and Elmadany, requested a Chambers discussion on a matter of recusal and scheduling. Due to the Chair's previous association with a law firm represented at the proceeding, counsel as a courtesy agreed that in the circumstances it would be appropriate to stand the matters of the motion and the hearing down to revised dates.

The Parties were provided with a roster of suggested dates to reconvene for the Motion and the rescheduling of the Hearing Date. The Appellant's counsel urged that the matter be dealt with as expeditiously as possible.

As a result, the following Decision and Order was issued by the Panel Chair on March 26, 2018:

- The City Motion is rescheduled on consent of the parties to be heard to March 27, 2018;
- The Hearing Date is rescheduled on consent of the parties to be heard: July 10, 11 and 12, 2018 at 9:00 am and at a location to be determined;

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- Despite the rescheduled Hearing Date, the dates of June 4, 5 and 6, 2018, are being held as a possible earlier Hearing Date. The Member sitting on the Motion on March 27, 2018 will canvass those present whether any changed circumstances exist that would permit the hearing of the matter to proceed on the earlier Hearing date.
- No change was requested and no other alterations are made to the Notice of Hearing originally issued on this matter; and
- A Notice advising as to the revised dates and hearing location is to be sent to counsel and posted on the TLAB website.

On March 26, 2018, one day before the rescheduled Motion hearing, The City submitted an Affidavit (Exhibit 1) to the TLAB from Adrienne de Backer, a City Solicitor, providing further information regarding possible heritage matters impacting the subject property. In the Affidavit, Ms. de Backer confirmed that on March 22, 2018, the Toronto Preservation Board considered Item PB32.11, the “*Intention to Designated under Part IV, Section 29 of the Ontario Heritage Act – 64 Woodlawn Avenue West.*” The recommendations, Attachment 1 to her Affidavit, were adopted by the Toronto Preservation Board and will be considered by Toronto City Council at its meeting of March 26, 27 and 28, 2018.

The City also advised that on March 23, 2018, Leo Longo, on behalf of Constantine Enterprises Inc., the owner of the subject property and the Responding Party, wrote to City Council requesting the deferral of consideration of Item PB32.11 until April 24, 2018, the next City Council meeting. This deferral was requested in order to allow the Appellant/Owner and its consultants time to sufficiently review the report by Heritage Preservation Services Staff (dated March 2, 2018), and to provide an appropriate response to Staff’s recommendations.

At the Motion Hearing on March 27, 2018, the City advised the TLAB Panel member and the parties in attendance that City Council had yet to make a determination on Item PB32.11.

MATTERS IN ISSUE

The matters in issue are listed below in the same alphabetical order in which they are identified in the Introduction and Background sections. They are further separated by relief sought by the Moving Party and the Responding Party.

Relief Sought by the Moving Party As Originally Framed

- A. To adjourn the hearing date in this matter to a date to be determined by the TLAB, after July 25, 2018, to permit Heritage Preservation Services (the “HPS”)

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- to assess whether the property, municipally known as 64 Woodlawn Avenue West, should be listed or designated under the Ontario Heritage Act;
- B. Should the property be determined by City Council and/or Heritage Preservation Services to have cultural heritage value or interest, that the City be permitted to enter heritage planning evidence to this TLAB proceeding;
 - C. Should the TLAB grant the above-referenced relief, that the TLAB determine appropriate dates for Document Disclosure and a Heritage Planner's Expert Witness Statement after the July 23-25 City Council meeting;
 - D. Given the late notice of disclosure by the Appellant, should the TLAB permit the Appellant to file and serve their two (2) new Expert Witness Statements and associated documents, the City be granted relief to file and serve a Reply Witness and/or Reply Expert Witness Statement to respond to any new issue raised;
 - E. Should the TLAB grant the requested adjournment, the City requests that the TLAB schedule four (4) consecutive hearing dates given the number of parties, participants and Expert Witnesses involved in this proceeding; and,
 - F. That this motion be heard orally on the first day of the Hearing scheduled for March 19, 2018.

Relief Sought by the Responding Party

- A. Abridging the time, if necessary, for the service and filing of this Notice of Response to Motion;
- B. Abridging the time, if necessary, for the service and filing of the Witness Statements of Michael Presutti and Rachael Kowaleski;
- C. Dismissing the City's Motion for Adjournment; and
- D. For such further and other relief as counsel may request and the TLAB may permit.

The various requests listed above may be combined and collapsed into the following questions:

- I. Can the TLAB hearing originally scheduled for March 19, 2018 and subsequently rescheduled for March 27, 2018, be adjourned to a date after July 25, 2018, to permit Heritage Preservation Services an opportunity to assess whether the subject property should be listed or designated under the Ontario Heritage Act?

