

# DECISION AND ORDER

**Decision Issue Date**      Thursday, December 06, 2018

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

Appellant(s): YEN PING LEUNG

Applicant: KEVIN CHENG

Property Address/Description: 787 DUNDAS ST W

Committee of Adjustment Case File Number: 17 255982 STE 19 MV (A1198/17TEY)

TLAB Case File Number: 18 213028 S45 19 TLAB

**Motion Hearing date:**      Wednesday, November 14, 2018

**DECISION DELIVERED BY S. GOPIKRISHNA**

## INTRODUCTION AND BACKGROUND

Yen Pin Leung is the owner of 787 Dundas St West. She applied to the Committee of Adjustment (COA) for permission to convert the existing two storey non-residential building into a hotel containing six guest suites, and two office units, through the approval of various variances. The COA, heard the application on 1 August, 2018, and refused the same.

On 21 August, 2018, Ms. Leung, applied to the Toronto Local Appeal Body( TLAB), which scheduled a hearing on 11 December, 2018. On 13 September 2018, Mr. John Provart, resident of 6 Andrews Lane and Ms. Andrea Krones., resident of 12 Andrews Lane, elected to be a Party and a Participant, respectively.

On 14 November, 2018, Kevin Cheng, Ms. Leung's son and agent, submitted a Motion to the TLAB wherein an option was provided to the TLAB for the Motion to be heard in person, or in writing. On 3 December, 2018, I considered the nature of the request, and determined that only the Motion (and not the hearing, it may be emphasized) could be heard in writing. The details of the Motion are discussed in the "Evidence" section of this Decision, while the reasoning behind my decision appears in the Analysis, Findings and Reasons section. I then requested the TLAB staff to send out an email to the Parties

stating that I had decided to continue with a hearing beginning at 10 AM on 11 December, 2018, and that written reasons would follow soon. This Decision provides the details, and the reasoning behind my conclusions about components of the Motion put forward by Mr. Cheng.

## **MATTERS IN ISSUE**

The following are the issues raised by the Appellants, ( also the Moving Party )in their submission dated 29 October, 2018.

- 1) Relief of the Rules and an extension of time ( i.e. to submit an Expert Witness Statement)
- 2) An adjournment of the hearing to set up a Mediation and Prehearing conference
- 3) Dismissal and/or clarification of evidence or documents that do not relate to land use planning
- 4) To have these proceedings, **and the hearing**, ( my emphasis) be heard in writing  
On 9 November, 2018, Mr. John Provart, responded to the Motion ( this is the "Response to Motion") and requested:
- 5) Relief from Rule 4.4. for a late submission
- 6) Opposition to the adjournment of the hearing scheduled
- 7) Denial of other relief requested by the Moving Party, who *inter alia* , had included dismissal of some of Mr. Provart's filings, in their reference to "documents that do not relate to land use planning", in Item (3) above.
- 8) On 16 November, 2018, Mr. Kevin Cheng sent in his Reply to Response to Motion, wherein he reiterated the relief requested in Items (1)-(4), as numbered above, and provided further explanation, in support of his original request.

## **JURISDICTION**

The relevant sections of the TLAB Rules (Rules), as referenced by the Parties, as part of their submissions, are recited below:

### **Failure to Comply With the Rules or Procedural Order**

**2.11** Where a Party or Participant to a Proceeding has not complied with a requirement of these Rules or a procedural order, the Local Appeal Body may:

- a) grant all necessary relief, including amending or granting relief from any procedural order on such conditions as the Local Appeal Body considers appropriate;
- b) adjourn the Proceeding until the Local Appeal Body is satisfied that there is compliance;
- c) order the payment of costs; or
- d) refuse to grant the relief in part or whole.

### **Extension or Reduction of Time**

**4.4** The Local Appeal Body may on its own initiative, or, on a Motion by a Party, extend or reduce a time limit provided by these Rules on such conditions as the Local Appeal Body considers appropriate.

