

DECISION AND ORDER

Decision Issue Date Wednesday, January 02, 2019

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 BARRECA

Applicant: MURRAY FEARN

Property Address/Description: 39 BASTEDO AVE

Committee of Adjustment Case File: 18 152990 STE 32 MV

TLAB Case File Number: **18 246892 S45 32 TLAB**

Written Motion Considered: Friday, December 28, 2018

DECISION DELIVERED BY G. BURTON

REGISTERED PARTIES AND PARTICIPANTS

NAME	ROLE	REPRESENTATIVE
PETER BARRECA	Owner	
JENNIFER BARRECA	Appellant	MURRAY FEARN
AVERY BEST	Party	

INTRODUCTION AND BACKGROUND

This is a Decision on a Motion made to the Toronto Local Appeal Body (TLAB) to dismiss an Appeal without holding a hearing, as is permitted by the Planning Act. The Motion to Dismiss was made by a Party to the owners' appeal for 39 Bastedo Avenue in Scarborough. The owners, Peter and Jennifer Barreca, had applied to the Committee of Adjustment (COA) for a total of seven variances for the planned alteration of the existing 1 1/2 –storey semi-detached dwelling. Three of these variances would legitimize

existing conditions. As stated in the COA application, they wish to construct a rear two-storey addition with ground floor deck, and a third storey addition with a rear balcony. They also propose a secondary suite in the basement.

The COA refused the application on October 3, 2018. The Barrecas appealed to the TLAB on October 22, 2018. The Hearing of the appeal is set for March 12, 2019.

Mr. Avery Best of 40 Bastedo Avenue, across the street to the west of the subject, filed to become a Party to the appeal on November 7, 2018. He opposes the application, as he had at the COA hearing.

As required under TLAB Rules, the owner/applicants' agent had filed on November 9 an Applicant's Disclosure in Form 3, providing certain intended alterations and reductions in the variances requested before the COA. The substance of this Disclosure is set out below under Evidence.

On November 23, the neighbour Mr. Best filed his Witness Statement, setting out in detail his objections to the appeal. His views are summarized in paragraph [3] of his Statement: "Without having seen the appellant's revised plans, I would note that the Appellant's Disclosure (in Form 3) describes revised variance requests are still not minor at all, and remain above the height and density maximums in the city's zoning bylaw."

On December 10, Mr. Murray Fearn, the owners' designer, filed a Witness Statement summarizing the new variances requested, as set out in his earlier Disclosure.

On December 12, Mr. Best filed a Notice of Motion, requesting that the appeal be dismissed without holding a hearing on the merits. His Motion and Responses to it were considered in written form on December 28, 2018.

On December 26, 2018, Ms. Barreca raised an objection to Mr. Best's affidavit. His signature appeared to have been validated prior to having been affixed.

MATTERS IN ISSUE

The issue in the Motion was whether the facts of this appeal fall within the language of the Act cited below, which allows for dismissal of an appeal without a hearing in certain situations. In view of the disposition of this matter, it is not necessary to make a determination on Ms. Barreca's objection to the signature on Mr. Avery's affidavit. It will be accepted as a valid affidavit.

JURISDICTION

The TLAB is permitted to take this action, if warranted, under subsection 45(17) et seq. of the Act. Subsections 45(17), (17.1) and (17.2) of the Act state, in part:

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal...

(17.1) Before dismissing all or part of an appeal, the Tribunal shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal

(17.2) The Tribunal may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (17), as it considers appropriate.

EVIDENCE

These were the reasons given by Mr. Best for the requested dismissal without a hearing:

[1] While an initial Appellant's Disclosure (Form 3) and Witness Statement (Form 12) have been provided, the appellants have not produced any updated plans, impact studies, or other materials to give any justification or rationale for overturning the Committee of Adjustment's decision.

[2] The Applicant's disclosure and Witness Statements only contain a few short lines setting out the general dimensions of their revised proposals. Their newly proposed height and density both remain significantly above the maximums in the City's bylaw.

[3] The appellants have not provided any revised architectural plans, nor any type of impact study to show how their proposed revisions would address the concerns that have been raised about sunlight and shadows. There is no information that has been provided that gives any new rationale for overturning the Committee of Adjustment's decision.

[4] As a result of this, as per Rule 9.2 (f), I would submit that the Appellants have not provided adequate written reasons for proceeding with the Appeal; I submit there is no reason for an in-person hearing in March."

Mr. Murray Fearn, agent for the owners, had filed a Witness Statement on December 10, 2018, stating that "...**we have revised our drawings as follows:** (emphasis added)

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(a) Reducing the addition by 2' (0.61m) at the front and 2' (0.61m) at the rear, 4' (1.20m) overall, therefore reducing the floor space index from 1.35% to 1.30%.

(b) We have also lowered the height of the front & rear main walls from 9.68M to 8.53m (Note: There is no variance required for the overall height to the roof peak)....

By-law 569-3013

Variance Item No. 1. Is reduced height from 9.68M to 8.53M

No. 2. Is reduced F.S.I. from 156.04M2, 1.35% to 151.30M2, 1.30%

No. 3 Remains as is

No. 4 Remains as is

By-law 438-86

Variance Item No. 1 Remains as is (existing condition)

No. 2. Remains as is (existing condition)

No. 3. Remains as is (existing condition)

3. We entered evidence at the Committee of Adjustment with regard to other 3 storey dwellings in the neighbourhood, which the committee chose to disregard.”