- II. Can the City enter heritage planning evidence to the TLAB proceeding related to the subject property should City Council and/or Heritage Preservation Services determine that the property has cultural heritage value or interest?
- III. Can the TLAB provide appropriate dates for Document Disclosure and a Heritage Planner's Expert Witness Statement after the July 23-25, 2018 City Council meeting should the requested relief be granted by the TLAB?
- IV. Can the Appellant file and serve their two new Expert Witness Statements and associated documents from M. Presutti and R. Kowaleski respectively?
- V. Can the City file and serve a Reply Witness and/or Reply Expert Witness statement to respond to any new issues raised?
- VI. Can the City's Motion of Adjournment be dismissed as requested by the Appellant in the Notice of Response to Motion?

JURISDICTION

To make rulings on Questions I – VI above, the relevant sections from the TLAB's Rules of Practice and Procedure are referenced in the following section. Appellants and Respondents have referenced some Rules in their submissions while other Rules are referenced because they have been utilized and applied by me in the Analysis, Evidence and Decision Sections.

Under Rules 2.2 and 2.10, the TLAB may grant all necessary exceptions to the Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters in a just, expeditious and cost-effective manner. Pursuant to Rule 2.11, the TLAB may grant all necessary relief, including amending or granting relief from any procedural order on such conditions as the TLAB considers appropriate, and may adjourn the Proceeding until the TLAB is satisfied that there is compliance.

In addition, under Rule 4.4, the TLAB may extend or reduce the time limits provided by the Rules, and under Rule 23.4, the TLAB may, among other options, grant or deny a Motion for Adjournment.

Matters Not Dealt With by the Rules

Section 2.5

Where procedures are not provided for in these Rules the Local Appeal Body may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner.

It is important to note, both the Provincial Policy Statement (“PPS”) and the Growth Plan speak to heritage related matters and the *Planning Act* itself lists ‘heritage’ as a matter of provincial interest to which consistency, conformity and consideration must be given. While the TLAB has no jurisdiction under the *Ontario Heritage Act.*, the subject matter of heritage is a consideration of relevance under the Act, provincial policy, and the City’s Official Plan on both the consent and variance applications.

EVIDENCE

On March 27, 2018, the return date of the rescheduled March 19, 2018 Notice of Motion to Adjourn Hearing, the TLAB heard from the City, the Appellant’s counsel, and the legal representative of the other Parties, Mr. S. Rouleau of the law firm, WeirFoulds LLP. Mr. Rouleau was substituting for Mr. Engell, who could not attend.

At the outset of the Hearing, counsel for both the City and the Appellant submitted documentation in the form of Books of Authorities containing Case Law for reference purposes. In arguing their positions on the matters before this Body, both counsel for the City and for the Appellant stated their intentions to cite the cases submitted in those documents.

The evidence in this matter can be addressed through two specific lenses: urban forestry/landscape matters and heritage issues.

Urban Forestry Document Submission and Expert Witness Statements

The Affidavit of Stephanie Moutsatsos (Exhibit 4), Student-at-Law in the City Solicitor’s Office, indicated that on January 29, 2018, the City served the Parties and Participant’s with the City’s Document Disclosure. The City acknowledged its disclosure was one week later than the TLAB deadline on the Notice of Hearing, which was January 22, 2018. The City stated that it intended to submit a forestry Expert Witness Statement on or by February 5, 2018, and stated that it would not object to a party who wished to submit a forestry witness statement a week later, on or before February 12, 2018. Further, Ms. Moutsatsos noted that the City did not receive any objection to filing document disclosure one week later than required.

On February 5, 2018, the City filed its Expert Witness Statement for the City’s Forestry Witness and the Affiant acknowledged that the City did not receive an Expert Witness Statements from any party related to urban forestry related matters on or before February 12, 2018.

On March 9, 2018, the City received a letter (attached as Exhibit “C” to Exhibit 4) from the Appellant’s counsel, Mr. Longo, indicating that the Appellant intended to file

documents and the Expert Witness Statements of their two experts on March 12, 2018. In that letter, Mr. Longo, stated that after reviewing the documents and witness statements filed by the parties, the Appellant determined it was necessary to retain an arborist and landscape architect to respond to issues raised by the City. Consequently, the Appellant retained the services of Michael Presutti and Rachael Kowlaleski.