### **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.

### **Settlement before Final Determination**

**19.1** The Local Appeal Body is committed to encouraging Parties to settle some or all of the issues by informal discussion, exchange and Mediation

### **Matters to be Dealt with in a Prehearing**

**21.6** A prehearing may include settlement discussions, Motions or other procedural issues, in order to:

- a) identify the Parties and Participants and determine or resolve the issues raised by the Appeal;
- b) identify facts or evidence the Parties may agree on or upon which the Local Appeal Body may make a binding decision;
- c) obtain admissions that may simplify the Hearing;
- d) provide directions to the Parties;
- e) discuss the possible use of Mediation or other dispute resolution processes;
- f) estimate the length of the Hearing and encourage the Parties to agree upon the date for any further procedural steps;
- g) discuss issues of confidentiality, including any need to hold a part of the Hearing in the absence of the public or to seal Documents; and
- h) deal with any other matter that may assist in a fair, cost-effective, and expeditious resolution of the issues.

## **EVIDENCE**

As stated earlier, Mr. Cheng, as the Moving Party, requested for relief regarding Items (1) to (4), as recited in the “Matters in Issue” section. The reasoning behind the request for an adjournment was stated as follows:

Mr. Michael Layton, the local municipal councilor had suggested mediation between the Parties; apparently, there were efforts at setting up Mediation between the Parties regarding the “rear public lane and neighbouring properties” by the Councillor’s office. In addition, (and on an unrelated note), the Motion also alluded to the City of Toronto’s development of new municipal regulations and guidelines for Laneway Suites, and laneway development. The Moving Party linked their request for an adjournment to the planned Mediation , as well as the new guidelines for Laneway Suites to be released in

late 2018, suggesting that their case could be better supported after the guidelines would be released.

A second reason behind the request for adjournment was the unavailability of Mr. Richard Yoon, the Appellants' Expert Witness, on the 11<sup>th</sup> of December, 2018, because he would still be recovering from surgery that he had undergone earlier. The Affidavit also alluded to Mr. Yoon's "hearing disability", and advanced the disability as the basis for a Hearing in writing. Mr. Yoon's ongoing recovery was also cited as the reason for the lack of submission of an Expert Witness Statement, and a request was made for relief from the Rules to submit an Expert Witness statement at a later ( but undetermined) date.

The Appellants also requested that some of the documents submitted by the opposing Party, to be "dismissed wholly, or partially", because they were "outdated i.e. more than a year old". They also challenged the inclusion of case-law submitted by the Opposition regarding a different commercial property owned by the Appellants on the ground that it was irrelevant to the issue before the TLAB. Lastly, the Appellants requested that completing the Hearing (not the Motion, but the actual Hearing itself) be heard in writing, because of the aforementioned reasons, as well as because it "saves time for all Parties".

In his response dated 9 November, 2018, Mr. John Provart opposed the granting of relief on any of the grounds requested by the Appellant. Conceding that he was late in his Response as per Rule 4.4 of TLAB's Rules, Mr Provart apologized for the delay, and linked the delay to his confusion as to whether the Tribunal was going to provide a date pursuant to Practice Direction 2, which he seems to have thought to be applicable to the situation.

Mr. Provart asserted that further conversation would not result in a negotiated, or mediated settlement. He pointed out that a fire escape is a legal, non-negotiable requirement for a hotel, and that the lack of a fire escape had not prevented the Appellant from using the facility at 787 Dundas West as a hotel. Expressing his disappointment at what he perceived to be the Appellants' long history of non-compliance with planning laws and fire codes, Mr. Provart concluded that he had " little faith in that any commitments made by the Appellant through a dispute resolution would be kept".

In disagreeing with the Appellants' reasoning which linked the adjournment to the new guidelines regarding laneway suites, Mr. Provart contended that the request was without merit, because the objective behind the request for approval of variances to be able to legally run a hotel business, and not the conversion of the property into a laneway suite. Deeming the apparent unavailability of the Expert Witness to be unacceptably vague, Mr. Provart suggested that detailed medical evidence should have been readily available to support the claim, rather than a hearsay statement from Mr. Cheng.

