

# DECISION AND ORDER

**Decision Issue Date**      Friday, November 02, 2018

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

Appellant(s): Jennifer Rachel Kirby

Applicant: Cantam Group Ltd

Property Address/Description: 64 Poplar Rd

Committee of Adjustment Case File Number: 17 213249 ESC 43 CO (B0046/17SC), 17 213262 ESC 43 MV (A0300/17SC), 17 213266 ESC 43 MV (A0312/17SC)

TLAB Case File Number: 18 112946 S53 43 TLAB, 18 112948 S45 43 TLAB, 18 112950 S45 43 TLAB

**Written Motion Hearing Date:**    Monday, November 05, 2018

**MOTION DECISION DELIVERED BY Ian James LORD**

## INTRODUCTION

This is a Motion matter accompanying a Request for Review (Request) pursuant to Rule 31 of the Rules of Practice and Procedure (Rules) of the Toronto Local Appeal Body (TLAB).

The Motion is in writing and requests an Order "permitting the Request for Review to be argued orally", together with any ancillary relief necessary.

As I understand the nature of the relief requested, the Moving Party (Applicant):

- a) In a written Motion request, asks for a determination that the Request be heard orally; and
- b) In the event the Motion is granted, that a hearing be scheduled to afford the Applicant an opportunity to argue the issues raised in the Request, i.e., in effect, have the opportunity to orally establish whether or not the Request is

justified and in the same (or a subsequent proceeding), argue the merits of the Request.

It goes without saying that in the latter circumstances, any Party with an interest in the matter would receive an equal opportunity to orally argue their position, presumably on both aspects: whether the Request should be entertained and allowed to proceed and the manner of disposition of the Request.

## **BACKGROUND**

By Decision and Order issued September 20, 2018 (Decision), TLAB Member S. Makuch allowed an appeal by the Appellant herein, overturned the decision of the City of Toronto (City) Committee of Adjustment (COA) and refused both the severance and the variances sought applicable to the lot division of 64 Poplar Road (subject property), into two lots.

The matter of the original appeals had been preceded by an earlier Motion with a decision issued May 31, 2018 in which the owner, over objections from the Appellant based in part on cost prejudice, was granted an adjournment to accommodate the availability of the Applicant's planner.

Later, as a consequence of the Decision, the Request was brought by counsel for the owner, identified as Abu Bhuyan, whose relationship with the Applicant (Cantam Group Ltd.), if any, is not disclosed. For the purposes of this disposition, the Applicant, Abu Bhuyan and Cantam Group Ltd., are one and the same.

The Request was supported by the affidavit (Form 10) of Sarah Ouildon, affirmed October 18, 2018.

At the same time as the filing of the Request was perfected, the owner's counsel filed the above noted Notice of Motion (Form 7). The Notice of Motion (Motion) relies on the same affidavit filed in support of the Request. Form 7 identifies and attests to the fact that service of both matters was made on the Applicant, the Appellant and nine (9) other persons.

A Notice of Response to Motion (Form 8) was served on the same roster by the Appellant, Jennifer Kirby, and was affirmed October 24, 2018 as being the "collective response from the appellant and the involved parties and participants." An affidavit (Form 10), dated October 23, 2018, accompanied the Notice of Response to Motion containing almost the identical content that was included therein.

It is noted that although the Notice of Response to Motion (Response) identifies itself as a response to the Motion only, it is clear from its content that it is intended to

address the substance of the Request and the reasons therefore, as well as to resist the Motion.

A Notice of Reply to the Response was received by the TLAB (Form 9) was served on the same roster by the Applicant and was affirmed October 29, 2018 as being the Reply. An affidavit (Form 10), sworn and dated October 29, 2018, accompanied the Notice of Response to Motion containing the identical content that was included in Part 3 of the Reply.

I accept that all of the material referenced in the above chronology was timely.

The Motion selected November 5, 2018 for its consideration. The Motion requests that it be dealt with in writing; the Response was content to deal with the Motion matter in writing as no objection was made to its consideration in that format. The Reply makes no alteration to that agreed procedure.

The Response takes issue with and opposes the Motion and the relief it requests: namely, the Response opposes that the Request to be heard orally, its justification and to any subsequent positive disposition of the Request.