Further, Mr. Longo noted that since becoming aware of the City's issues in its Expert Witness Statement filed with TLAB on February 5, 2018, the Appellant had been actively coordinating the retainer of both an arborist and landscape architect in order to respond to the issues. Mr. Longo stressed that the process of retaining experts, undertaking several site visits and preparing supporting documents required a significant amount of time. He confirmed that submission of materials would occur *"in as timely a manner as is possible with sufficient time for other parties to review."*

It's the City's position in its Notice of Motion (Exhibit 2) that it is prejudiced by the late disclosure of expert witness statements by the Appellant. The City argues that the Appellant had been notified of the City's intention to bring a forestry expert witness as of January 29, 2018, and it deems the intent by the Appellant to disclose witness statements 10 days before the scheduled hearing is unfair and prejudicial to the City.

The City noted that the Appellant has also had the opportunity to review the City's forestry witness statement before submitting any forestry evidence. As a result, the City requires additional time for its expert, Lisa Carson, to conduct a proper review and has requested in its Motion that the City be given the opportunity to submit reply evidence to respond to any new issues raised by the Appellant, if necessary.

Mr. Elmadany argued that there is no TLAB Rule that permits a party to unilaterally file a reply Witness statement without permission from the TLAB and the consent of the parties to the proceeding, neither of which the City notes has been sought. The City emphasized that no motion was presented by the Appellant to the TLAB requesting this relief, and contends that while the TLAB has the power to grant a party such relief under its Rules, the Rules must be exercised as to not prejudice the City and any parties to this proceeding.

In response, Mr. Longo maintains that the Appellant did request relief to file its forestry Expert Witness Statements, noting that the request is found in the Appellant's Notice of Response (Form 8), dated March 15, 2018. In that document, the request for relief is noted in Attachment "A", point i) and ii). Specifically, in point ii), the Appellant requests an Order from the TLAB, "abridging the time, if necessary, for the service and filing of the Witness Statements of Mr. Presutti and Ms. Kowaleski.

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Mr. Longo referred to the Affidavit (Exhibit 5) of Ms. Jinny Tran, a Land Use Planner employed by the Appellant, to support the relief being sought to allow the two experts materials noted above. The Affiant stated that Appellant was not aware of the City's intention to call a forestry expert witness until January 29, 2018, and was not aware of the City's urban forestry issues until receipt of the City's expert witness statement on February 5, 2018.

To further support this position, Mr. Longo cited directly from Ms. Tran's affidavit noting for the TLAB Member that the City's Forestry Staff comments provided to the Committee did not oppose the subject consent and minor variance applications, and simply provided standard conditions in the event that the Committee decided to approved the requested variances/consents.

Mr. Longo argued that there is no prejudice in allowing the Appellant's two expert witness statements to be received by the TLAB and allowing the City and parties to respond accordingly. He confirmed that the Appellant consents to allowing the City and parties to file materials in response.

However, Mr. Longo is requesting that the timeline for the City and other parties to respond to their arborist and landscape architect expert witness statements be compressed. In addition, he is also proposing that the TLAB provide a fixed date for disclosure and the filing of expert witness statements in response, and that these dates be separated from the April 24-26 City Council meeting cycle when City Council potentially may be addressing the subject property's heritage designation.

Heritage

The affidavit of Mary McDonald, Senior Manager, Heritage Preservation Services (Exhibit 3), indicated that the subject property was not included in the City's Heritage Register, and that Heritage Preservation Services did not review the Committee of Adjustment application for the subject property.

As recited above, on February 23, 2018, residents and the local Councillor requested a meeting with Heritage Preservation Services regarding the subject property and on March 6, 2018, HPS was presented with, among other items, photos and renderings of the existing dwelling prepared and disclosed by one of the parties to the TLAB hearing. Heritage Preservation Services also reviewed the Expert Witness statement of Dr. Carl Bray, attached to Ms. MacDonald's Affidavit as Exhibit "F", and filed with the TLAB.

Dr. Bray's Expert Witness Statement attests that the subject property was evaluated using the Ontario Regulations 9/06: Criteria for Determining Cultural Heritage

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Value or Interest under the Ontario Heritage Act, R.S.O. 1990, c.0.18 and that, in his opinion, this property has a potential cultural heritage value. In her Affidavit, Ms. MacDonald confirmed that HPS agreed with this finding.

he City also argued that since the Expert Witness Statement of Dr. Bray was filed on February 5, 2018, the Appellant should not be surprised that heritage matters were going to be raised as they relate to the subject property..

At the March 26, 2018 Notice of Motion Hearing, the City argued that HPS requires time to determine whether the subject property is a property of cultural heritage value or interest that should be listed under the City's Heritage Register or designated under Part IV of the Ontario Heritage Act. Further, if HPS is not granted time to make this determination, then any final ruling on the related appeals before the TLAB would be premature and not in the public interest.