Mr. Provart then provided the nexus between his introducing case law( *L 'Ouvrier Inc vs. Leung, 2016 ONSC 6993*) to the matter before the TLAB, and what he depicted as unreliable behavior on the part of the Appellant, by pointing out that the Court had held that the Appellants behavior was “sufficiently egregious to merit punitive damages”, and submitted that “such an award is unusual in civil proceedings, and that this finding spoke volumes” about the Appellants.

Mr. Provart then said that it was extraordinary for documentary disclosure to be struck off the record on a preliminary basis, prior to the hearing of an appeal, where its relevance and accuracy may be tested. He commented on the validity of the photographs by saying that while the pictures originally sent to the TLAB had been taken before the COA hearing, they were still relevant because there had been little change. Challenging the Appellants’ claims about the photos being “misleading”, he enclosed other photos taken on October 31, 2018, to demonstrate his point ,as an appendix to his Response. He concluded that the adjournment should not be granted.

Mr. Cheng sent in his Reply to the Response on 16 November, 2018, wherein he pointed out that Mr. Provart’s late Response to the Motion, fell within 30 days of the Hearing, which he found to be a contravention of Rule 17.1 of the Rules. He reiterated the need for an adjournment as a result of the contravention. He also said that the” past failures of the Parties to comply with time requirements, provided grounds under Rule 2.11 to provide an adjournment”, and also invoked Rule 23.4 (f) for an “adjournment *sine die*”.

Responding to the question of whether a fire escape is a “legal requirement”, Mr. Cheng stated that the alternative hotel building permit application without a fire escape was still under review by the Toronto Buildings Department. Having stated that Mr. Yoon had submitted revised drawings for a hotel building permit to the City, Mr. Cheng said that the fire escape was to address “the complaints of community members about not wanting suite entrances along the laneway”, he said that his hope of a settlement regarding this matter, would be facilitated by Mediation or a Prehearing conference. Referring to the new guidelines to be released by the City of Toronto for laneway design and planning, Mr. Cheng proclaimed them to be a monumental change”, and asserted that the use of these guidelines would “lead to better planning” . He added that the wait for these guidelines could not “be long”, he reiterated that a Settlement discussion or Mediation using these guidelines would allow for a “fair, cost-effective and expeditious resolution of the issues”.

Finally, Mr. Cheng relied on Rules 20.2 and 21.6 of the Rules to advocate for a Pre-hearing Conference, which would:

- a. Clarify discrepancies in facts or evidence so the Parties may agree on or upon which the Local Appeal Body may make a binding decision,
- b. Determine or resolve the issues raised by the Appeal,
- c. Obtain admissions that may simplify the Hearing,

- d. Discuss the possible use of Mediation or other dispute resolution process,
- e. Clarify the scope of this application and its relevancy to separate properties and ownership,
- f. Clarify “legal requirements” for “hotel use” with the help of our consultants,
- g. Clarify the progress on nuisance matters since the last community meeting,
- h. Clarify the neighbours specific planning-related concerns,
- i. Discuss issues of confidentiality relating to the evidence submitted and,
- j. Deal with other matters that may assist in a fair, cost-effective, and expeditious resolution of the issues.

He reiterated, and expanded on earlier arguments about the jurisdiction of the TLAB prevented it from hearing matters outside of land-use planning, and questioned the Opposition’s use of the Court Decision regarding a commercial tenancy dispute, online reviews, and a news article. He asked the opposition to provide reasons about why these factors were relevant.

