



October 26, 2018

Toronto Local Appeal Body
40 Orchard View Boulevard, Suite 211
Toronto, Ontario, M4B 1R9
Via email: tlab@toronto.ca

RE: Feedback on Revised TLAB Rules of Practice and Procedure:

Dear Chair and Members of TLAB,

First, we thank the TLAB for following through on its commitment to review and revise the Rules of Practice and Procedure. This is an important Year One initiative.

But we believe much more needs to be done to improve fairness and accessibility for residents in the TLAB process in order to address balance of power issues. This was the focus of the concerns we raised in our original submission of May 9th, 2018. The opening paragraph of our submission stated:

“The TLAB is an independent, quasi-judicial tribunal that hears appeals of Committee of Adjustment (COA) decisions. A quasi-judicial tribunal normally permits more flexibility to the Member in adjudicating the case, for example determining the facts of the case, as compared to a judicial (Court) hearing. As such, while TLAB Rules and Procedures are required, TLAB members should be allowed a degree of flexibility in managing their proceedings.”

Our submission addressed two broad areas affecting residents: substantive matters of administrative justice (fairness), and legal/technical procedures.

The revised proposal has taken only limited steps to address key changes that are needed to address the balance of power issues. We have summarized the proposed changes in the revised Rules in relation to the FONTRA submission in the chart below.

FoNTRA May 9 2018 Submission	TLAB Rules (October 11 2018 version)
Members must provide active adjudication	No change
“Local Knowledge Expert” must be recognized	No change
City must provide support for residents in planning appeals	Beyond TLAB jurisdiction
City must provide Intervenor programs	Beyond TLAB jurisdiction
The settlement process to be open to participants	No change
Changes to various Administrative matters to help facilitate access by residents	Several changes including time frame adjustments

TLAB Goals

The revised Rules describe the goal of the TLAB as being to adjudicate matters in ‘a just, expeditious and cost-effective manner’. COAT’s International Framework for Tribunal Excellence¹ identifies eight measures of excellence against which all tribunals should be assessed:

1. Independence;
2. Leadership and Effective Management;
3. Fair treatment;
4. Accessibility;
5. Professionalism and Integrity;
6. Accountability;
7. Efficiency; and
8. Client Needs and Satisfaction.

While “efficiency” is one of the key measures of excellence, “cost effectiveness” is not an appropriate goal for a modern administrative tribunal in Ontario². We propose that the goal be to adjudicate in ‘a just, expeditious and **efficient** manner’. Of course all City processes should be cost effective but cost consideration should not take precedence over proper consideration to the relevant issues: The cost to neighbourhoods of an inappropriate decision can be huge. Large portions of the City are being rezoned ‘one property at a time’ due to practices and procedures that are inherently unfair. The ‘power of precedent’ extends the impact of the single decision

¹ Council of Australian Tribunals (2014, April): International Framework for Tribunal Excellence, Retrieved from: <http://www.coat.gov.au/images/downloads/INTL%20COAT%20FRAMEWK%20TRIB%20April%202014.pdf>

² Lorne Sossin, Osgoode Law School (2016, November 1): Designing Administrative Justice, Retrieved from: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1276>

to multiple cases. Accessibility is a huge issue for FoNTRA, which represents the residents whose needs are not being met.

Revisions to the Rules document fail to address the administrative justice issues we highlighted in our original submission.

Access to legal and planning resources - The primary issue continues to be the unfairness and imbalance of power in the proceedings. Lay persons often cannot gain access to the appropriate legal and planning resources, as these 'expert' resources often choose to work exclusively for the development industry.

Lack of consistency in COA and TLAB decisions - The outcome ratios suggest that there are significant problems with consistency of either the COA decisions and/or TLAB decisions. SERRA in its earlier submission³ provided evidence that the win/loss ratio for applicants vs. residents in opposition is 83% vs. 17%. This is significantly different from the merit decisions originating at the COA hearings with a 78% vs. 22% (refusal vs. approval rate).

. The public expects both tribunals to generally arrive at the same decision when presented with the same set of facts and the same planning regime. Comparable results in the lower level and the higher level tribunals would help to improve public confidence. The TLAB should undertake a review to understand why this is happening and take corrective actions, as appropriate.

Lack of residents' access to expert witnesses - The number of development projects in certain areas of Toronto has increased the demand and reduced the availability of lawyers and planners to represent opponents at TLAB hearings. This creates a 'hapless circle' where the decisions are awarded to the applicants, and then subsequent cases refer to these wins against unrepresented parties.

Failure to apply the four tests as established by the DeGasperis decision - The DeGasperis decision principle that both the size of the variance, and the adverse impact are relevant in the minor variance test has effectively been abandoned. The expert witness tends to argue that only adverse impact should be considered, and then residents highlight the adverse impacts, and this is followed by the applicant's counsel aggressively challenging the testimony of the lay witness. The represented parties win consistently, and the 'hapless circle' of adjudication continues. The case law for DeGasperis is not challenged in these cases.