The City contends that it would not be appropriate for the TLAB to render a decision at this juncture because of the following propositions:

- It would be contrary to section 51(24)(b) of the Planning Act.
- It could not be determined whether the proposed development has appropriate regard for matters of provincial interest, as set out in Section 2 of the Planning Act; or
- It could not be determined whether the development conforms to the City of Toronto Official Plan Policy 4.1.5(h), which states that development in established neighbourhoods will respect and reinforce the existing physical character of the neighbourhood including in particular "conservation of heritage buildings, structures and landscapes."

Ms. MacDonald indicated that if HPS determines the property to have cultural heritage value or interest, a recommendation to Toronto City Council would be made to either list the property or for City Council to state its intent to designate the property on or by the City Council meeting scheduled for July 23 to 25, 2018.

At the March 26, 2018 Notice of Motion Hearing, the City referenced the Affidavit of Adrienne de Backer (Exhibit 1), a solicitor for the City of Toronto, and noted that the City had expedited the timeline for addressing the heritage matter relating to the subject property. The City confirmed that the Toronto Preservation Board (the "TPB") considered Item PB32.11, "*Intention to Designation under Part IV, Section 29 of the Ontario Heritage Act – 64 Woodlawn Avenue West*" (Exhibit "A"), and that the

recommendations were adopted by the TPB. This Item was to be considered by Toronto City Council on its meeting of March 26, 27 and 28, 20018.

Again, as above recited, Mr. Longo, on behalf of the owner of 64 Woodlawn Avenue West, Constantine Enterprises Inc., wrote to Toronto City Council on March 23, 2018, requesting deferral of the consideration of Item PB 32.11 until April 24, 2018, the next City Council meeting cycle (Exhibit "B"). The City noted that Toronto City Council had yet to make a determination on the Item.

In its Notice of Response to Motion (Exhibit 6), in Attachment "A", under the heading "The Grounds in Support of This Response to Motion," Point (a) – Proposed Heritage Investigation & Heritage Policies, the Appellant's counsel provided the following arguments related to heritage:

1. At present, the subject lands are neither listed nor designated by the city as possessing any cultural heritage value or interest; nor are the lands located in an existing or proposed Heritage Conservation District.
2. It is fair, just, reasonable and in the public interest that an application/appeal be considered and determined within the policy framework and context in existence at the time of the application...the "Clergy" principle.
3. Further, it would be prejudicial to the Appellant's rights and interests to delay the TLAB's consideration of this appeal.
4. The City's interests will not be prejudiced by the TLAB dismissing the City's Motion for Adjournment.
5. Section 30 of the Ontario Heritage Act, R.S.O, 1990, c. 0.18, as amended, provides for the potential protection of any alleged matters of cultural heritage value or interest.
6. This aspect of the City's adjournment request is unrelated to procedural aspects of this appeal and the hearing. Rather, the City is simply attempting to create and/or change current circumstances in an effort to strengthen the merits of its case.

"Clergy" Principle

In point #2 above, Mr. Longo makes a specific reference to the "Clergy" principle, and has filed with the TLAB a copy of the Ontario Municipal Board Decision (the "OMB") – Clergy Properties Ltd. v. City of Mississauga - 34 O.M.B.R. – (Page 277) (1996) in this regard. This citation forms the basis for his arguments debating the question of heritage

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value or interest matter related to the subject property and it supports the Appellant's chief request that the TLAB dismiss the City's Motion for Adjournment.

For the purposes of brevity, I believe that the basis of the 1996 OMB Clergy Decision can be very simply encapsulated using the Board's own words found on pg. 280 of the above referenced Decision (paragraph #2), where the Board Member writes:

"The Board, in determining the policy framework under which an application should be examined, has consistently stated that an application must be tested against the policy documents in place at the date of the application. It has done so in order to lend some certainty to the land use planning process, and to ensure that fairness to all parties prevails."

In referencing this paragraph, Mr. Longo opined that the Clergy Decision speaks both to the integrity of the planning process as well as the integrity of the adjudication process related to it. He further references pg. 283 (Paragraph e)) in the same Decision, suggesting that Clergy speaks to natural justice and fairness, and that one (an application and appeal) can be judged in accordance with the policy framework in effect at the time of the application.

These references are central to the Appellant's arguments in support of their Response to Motion. As the Appellant correctly recognizes the subject property is not currently listed or designated as having heritage value or interest and is not in a proposed or existing Heritage Conservation District. As a result, it is Mr. Longo's position that it would be fair, just, reasonable and in the public interest that their application and appeal be considered and determined within the policy framework and context in existence at the time that both were submitted.