## **ANALYSIS, FINDINGS, REASONS**

I start by pointing out that the reciting the requests from the Parties, as stated in the “Matters in Issue” section:

The Applicants/ Appellants requested for:

- 1) Relief from the Rules through an extension of time ( i.e. to submit an Expert Witness Statement)
- 2) An adjournment of the hearing to set up a Mediation and Prehearing conference
- 3) Dismissal and/or clarification of evidence or documents that do not relate to land use planning
- 4) To have these proceedings ( i.e. Motion), and the Hearing to be heard in writing

While Mr. Provart’s requests are:

- 5) Relief from Rule 4.4, for a late submission
- 6) Opposition to the adjournment of the hearing scheduled
- 7) Denial of all other relief requested by the Moving Party, including the dismissal of Mr. Provart’s evidence

Of these, I start by ruling on request No. (5) since it is a stand-alone request, unrelated to any other of the requests. I accept Mr. Provart’s explanation for his confusion about when to submit a Response, and grant relief from Rule 4.4. I therefore take his Response submission into account to make my decision.

I now turn to what is one of the most important requests in the Motion, namely hearing this Motion in writing, as well as the actual hearing by Writing. Given that the TLAB has the ability to hear the Motion under the Rules, under Section 17.4 of the Rules, where appropriate; I concluded that the Motion regarding the adjournment was clear, with

straightforward submissions, and consequently determinable solely on the basis of written submissions. .

However, conducting the Hearing itself in writing poses significant challenges. As a general comment, conducting a hearing in writing implies that there is no opportunity for a *viva voce* examination, which circumscribes the process of evidence collection, and severely limits the quantum of tested evidence upon which an adjudicator relies to arrive at a decision. With this generic observation in mind, I review the reasons put forward by Mr. Cheng in support of conducting the entire hearing the case by writing:

One of the reasons provided by the Appellants is that Mr. Yoon, their Expert Witness, is recovering from surgery; the Reply to the Response makes a reference to a cochlear surgery that took place in September, 2018. It is to be recognized that Mr. Yoon has a hearing related disability.

The TLAB has a demonstrated ability for embracing diversity, including ableism, and has successfully providing witnesses opportunities to participate in oral hearings in a fulsome fashion, notwithstanding various disabilities, including hearing issues. When I juxtapose my experiences in working with witnesses with hearing disabilities on the description of Mr. Yoon's disability in the submissions, I cannot fathom why Mr. Yoon can't provide evidence after he recovers fully, at least on a *prima facie* basis. It is extremely difficult to conduct cross examinations, or seek clarifications when the Parties cannot have an oral discussion. It is important to bear in mind that the burden of proof, and demonstration of the proposal's satisfying various policies, and zoning by-laws, rests on the Appellants/Applicants. It is also the Applicant/Appellants burden to be ready to prosecute its appeal in accordance with the timelines set by the TLAB

Expert Witnesses are required to attest to the independence of their work while providing evidence, and responding to questions in examinations and cross-examinations helps corroborate the key elements of the Expert's testimony of completing an independent study. In a contested appeal, I would be concerned about how this key element of recognizing, and challenging an Expert Witness would be compromised if a *viva voce* can't be completed.

Lastly, Mr. Cheng asserts that Parties have mentioned the paucity of time, and advances that the Hearing be heard in writing on this basis. However, the only Party in opposition, Mr. Provart, has not said anything in his submission about the paucity of time. He has steadfastly opposed the postponement of the hearing scheduled for 11 December.

Given the above reasons, I am uncomfortable, and reluctant, to approve the hearing in writing. However, I approach the matter with an open mind, and am amenable to the elucidation of compelling reasons to advocate for a hearing in writing at the hearing scheduled for December 11, 2018, and will make a final determination on how to proceed forward after hearing from the Parties.

The other important question to be answered is the possibility of Mediation and possible Settlement. I note that Mr. Cheng enthusiastically advocates for Mediation, while Mr. Provart has significant misgivings about such a process, and what it would result in. I would like to point out that the TLAB itself encourages mediation between Parties, and has the ability, and expertise to mediate, subject to the willingness of the Parties. I recognize that the Appellants have approached Councilor Layton's office, and that his office seems to have shown interest in facilitating such mediation; however, the submissions are not clear about what the scope of the mediation will be, and what the timelines are for such mediation.