The Reply disputes the concerns expressed by the Respondent/Appellant and argues that only the two parties are affected by proceeding with the Request in an oral hearing setting.

## **MATTERS IN ISSUE**

There appear to be two (2) principle matters advanced for resolution. The first is the Motion itself and the second is the handling of the Request, including the process for determination on its merit.

For the reasons that follow, these matters are interrelated.

That said, only the Motion is capable of a determination in this consideration.

## **JURISDICTION**

The Rules of Practice and Procedure (Rules) govern the conduct of Motions (Rule 17) and procedures respecting a Request (Rule 31).

I extract, below, portions of the Rules for convenient reference, particularly as they relate to Motions and Review Requests.

As well, I include the direction the Rules also provide to the TLAB to ensure proper consideration be given to the matters raised:

### **Interpretation of these Rules**

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

### **Matters Not Dealt With by the Rules**

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.

## **17. MOTIONS**

### **Date by which Motions will be Heard**

17.1 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.

### **Notice of Motion**

17.2 A Motion in a Proceeding shall be made by notice of Motion, using Form 7.

### **Date for Motion**

17.3 A Motion shall be heard by Oral Hearing and the Moving Party shall obtain from the Local Appeal Body a Motion date prior to service of the notice of Motion, unless the Local Appeal Body directs otherwise.

### **Local Appeal Body may Require Motions to be in Writing or Electronically**

17.4 The Local Appeal Body may require a Motion to be held by Written Hearing or by Electronic Hearing upon such terms as the Local Appeal Body directs.

### **Content of Motion Material**

17.5 A notice of Motion to be heard by Oral Hearing, by Electronic Hearing or by Written Hearing shall:

a) state the date, time and location of the Motion, unless the Motion is to be by Written Hearing;

- b) state the precise relief sought;
- c) state the reasons and grounds to be argued, including a reference to any statutory provisions or Rules to be relied on;
- d) list and attach the Documents to be used in the Motion;
- e) be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the Moving Party will rely; and
- f) state the names and contact addresses of the responding Parties or their Representatives and all Persons to whom the notice of Motion is to be given

### **Procedure at a Proceeding**

27.3 A Member presiding at a Proceeding shall control the conduct of that Proceeding, including the order of presentation of evidence and submissions, and may limit further examination or cross-examination of a witness where the Member is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the matters at issue.

Contents of a Request for Review

### **A Party may Request Review**

31.1 A Party may request a review of a Final Decision or order of the Local Appeal Body

31.4 A Party requesting a review shall do so in writing by way an Affidavit which provides:

- a) the reasons for the request;
- b) the grounds for the request;
- c) any new evidence supporting the request; and
- d) any applicable Rules or law supporting the request.

### **Local Appeal Body may seek Submissions, Direct Motion, Rehear etc.**

31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:

- a) seek written submissions from the Parties on the issue raised in the request;
- b) grant or direct a Motion to argue the issue raised in the request;
- c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or
- d) confirm, vary, suspend or cancel the order or decision.

### **Grounds for Review**

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

- a) acted outside of its jurisdiction;
- b) violated the rules of natural justice and procedural fairness;
- c) made an error of law or fact which would likely have resulted in a different order or decision;
- d) been deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision; or
- e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

### **EVIDENCE**

The totality of evidence supplied in this matter is described above: the Rule 31 Request with the supporting affidavit of Ms. Ouildon; the Motion that the Request be heard orally, including grounds and supported by the same affidavit (Motion); the Response to Motion, supported by the affidavit of Ms. Kirby (Response) and the Reply to the Response (Reply).

The Applicants Motion poses, in Part 4 of the Notice of Motion (Form 7), the following reasons and grounds, expressed in six (6) paragraphs, for the requested oral consideration of the Request (Motion Grounds):

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1. The fact of the September 20, 2018 request for review;
2. The request for a hearing of the review to provide “ the opportunity to argue the numerous issues raised in the Affidavit”;
3. Rule 24.6 (factors to hold a Written Hearing);
4. On the basis that the owner says he has raised ‘several issues regarding procedural fairness at the August 27, 2018 appeal’: “It would be similarly be unfair to dismiss these issues, without giving counsel the opportunity to argue the issues orally, and address any questions or doubt of the TLAB.”;
5. Finally, the grounds indicate: “Additionally, the Chair questioned the credibility of the expert planner in his reasons, and made several errors of fact. For this reason as well, it would be appropriate to allow an oral hearing of the request for a review.”
6. Paragraph 6 provides unavailability dates to year end.