An additional citation introduced and referenced by Mr. Longo at the Notice of Motion Hearing, and contained in his submission document (Brief of Authorities), is OMB Decision Case # PL060707, *Sun Life Assurance Company of Canada v. City of Burlington, Nov. 29, 2007* (Tab 2). In that Decision, Mr. Longo referred to pg. 10, (paragraph 3), noting that:

"The Board in determining the policy framework under which an application should be examined has consistently stated that an application must be tested against the policy document in place at the date of the application. It has done so in order to lend some certainty to the land use planning process."

Further, Mr. Longo referenced Pg. 11 (Paragraph 1), concluding that in this Decision the Divisional Court upheld the Clergy principle. He attempted to summarize the Board's opinion by suggesting that it was within the Board's jurisdiction to determine

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the scope of issues before it, the procedures to be followed and the appropriate policy choices to be applied to arrive at a decision.

Finally, Mr. Longo also highlighted the last paragraph on Page 11, where the Board Member wrote:

“Both private parties and representatives of the public interest are entitled to understand the “rules of the game” from the outset. This Board’s authority to set its own procedures does not permit it to allow one party to change these rules in mid-application.”

He also noted the last Paragraph on Pg. 12,

“The Board will consider this application in light of the Provincial, Regional and City policies in force at the time of the application was made.”

Mr. Longo concluded his submission by suggesting that the City’s intention to designate the subject property would actually trigger the introduction of the very policies that would change the rules of the game that all of the cases cited say are offensive for reasons of natural justice and procedural fairness. He stated that the Appellant was not suggesting that the City has no rights to designate the subject property, noting that the Ontario Heritage Act allows for this. Instead, Mr. Longo was questioning whether this application and appeal should be judged against a designation that would apply after the fact that changes the rules of the game and the policy framework.

In response, the City’s solicitor, Mr. Elmadany, provided a differing conclusion, summarizing the City’s position at this proceeding with the following opinion:

1. The “Clergy” principle does not apply to potential heritage designations;
2. The TLAB must have regard to heritage matters pursuant to Sections 2 and 51(24) a) of the Planning Act;
3. As a planning matter, all TLAB decisions must be consistent with the Provincial Policy Statement (the “PPS”) and the Growth Plan (2017); and
4. Consents must conform to the City’s Official Plan Policies, specifically policies 3.1.5 and 4.1.5 h).

Each of these points was addressed in the following by manner by Mr. Elmadany, using references to the Case Law submitted within the City Book of Authorities, dated March 27, 2018.

First, the City contends that the “Clergy” principle as cited by the Appellant’s counsel does not apply to a potential heritage designation of the subject property, because it applies to situations where a policy change has occurred and even then there are several considerations regarding what weight that evidence is given. In their opinion, a heritage designation or potential designation is not a policy decision but rather an authority pursuant to a statute, specifically the Ontario Heritage Act.

Mr. Elmadany argued that there has been no change to the Planning Act that has implications for this matter, no changes to the Provincial Policy Statement or the Growth Plan, the City’s Official Plan Heritage policies, the Ontario Heritage Act, or changes in consideration of heritage matters at TLAB proceedings. To suggest, as the Appellant has done, that once a development application is submitted heritage preservation considerations cannot occur runs afoul of the principles of applicable legislation and approved policy, and is contrary to how heritage has been addressed within the Province or more so in the City.

In support of this position, the City cited the following Ontario Municipal Board Decisions, highlighting specific sections of each Decision in addressing Points 2, 3 and 4 above in support of the relief requested in their Notice of Motion.

A) OMB Decision File # PL151047 - 9218 Yonge Street Inc. v. Richmond Hill (Town), dated March 14, 2017, (Tab1 of their Book of Authorities).

This Decision is introduced to provide a helpful summary of the “Clergy” principle as well as issues of jurisdiction and fairness in the planning process. That Decision deals directly with Section 2 of the Planning Act and suggests that this Section of the Act codifies what the Board’s jurisprudence had already factored in to the application of the Clergy principle as it concerns the evolution of policy.

Mr. Elmadany specifically references Paragraph 21 in that Decision, where the Board Member writes:

“The Clergy principle is not a law or an inviolate rule but rather a practice meant to promote fairness in the planning process. Even so, there are occasions where fairness conflicts with other values that may be of equal or in some cases much greater importance to the planning process, and while abandoning fair practice may result in some prejudice to one party, this must be weighed in the balance against the other values that are at stake.”

Further, the Board Member writes:

“Its (“Clergy” principle) application is to policy and is not rigid and should make the Board blind to information that would assist in determining the merits of the application.”