³ SERRA, Al Kivi (2018, April 10), Written Submission to TLAB, Retrieved from: <https://www.toronto.ca/wp-content/uploads/2018/04/8e08-SERRA-Letter-Feedback-on-TLAB-Rules-and-Procedures-Final.pdf>

FoNTRA Annotations to TLAB Rules (Attachment 1)

The revised Rules propose a number of changes to the “Due Dates”. We laud the improvements in preparation time that appear throughout the Rules document. We have also observed that Parties at the TLAB have begun to “slip” on the published due dates. In a recent case, the Expert Witness statement of the applicant was issued three weeks after the due date. The TLAB should require an explanation for significant delays and apply penalties in order to ensure compliance.

The FoNTRA - annotated Rules document (Attachment 1) includes suggested changes to the following sections; 2.6, 2.11, 3.1, 3.3, 3.6, 5.2, 7.1, 8.5, 9.2, 11.1, 11.4 (new item), 13.7, 16.2, 16.3 (error), 16.4, 16.7, 16.8, 16.11, 19.2, 19.3, 22.1 and 29.1.

FoNTRA suggesting additional changes to simply the text, identify opportunities for improving the process, and in one case, remedy a referencing error (section 16.3 refers to itself).

We believe that that the suggested changes, in addition to those proposed by the revised Rules, will result in improved compliance with the TLAB due dates.

Practice Directions (Attachment 2)

The TLAB has endorsed the use of “Practice Directions” and has already provided a number of them. We believe that Practice Directions, written in plain language, can help residents understand the very complex procedures that are in place. In so doing they contribute to fairer decision-making.

Initially, FoNTRA proposes three new Practice Directions, as follows:

Proposed Practice Direction:

Minimum Level of Assistance to Unrepresented Persons (Attachment 2.1)

In the recent case of *Challans v. Timms-Fryer, 2017, ONSC 1300* (a Police Tribunal hearing) the Divisional Court found that a minimum level of assistance must be provided to an unrepresented party.

Attachment #2.1 outlines a proposed TLAB Practice Direction to be applied to all cases at the TLAB hearings involving self-represented parties based on the above decision. .

Proposed Practice Direction: Representation of Parties and Participants (Attachment 2.2)

The rules associated with representation continue to be confusing. Lay residents will therefore continue to have difficulties in organizing their efforts at a TLAB hearing. In some cases, the result can be denial of representation on the day of the hearing,

leaving the residents at a significant disadvantage to say the least. Such situations should result in an adjournment to allow the Parties and Participants to find alternative representation.

The proposed Practice Direction for representation is modelled after the Social Justice Tribunals Ontario (SJTO) Practice Direction. Our proposed TLAB Practice Direction (Attachment 2.2.) addresses most of the situations that can be anticipated in a TLAB hearing.

Proposed Practice Direction: Evidence and Submissions (Attachment 2.3)

Unrepresented Parties and Participants should be allowed to provide a submission or arguments at the close of the hearing. Persons who are not familiar with legal proceedings often make the error of confusing evidence and submissions. The proposed Practice Direction for submissions is modelled after a similar Practice Direction prepared by the Resource Management and Planning Appeal Tribunal in the State of Tasmania, Australia. The proposed TLAB Practice Direction would assist lay persons who appear at the TLAB hearings.

Proposal to reduce and simplify organization of the Rules

We suggest that TLAB consider breaking the Rules document into two major chapters. The first chapter would include those sections that are applicable to all cases. The second chapter, those sections that are only used occasionally - mediation, settlement and motions. The following sections might be included in the 'occasional' Chapter ... 17, 18, 20, 21, 22, 23, 25 and 31. There would be no change in content, simply a change in organization with the first chapter containing 30 pages, and the second chapter containing 14 pages.

Conclusion

We look forward to discussing with you the concerns and proposals that we have outlined in this submission to make the TLAB fair and accessible to all.

TLAB should be measuring success by focussing on such factors as fairness and accessibility so as to address the needs of all the clients (stakeholders) in the process

Yours truly,

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Attachments:

- #1: Rules of Practices and Procedures: annotated with additional proposed changes
- #2.1: Practice Direction: Minimum Level of Assistance to Unrepresented Persons
- #2.2: Practice Direction: Representation of Parties and Participants
- #2.3: Practice Direction: Evidence and Submissions

C.c. Mayor John Tory and City Councillors
Gregg Lintern, Chief Planner and Executive Director, City Planning Division
Michael Mizzi, Secretary-Treasurer, Committee of Adjustment and Director,
Zoning
Sarah Rogers, Project Coordinator, Zoning and Committee of Adjustment
City Planning Division

The Federation of North Toronto Residents' Associations (FoNTRA) is a non-profit, volunteer organization comprised of over 30 member organizations. Its members, all residents' associations, include at least 170,000 Toronto residents within their boundaries. The residents' associations that make up FoNTRA believe that Ontario and Toronto can and should achieve better development. Its central issue is not whether Toronto will grow, but how. FoNTRA believes that sustainable urban regions are characterized by environmental balance, fiscal viability, infrastructure investment and social renewal.