The supporting affidavit of Ms. Ouildon (Form 10) is germane to the Request (for review), but by reference in the second ‘Motion Ground’, above, is brought into the Motion. There is no other or separate affidavit in support of the Motion.

Ms. Ouildon’s affidavit affirmed October 18, 2018 raises grounds only in support of the Request (Request Grounds).

I group these for simplicity of reference:

- a) Matters related to the Chairs ‘site visit’, affidavit paragraphs 4-8;
- b) The evidentiary issues of ‘lot width’ and loss of mature trees’ and associated evidence, affidavit paragraphs 9-18;
- c) The Chairs ‘numerous interventions’ to testimony, affidavit paragraph 17-20.

There is nothing in this affidavit that addresses the need for a Motion or an oral hearing. Rather, its focus is entirely on the above three grounds for the Request.

In the Notice of Response to Motion, Ms. Kirby on behalf of herself and others repeats the substance of her opposition in a nine (9) paragraph affidavit.

I summarize these response assertions by their subject matter in dealing with the Motion Grounds and the Request Grounds, above:

1. Motion Ground: prejudice of an oral hearing arising from ‘lost wages’, ‘child care costs’, inconvenience, factors to be weighed as identified in Rule 24.6;
2. Review Ground b), above;
3. Review Ground a), above;
4. Review Ground b), above;
5. Review Ground b). above;
6. Review Ground b), above;

7. Review Ground b), above;
8. Review Ground c), above;
9. General assertion on the substance of the Review Grounds.

The Reply is similarly short and succinct. It asserts that the Response on the Motion Grounds is similar to that argued unsuccessfully on the initial adjournment request, above described. Costs and inconvenience to the Appellant of an adjournment requested by the Applicant, necessary to permit the Applicant's supporting planner to testify, was rejected.

The Reply adds that the only two Parties involved with the Request are the Applicant and the Appellant. Any representation that others might be inconvenienced is suggested to be irrelevant as their attendance would be entirely gratuitous having no role in the Request – a matter between the Parties.

The balance of the Reply addresses the Appellants Response to Review Grounds a), and b) and seeks to address the evidence related thereto.

It describes the Request as a 'complex issue' that would benefit from oral submissions but adds no further elaboration.

When examined in the above manner, the bulk of all the filings relate to the Request; very little support material is offered in respect of the Motion.

## **ANALYSIS, FINDINGS, REASONS**

In my view, this Motion must be dismissed for two principle reasons, either of which I find is substantive enough, on its own, to found that disposition. The reasons are:

1. Absence of Merit
2. No Procedural or Jurisdiction Foundation.

I address each in turn.

### **1. Absence of Merit**

Under the Rules of the TLAB, a Motion is required to be supported by an affidavit attesting to certain evidentiary matters relevant to the Motion (Rule 17.5 e). In this case, there is no such motion dedicated affidavit. By reference, the affidavit required under Rule 31 is imported into the Motion relief requested. However, an examination of that affidavit reveals that it is clearly for a different purpose, the Request. It is not, on its



face, intended as a support for the Motion. In setting out Request Grounds, I find that it does not present Motion Grounds or support the necessity of an oral treatment of the Request.

Independent of that consideration, a Motion requesting relief for the oral argument of specific Request needs to have a proper support base, or explanation as to why the relief requested is important, advantageous to the administration of the matter or is otherwise supportable and warranted.

In this case, the request for an oral hearing is in aid of an opportunity to accomplish one of two possible objectives:

- i) To argue that the Request should be allowed to proceed to further consideration on its merit through consideration, including a possible motion hearing on issues or a re-hearing;
- ii) To argue a final disposition of the Request.

In either circumstance, I find that the Motion for an oral consideration of the request is unsupported.