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Mr. Elmadany argues that this Decision inherently recognizes that the OMB, and by transference tribunals such as the TLAB, understands it has the jurisdiction and the scope to determine the appropriate policy choices to make and to be applied to arrive at sound planning decisions. In the City's opinion, a heritage designation is not a policy decision.

B) OMB Decision Toronto College Street Centre Ltd. v. Corporation of the City of Toronto et al., dated Sept. 30, 1986 (Tab 2).

This Decision is referenced by the City in response to the Appellant's argument that it would be prejudicial to their rights and interests to delay the TLAB's consideration of their appeal because of a potential heritage matter.

In this case, the City contends that the Ontario Court of Appeal recognized the intended purpose of the Ontario Heritage Act and heritage preservation generally. In brief, the Ontario Heritage Act conserves, protects and preserves the heritage of Ontario.

However, Mr. Elmadany noted that in this Decision:, the Board also recognized that:

“the Supreme Court of Canada accepted the position that the provisions of the Ontario Heritage Act allowing municipalities interference with private property rights should be construed purposely and liberally in order to allow municipalities to effectively preserve Ontario's heritage. On the other hand, the Court recognizes that there was a counterbalancing need to give equally liberal construction to those provisions of the Ontario Heritage Act that were designed to protect the landowner's rights.” (Paragraph 4, Pg. 7).

This Decision recognized that:

“To achieve its aims the Ontario Heritage Act must interfere with private property rights. To counterbalance such interference, numerous procedural safeguards are enacted for the benefit of the property owner.” (Pg. 7, Last paragraph).

The City submitted that just as with the OMB, the TLAB has a responsibility to have regard for matters related to provincial interest including the conservation of significant architectural, cultural and heritage interests pursuant to Section 2 d) of the Planning Act. Further, under Part IV of the Ontario Heritage Act, the Province has made the municipality responsible for listing of properties of cultural heritage value

C) OMB Decision File #PL000430 – Tucker v. Municipality of Chatham-Kent, dated July 18, 2000 (Tab 3).

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In this Decision, the City points to Paragraph 14, Page 3 of the Decision and the Panel Member's position that in the absence of a determination the Board is forced to make the decision on whether to identify a property of having significant architectural value.

In the relevant section, the Board Member writes:

"For Planning Act purposes, I think the decision-maker has to do the identification. The Committee of adjustment, council and the Ontario Municipal Board shall have regard to matters of provincial interest "in carrying out their responsibilities" under the Act. One such interest is the conservation of significant architectural historical features (Planning Act, R.S.O 1990, c. P.13, s. 2(d). Thus if this question arose before the Committee, it should do the identification. Since I now have responsibility under the Act, I have to make the decision as to whether to identify."

The Appellant contends that the City's request is unrelated to procedural aspects of this appeal. However, the City counters with the argument that the Appellant is confusing their rights as a property owner with a privilege that is provided a consent and minor variance of the zoning by-law.

D) TLAB Case File # 17 221749, 17 221752, and 17 221753 for 1755-1757 Bayview Avenue, January 10, 2018, and February 1, 2018, respectively.

The City cited these recent TLAB decisions arguing that the TLAB had indeed recognized the importance of heritage issues in rendering decisions. Mr. Elmadany opined that in light of the two specific TLAB decisions identified, the TLAB must recognize that if the City's Notice of Motion now before the Body is denied then the TLAB may not be able to adjudicate the matter of heritage preservation in a just, expeditious and cost-effective manner in accordance with the TLAB Rules.

Specifically, the City solicitor noted the previous TLAB Panel Member's position as it related to matters of provincial interest and Official Plan policies. In her Decision, Panel Member McPherson wrote that:

"It is recognized that there could be heritage evidence relevant to the issue of the planning merits of the proposal and the appeals before the TLAB. These would include matters related to the PPS and the Official Plan based on the current status of the subject site."

In addition, Panel Member McPherson continued by concluding that:

"It is noted that the onus is on the Applicant/Appellant to provide evidence to support the proposed variances and consent requests."