Mr. Cheng has also requested for an adjournment *sine die*, and justified the same by linking the Appeal before the TLAB to the Laneway Guidelines. This request assumes that the Lane View Guidelines are key to a mediation process, a position that I can neither agree nor disagree with, based on the information from the Appellant. I would therefore prefer to understand the connection between the two, before deciding the issue of an adjournment *sine die*. Generally, the TLAB is reluctant to grant adjournments *sine die*, including matters which involve issues remote from what is in front of the TLAB.

At this stage, it is unclear to me about what the topics for mediation are, and who, in addition to the Parties, needs to be present to contemplate a meaningful mediation process. Mr. Cheng has referred to the "monumental" nature of the Laneway Suites Guidelines, and has alluded to Site Plans drawn up by Mr. Yoon, and submitted to the City, implying a nexus between the two, before stating that that this matter can be resolved through mediation. These statements make me wonder if the City has to be a Party to the mediation, in addition to facilitating the process. I am very cognizant of Mr. Provart's succinct observation about the Appellant approaching the TLAB for the approval of variances to be able to run a Hotel, and not Laneway Suites. I am therefore confused by what I perceive to be two parallel applications to the City, one involving Laneway Suites, and the other involving the approval of various variances to run a hotel at 787 Dundas West. I am not sure of any overlap between the perceived parallel applications. I find that any further direction, or decision on this matter, would benefit from a discussion in person at the hearing scheduled for December 11, 2018.

Lastly, there is the issue of striking evidence from the Oppositions statement. I note that there is no Rule that speaks to the ability of the TLAB to strike evidence at the submissions stage. Given that the Appellants have sought relief from the Rules to submit an Expert Witness Statement, it should be evident that discovery has not been completed. While I agree with the Appellant about the importance of only including evidence with a demonstrable connection to Section 45(1), it seems premature to strike out materials and submissions, because of the incomplete nature of the discovery process.

I believe that decisions about Expert Statements, and other submissions, may be better informed, after the issues before the TLAB are scoped, including the issue of Laneway Suites versus a Hotel, and the evolution of the mediation process (if there is one), in the context of a settlement, or a contested proceeding ..



I do not have adequate information to come to decisions on many matters, including some of the questions raised in the Motion put forward by the Appellants. Rather than dismiss the Motion outright, I have deliberately refrained from making any decisions, other than the following :

- Providing relief from the Rules to admit the Response from Mr. Provar, and
- Agreeing to hear only the Motion for an adjournment in Writing, which is now been refused.
- We will hold a hearing on 11 December, 2018, as planned earlier

. At this hearing, I direct the Parties to come prepared to address the following issues:

- Understanding the nexus between Laneway suites, Hotels, and how are they influenced by Section 45(1) of the Planning Act, or *vice versa*
- Understanding the scope of the Mediation to be facilitated by Councilor Layton's office, and associated timelines.
- An explanation of Mediation under the TLAB Rules, identification of Potential Parties for Mediation and the results of successful Mediation or unsuccessful Mediation
- Any extraordinary reasons for completing the Hearing in writing, notwithstanding my earlier stated concerns.
- Discussion about timelines, given the aforementioned issues for discussion, including calendar dates for concluding this Appeal

I am prepared to issue a subsequent Order, where necessary or appropriate, after informing myself about the listed questions, through the discussion scheduled for 11 December, 2018. I acknowledge that Mr. Yoon, Expert Witness for the Appellants, will not be able to attend the hearing scheduled for 11 December, 2018. His availability, or a possible substitution by a different Expert Witness, may also be explored at this hearing