The Motion acknowledges a Request has been made; as such, the Request itself is specific and in train. The TLAB Rules require its consideration. The Motion is to the effect that that consideration should begin with an oral opportunity to argue the above objectives. However, the support for the need for that method of proceeding is absent. The materials fail to reveal let alone substantiate why it is that proceeding orally is necessary, expedient, important, in the public interest or accomplishes anything substantive.

The mere desire of an applicant to have an opportunity for an oral presentation of its objectives is insufficient to overcome the considerations that the TLAB must bring to bear in its determination of 'fair, just and cost-effective' resolution of matters put in issue.

Here, the Applicants justification for an oral consideration of the Request is supported by the above listed six Motion Grounds. I address each it turn as above described (and in employing the original text):

Motion Grounds 1 and 6 lend nothing to the request for an oral opportunity to argue the Applicants objectives;

Motion Ground 2, the opportunity to argue, adds no reason as to why the ability to argue the grounds raised in the Request cannot be expressed in writing or, on the flip side, can be better expressed orally. An 'ask' via a Motion is not in itself a reason or a ground; at the most it is an expression of a preference. The request is neither self-evident nor as-of-right.

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Motion Ground 3 is simply the recitation of Rule 24.6, the relevant considerations to Written Hearings. None of these considerations are weighed or advanced by the Applicant. The Response, however, employs certain of these (a), b),c)) to suggest they support the standard course of consideration of Requests – in writing, unless ordered otherwise. Prejudice is asserted by the Response, whatever or whichever of the objectives is sought in the Motion.

I do not find the Reply adequately addresses or dislodges the reasons raised by the Appellant. The analogy to the prior Motion for Adjournment is not comparable, where real prejudice was at stake for the Applicant, if deprived of its expert witness.

I do agree with the Applicant that the Request is as between the Parties and while Participants are not specifically excluded from that process, the Rules provide a Participant no definitive role.

The Moving Party puts no emphasis, interpretation, application or support behind reciting Rule 24.6. How this is to be of assistance on its behalf to the determination of the Motion is left to the imagination.

Motion Ground 4 is somewhat circular, anticipatory and convoluted. While it makes the worthwhile point that an oral hearing may be more interactive and responsive, at least in a temporal sense, it does nothing to say why this feature is of particular importance to the objectives of the Motion, Rule 24.6 or the Request itself, or any of them.

The obligation on a person who makes a request for review under Rule 31 of the TLAB Rules is to put their 'best foot forward' and support the request. This is done in writing to be attested to by affidavit, as the Applicant has completed. This process, with service on the Parties, permits the exposition of the support base behind the 'several issues of procedural fairness' raised. Indeed, it is not self-evident on its face that (or how) oral submissions can in some manner expose the evidentiary foundation for these assertions in a new, superior or different way than can be exposed through a written record.

Where there is no further or other support for an alteration of that procedure, the Motion request itself adds nothing. On its own, I am not disposed to finding 'flexibility in oral exchanges' alone, if any, a compelling basis to mandate an oral hearing of a Rule 31 application. I do acknowledge the respect that the Applicant has for the oral hearing process and the opportunities therein to potentially address additional matters in the use of this communication vehicle.

Motion Ground 5 raises the issue of the finding of credibility of a witness and several 'issues of fact' sought to be explored. Again, these are matters that are evidentiary based. They too are otherwise capable of being raised and explored, possibly establishing and leading to relief available under Rule 31. Nothing in that circumstance warrants that they necessarily be elicited and explored orally. They can

and have been raised in the Request, the opportunity taken to date; and it is incumbent on the Applicant that they be fully supported. Nothing is stated as to how that obligation is somehow constrained in a manner that necessitates an oral opportunity to advance the objectives. The establishment of a remedy is essentially evidentiary; oral presentations by counsel are not normally the origin of evidence.

On the representations contained in the Motion materials, I find that the support for an oral argument of the Request or an aspect thereof, is not made out.

## **2. No Procedural or Jurisdiction Foundation.**

I can agree that the device of a Motion is perhaps the most flexible vehicle available under the Rules to seek a multitude of types of relief. Indeed, the only formal prohibitory constraint that the Rules place on Motions (other than procedural consequences and controls) is to prohibit a Motion for Costs during a specified timeframe.