ANALYSIS, FINDINGS, REASONS

To begin, it is useful to again list the questions defined previously in this Decision (under the heading Evidence).and discuss the order in which they can be answered before responding to them on the basis of the evidence presented

- I. *Can the TLAB hearing originally scheduled for March 19, 2018 and subsequently rescheduled for March 27, 2018, be adjourned to a date after July 25, 2019, to permit Heritage Preservation Services an opportunity to assess whether the subject property should be listed or designated under the Ontario Heritage Act?*
- II. *Can the City enter heritage planning evidence to the TLAB proceeding related to the subject property should City Council and/or Heritage Preservation Services determine that the property has cultural heritage value or interest?*
- III. *Can the TLAB provide appropriate dates for Document Disclosure and a Heritage Planner's Expert Witness Statement after the July 23-25, 2018 City Council meeting should the requested relief be granted by the TLAB?*
- IV. *Can the Appellant file and serve their two new Expert Witness Statements and associated documents from M. Presutti and R. Kowaleski respectively?*
- V. *Can the City file and serve a Reply Witness and/or Reply Expert Witness statement to respond to any new issues raised?*
- VI. *Can the City's Motion of Adjournment be dismissed as requested by the Appellant in their Notice of Response to Motion?*

It would be appropriate to begin with a response to Question's I, II, and VI above since these three questions deal with the main focus of the City's Motion and the Appellant's Response to Motion. These questions correlate to points 1.a) and b) in the City's Notice of Motion, and to Item iv) of Attachment "A" in the Appellant's Notice of Response to Motion, respectively.

The TLAB agrees that there may be important policy and procedural matters on which the City can contribute in assisting the TLAB in undertaking its mandate. I am concerned that if the City's request to adjourn this matter in order to allow time for City Council to state its intentions to designate the subject property under Part IV, Section 29 of the Ontario Heritage Act is denied, the TLAB may not be able to effectively and completely adjudicate the matter in a just manner. This must be balanced with TLAB's responsibility to adjudicate the matter in an expeditious and cost-effective manner and without undue prejudice to persons appearing before it.

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The City's motion indicates its request would enable the TLAB to adjudicate the issue of heritage preservation in a just, expeditious and cost effective manner, in accordance with the TLAB rules. The matters for consideration are the severance and variance appeals and the statutory tests applicable thereto. It is recognized that there could be heritage evidence relevant to the issue of the planning merits of the proposal and the appeals before the TLAB. These would include matters related to the Provincial Policy Statement and the Official Plan based on the current status of the subject property.

Not to consider heritage, which has public interest implications, would go to the issue of procedural fairness and is discussed in the citations raised by the City. Heritage is an important matter to the planning process and is identified through various documents both at the provincial level as well as the City of Toronto. The protection of potential heritage attributes is reference in the Provincial Policy Statement, which requires tribunals such as TLAB to consider heritage matters specifically when it comes to consents and when issuing decisions under the Planning Act that are required to be consistent with the PPS and Growth Plan.

It is noted that the onus is on the Appellant/ Applicant to provide evidence to support the proposed variances and consent request. Although the Appellant is correct in noting that the subject property is neither listed nor designated by the City as possessing any cultural heritage value or interest, there are properties on Woodlawn Avenue West that are designated and listed. Although none of the heritage properties on the vicinity of 64 Woodlawn Avenue west are "adjacent conditions", Dr. Bray's Expert Witness Statement, identifies the possibility of the subject property's heritage value. That should have alerted the Appellant that parties could raise this as an issue at the TLAB hearing and should not necessarily come as a surprise to the Appellant.

As to the consideration of the "*Clergy*" principle, I concur with the City's position, supported by authorities, that this principle does not apply to a potential heritage designation or heritage designation. A heritage designation is not, in my view, a policy decision and a change in policy direction. A designation or potential designation is an authority and decision made pursuant to a statute, specifically the Ontario Heritage Act.

With respect to an adjournment of this matter to allow heritage matters to be addressed, the Appellant contends that the City's request is unrelated to procedural aspects of this hearing. I conclude that the Appellant confuses their rights as a property owner with a question of procedural fairness. I disagree with the Appellant's argument that their rights as a property owner are being infringed upon. The *Ontario Heritage Act* provides for the right of a property owner to seek review of a designation should City

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Council make a determination to designate a property (s. 29 (5) of the *Ontario Heritage Act*).

Based on the above, and after a fulsome consideration of the arguments articulated both by the City and the Appellant, I conclude that it would be desirable for the TLAB to hear all relevant evidence in order to make the best decision possible. It would be in the public interest to do so. It is emphasized that this decision is based on the understanding that the TLAB has only the jurisdiction afforded to it under the Planning Act; it will not embark upon an assessment of the merits of a potential future heritage designation of the subject property as that is the subject matter of a separate statute and process..

The next question to be answered is Questions III above regarding the appropriate dates for document disclosure and the submission of a Heritage Planner's Expert Witness Statement after the July 23-25, 2018 City Council meeting. This question correlates to point 1.c) in the City's Notice of Motion.

Given the more recent information contained in Ms. de Backer's Affidavit (Exhibit 1) advising of Toronto City Council's consideration of the Toronto Preservation Board's recommendation to include the subject property on the City of Toronto Heritage Register and state Council's intention to designate (Item PB.11) at its Council meeting of March 26-28, 2018, the City has requested that any deadline for document disclosure, expert heritage witness statements and Notice of Motion occur after May 28, 2018.