## **DECISION AND ORDER**

- 1) The requests for hearing the Motion in writing moved by the Appellants, and the relief requested by Mr. Provar to admit his Response into the record, are granted.
- 2) The request for adjourning the hearing scheduled for 11 December, 2018, is refused. A Hearing Notice for a 10 AM start on 11 December, 2018, at the TLABs office at Suite 253, 40, Orchard Blvd., is provided with this Decision.
- 3) Parties must come prepared to address the following:
  - Understanding the nexus between Laneway suites, hotels, and their applicability to Section 45(1) of the Planning Act, and timelines
  - Understanding the scope of the Mediation to be facilitated by Councilors Layton's office

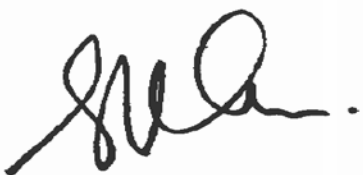
**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna**  
**TLAB Case File Number: 18 213028 S45 19 TLAB**

- Any extraordinary reasons for completing the Hearing in writing, notwithstanding my reasons
- Discussion about timelines, given the aforementioned issues for discussion
- Mr. Yoon's availability, and the question of replacing him with another Expert Witness, if he can't become available in a reasonable period of time.

4) I would like to share information, and have a discussion regarding:

- An explanation of Mediation under the TLAB Rules, identification of Potential Parties for Mediation, followed by next steps if Mediation succeeds, or does not succeed

So orders the Toronto Local Appeal Body.

X 

S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body

## **TORONTO LOCAL APPEAL BODY**

### **NOTICE OF HEARING**

#### **Pursuant to Rule 10.1 (Form 2)**

**HEARING DATE:** December 11, 2018  
**REVISED START TIME:** 10:00 a.m.  
**LOCATION:** 40 Orchard View Boulevard  
2nd Floor, Suite 253  
Toronto, Ontario M4R 1B9  
**HEARING ROOM:** TLAB Hearing Room 1

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

Appellant(s): YEN PING LEUNG  
Applicant(s): KEVIN CHENG

Property Address/Description: 787 DUNDAS ST W  
Committee of Adjustment File  
Number(s): 17 255982 STE 19 MV (A1198/17TEY)

**TLAB Case File Number(s): 18 213028 S45 19 TLAB**

The Toronto Local Appeal Body has set aside one (1) day for this hearing.

All parties and participants should attend at the start of the hearing at the time and date indicated, irrespective of the time allotted. Hearing dates are firm - adjournments will not be granted except in accordance with the Rules.

Hearings will ordinarily be held by Oral Hearing; however, TLAB by Notice or by its Rules may provide that a proceeding may be by way of an Electronic Hearing or a Written Hearing.

**TO VIEW PLANS AND MATERIALS IN THE APPLICATION FILE**, please visit the Toronto Local Appeal Body website at [www.toronto.ca/tlab](http://www.toronto.ca/tlab).

#### **MAKING YOUR VIEWS KNOWN**

If you do not attend the public hearing, or express your views in writing, the Toronto Local Appeal Body may proceed and make a decision in your absence, and may authorize changes to the proposal, matter, or grant the relief requested.

In the event the decision is reserved, persons taking part in the hearing and wishing a copy of the decision may request it by emailing the Toronto Local Appeal Body office at [tlab@toronto.ca](mailto:tlab@toronto.ca). Such decision will be emailed to you when available. Also, the decision when available will be publically posted on the Toronto Local Appeal Body's website at [www.toronto.ca/tlab](http://www.toronto.ca/tlab).

The Toronto Local Appeal Body is committed to providing accessible services as set out in the Accessibility for Ontarians with Disabilities Act, 2005. If you have any accessible needs, please contact the Accessibility Coordinator listed below as soon as possible. If you have specific accommodation needs, please identify those in advance and any assistance you may require in the event of an emergency evacuation.

**DATE ISSUED** December 03, 2018

Hsing Yi Chao  
Secretary

For more information on accessibility options, please contact

**Accessibility Coordinator: Tyra Dorsey**  
**Accessibility Coordinator Telephone Number: 416-392-4697**  
**Accessibility Coordinator Email: [tribunalaccess@toronto.ca](mailto:tribunalaccess@toronto.ca)**