Prohibitions however, are not the only mechanism to evaluate whether a motion is appropriate, timely or available.

Motions are available in 'proceedings'. In this case, the Decision ended the proceeding. The Request under Rule 31, arguably, commences another proceeding. However, Rule 31 deals with motions in a distinctly different manner.

A close examination of the scheme for a review request under Rule 31 presents a specific circumstance when the device of a motion is appropriate.

Rule 31.6 b), above, provides as follows:

**31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:**

**b) grant or direct a Motion to argue the issue raised in the request;**

It can be seen that the Rule expressly contemplates the prospect of a Motion; namely, one that is originated by the tribunal as a potential route available in the conduct of the request for review with which it is dealing.

In my view, it is not for an Applicant to usurp this prerogative by way of a Motion even in the circumstance where it is the very same tribunal that would ultimately determine whether the relief requested under the Motion is warranted.

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Rather, in my view, it would be appropriate for a request for review, in circumstances where it was felt warranted, to add as specific relief in that request that an oral motion having some objective or support is requested of the reviewing authority. That would permit the Member the opportunity to address the matter in a deliberative consideration within the ambit of his or her discretion to decide the matter.

A Motion brought by any party under Rule 17 is not consistent with the scheme of Rule 31. It is duplicative of the type of relief offered under the Rule, albeit subject to the judgement of the reviewing authority.

There is an additional compelling basis to suggest that a Motion under Rule 17 is not *prima facie* available to a party in a Rule 31 proceeding and it is aptly demonstrated in the materials supplied herein.

The principle at play is the unfairness in duplicative proceedings and the potential for prolix administrative proceedings.

As here, a Request was made and supported for the review of the earlier TLAB decision. That Request is required to be supported by an affidavit served upon the parties and the TLAB. It is this request for review that sets out the material evidentiary support for the relief requested – often a reversal of the decision of the Member who heard the initial appeal from the COA.

To add to that the right of the party to bring a Motion under Rule 17, supported again by a mandatory affidavit, would result in a **second** opportunity to re-state the grounds for the request for review, albeit in support of, as in this case, an oral hearing of the request.

If an oral Hearing were granted to consider the request,

- i) and the objective is to achieve a motion date for a motion there would be a **third** opportunity to re-state the grounds for the request for review, or
- ii) where the objective is to achieve a re-hearing, there would be a **third** opportunity to re-state the grounds for the request for review.

I do not believe the scheme of the Rules intended what is sought to be accomplished by the Motion. I do not support either the erosion of the responsibilities under the Rules or procedures that would give rise to multiple opportunities for repetitive applications or the opportunity to exhaust those opposed.

In both circumstances above described, I accept the evidence in Response that “the collective response from the appellant and the involved parties and participants” that there would be hardship, cost and inconvenience caused by the Motion relief requested.

The balance of the Reply does not address these concerns but rather deals with the opposition to the Request on its merit.

Even if a Motion were implied as available under the Rules, I find in this circumstance on the material before me that the use of that remedy has not been substantiated.

I find that the Motion relief sought is not justified and that conclusion flows from either of the above reasons expressed for its rejection.

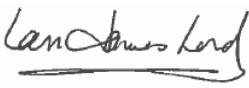
## **DECISION AND ORDER**

The Motion requesting that the review of the TLAB decision dated September 20, 2018 be argued in person is refused and the Motion is dismissed but without prejudice to any decision the TLAB may make under Rule 31 in the conduct and disposition of the Request.

The dismissal of the Motion is without prejudice to the Applicant in making further supplemental submissions in aid of the Request. Any further or additional submissions on the Request by the Applicant must be made and served as per past practice on or before November 19, 2018.

Any further responses arising only from further or additional submissions served on the Request by the Applicant arising from any other Party or participant must be made and served on the Applicant and the TLAB on or before November 30, 2018.

Any further Reply only to matters raised in the response, if any must be made and served as per past practice on or before December 5, 2018.

X 

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I. Lord  
Panel Chair, Toronto Local Appeal Body  
Signed by: ilord