The Appellant has requested an alternate and more aggressive timeline, proposing two separate dates depending on when City Council deals with the heritage designation issue for this property. The first proposes that if City Council adopts the Toronto Preservation Board's recommendations and declares its intentions to designate the subject property in the March City Council cycle, then document disclosure and expert witness statements can occur before the May 28, 2018 date requested by the City.

The Appellant has further requested that TLAB direct the City to make disclosure three weeks after the TLAB Decision and Order is issued for this proceeding and that the Appellant have a further two weeks to respond with further disclosure. Alternatively, if City Council deals with the heritage matter at its April 2018 Council meeting, then the Appellant is requesting that the TLAB approve the same timeframe as above.

Given my consideration of the requests above, I will allow the Appellant's Request with respect to timelines for document disclosure, expert witness statements, and Notice of Motion. Providing relief from the Rules to allow inclusive Witness

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Statements and Document Disclosure has been demonstrated in the decisions written by my esteemed colleagues on the TLAB based on Sections 2.2 and 2.3 of the Rules.

Question IV), namely, Can the Appellant file and serve their two new Expert Witness Statements and associated documents from M, Presutti and R. Kowaleski, respectively? may now be considered. Mr. Longo's position on this matter is clear and facile: there is no prejudice in allowing the evidence of the Appellant's two expert witnesses as outlined in their Expert Witness Statements to be received by the TLAB and allowing the City and the other parties to respond accordingly.

This Panel Member concurs with the City that the Appellant has had the opportunity to review the City's forestry witness statement before submitting any forestry evidence. However, I also agree with the Appellant that the City does not require the same length of time to provide a response to the Appellant's forestry expert witnesses as is being requested re the heritage matters. The City's witness, Lisa Carson, will be able to address and respond to the witness statements of Mr. Presutti and Ms. Kowaleski and the City will not be prejudiced by these witness statements being filed and considered by this Body.

Lastly, this leads to Question V: Can the City file and serve a Reply Witness and/or Reply Expert Witness Statements to respond to any new issues raised by the Appellant's witnesses? In their Notice of Motion, the City is requesting that it be given the opportunity to submit reply evidence to respond to any new issues raised by the Appellant, if necessary. This issue has already been addressed in this Decision.

In support of this, Counsel for the other parties in this proceeding confirmed that they fully consent and support the requested relief being sought by the City, and request that if the Appellant's forestry expert witness statements are filed with the TLAB that the parties be afforded the opportunity to reply with responding material through an additional witness statements by their expert. This request is supported by this Panel Member, provided timeliness applies

DECISION AND ORDER

The decisions communicated in the Analysis, Findings and Reasons section are summarized below:

- The Motions and cross-motions are allowed as set out herein. All materials filed are on the Motion and responses thereto form part of the TLAB file for proof and reference at the Hearing of these matters.

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- The City will be permitted to enter heritage planning evidence to this TLAB proceeding in the event only that should the property at 64 Woodlawn Avenue be determined by Toronto City Council to have cultural heritage value or interest.
- The service and filing of the Appellant's Notice of Response to Motion dated March 15, 2018 is abridged and the Expert Witness Statements of Michael Presutti and Rachael Kowaleski are allowed and accepted into evidence.
- The City and other Parties are granted relief to file and serve a Reply Witness and/or Reply Expert Witness Statement to respond to any new issues raised by the Appellant's two new Expert Witness Statements, above, and associated documents.
- The City shall deliver document disclosure and any supporting witness statements by no later than May 8, 2018. The Appellant and all other Parties shall deliver reply documentary disclosure and expert witness statements, if any, no later than May 22, 2018.
- A rescheduled Hearing will commence and be held, as required, on July 10, 11, 12, 2018 at 9:00 am and at a location to be determined. Due to the unavailability of parties and witnesses, the previously held possible earlier dates of June 4, 5 and 6, 2018 are released.
- The TLAB Staff will issue a Notice of Hearing advising as to the revised dates and hearing location to communicate the foregoing and will post it on the TLAB website.
- Due to the scope of the matters being dealt with, TLAB Staff shall canvass all parties to secure two additional hearing dates as requested, in addition to those noted above, if necessary.

The TLAB Hearing in this matter will not expect to hear evidence challenging or supporting the merits or otherwise of the heritage designation process or decisions, whether or not it advances through City Council or the Toronto Heritage Board.

X 

Dino Lombardi
Panel Chair, Toronto Local Appeal Body