Notwithstanding Mr. Fearn’s reference to revised plans, they have not been filed with the TLAB. His Notice of Response to Mr. Avery’s Motion was filed on December 20, 2018. He argued that there is no obligation to produce updated plans or impact studies on an appeal to the TLAB. Here, he reiterated, the variances for main wall height and density have been reduced since the COA decision, and thus the appeal is both justified and rational. He pointed out that the roof height is within the By-law requirements. The revisions made will reduce the visual impact. He attached photographs of the sun and shadows at various times of day, stating that the subject property does not cast shade onto 40 Bastedo Avenue. Adjacent neighbours (these include those in the other semi) had no objection to the application, he affirmed, nor did any other resident of Bastedo Avenue.

He also made the following statement:

“4. Just the fact that we have reduced the extent of the variances required, should be reason enough for us to appeal the C. of A. decision to the TLAB. In addition, we have received a positive report from the City of Toronto Planning Department, therefore we believe the decision made by the Committee of Adjustments was unfair and incorrect. The updated plans that we have submitted are in good planning practice, do not exceed maximum height restrictions, are in keeping existing neighbourhood standards, have been revised to address the concerns of the Committee of Adjustments, not because

we had to, but rather in good faith to demonstrate a willingness to work collaboratively and cooperatively. For all of the above reasons, we ask that our in person hearing in March remain as is.”

He argued that the appeal should be heard as scheduled, and that the TLAB should make the decision as to whether the revised variances are minor.

The variances refused by the COA are:

1. Chapter 10.10.40.10.(2)(A)(i), By-law 569-2013

The maximum permitted height of all front and exterior main walls is 7.5 m.

The height of the front and rear exterior main walls will be 9.68 m.

2. Chapter 10.10.40.40.(1)(A), By-law 569-2013

The maximum permitted floor space index is 0.6 times the area of the lot (69.98 m²).

The floor space index will be 1.34 times the area of the lot (156.04 m²).

3. Chapter 10.5.40.60.(7), By-law 569-2013

Roof eaves may project a maximum of 0.9 m, provided they are no closer than 0.3 m to a lot line.

The roof eaves will be 0.0 m to the north lot line.

4. Chapter 150.10.4.1.(3)(A), By-law 569-2013

A secondary suite is a permitted use, provided that an addition or exterior alteration to a building to accommodate the suite does not alter or add to a main wall or roof that faces a street.

In this case, the addition will alter the front main wall that faces Bastedo Avenue.

1. Section 6(3) Part II 3.C(I), By-law 438-86

The minimum required side lot line setback is 0.45 m, where the side wall contains no openings.

The north and south side lot line setbacks will be 0.0 m.

2. Section 6(3) Part II 3(I), By-law 438-86

The minimum required distance between a building to the side wall of an adjacent building that contains no openings is 0.9 m.

The semi-detached house will be located 0.0 m from the adjacent building on the south side at 37 Bastedo Avenue.

3. Section 6(3) Part II 3(II), By-law 438-86

The minimum required distance between a building to the side wall of an adjacent building that contains openings is 1.2 m.

The semi-detached house will be located 0.59 m from the adjacent building on the north side at 41 Bastedo Avenue.

It can be seen from the assertions in his Witness Statement of December 10 that **some of these have now been reduced.**

ANALYSIS, FINDINGS, REASONS

An appeal to the TLAB from a COA decision is always a “new hearing” of the application, just as if the COA had not yet considered it. Thus the substance of the evidence submitted to the COA must be repeated, as altered if this occurred, in a

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hearing before the TLAB. Therefore I agree with Mr. Fearn that (absent the TLAB disclosure rules as set out below) there is no need for the applicant to submit new plans prior to the consideration of the matter by the TLAB. However, he is not correct in thinking that any alterations that will be relied upon in the oral hearing, such as revised plans, are not required to be **disclosed** to the other parties prior to the hearing.

Rule 16.2 of the TLAB Rules specifies:

“16.2. Parties shall serve on all Parties a copy of every Document or relevant portions of public Documents they intend to rely on or produce in the Hearing and File same with the Local Appeal Body not later than 30 Days after a Notice of Hearing is served. “

It is to be noted that Rule 16.3 provides that where a Party fails to disclose Documents in accordance with Rule 16.2, the TLAB may disallow the Document to be entered in evidence and may make such other orders as it deems appropriate in the circumstances.

Because of Mr. Avery's Motion, the Dismissal without a Hearing question should be determined first. In order to do this, TLAB must decide if there had been any valid planning question raised in the appeal that could be the basis of a TLAB decision on the merits.

In a Motion to Dismiss, evidence on the variances is accepted only for the purpose of making findings on whether there is a triable issue to go to a hearing. If no triable issue is found, there is no consideration of the merits required.

Mr. Fearn affirmed that just the fact that the variances have been reduced is reason enough for the owners to appeal the COA refusal. In addition, he affirmed, there had been a positive report from the Planning Department. Thus the COA decision was unfair and incorrect. The updated plans submitted are good planning, do not exceed maximum height restrictions, and are in keeping existing neighbourhood standards, he asserted.

In this case, I am satisfied that the reasons set out in the Notice of Appeal do disclose land use planning grounds upon which the Tribunal could allow all or part of the appeal. The appropriateness of the variances requested is a question clearly within TLAB's jurisdiction. Thus subsection 45(17)(a)(i) of the Act does not apply here. In addition, Mr. Avery's reference to TLAB Rule 9.2 (f) is not correct, as this applies only to applications for consents or severances and not to variances.

A decision here to dismiss the appeal without a hearing is not possible. Many issues concerning the planning merits of the variances must be addressed by evidence presented. The TLAB must hold the hearing *de novo* as the law requires. Mr. Avery's objections can then be assessed when a complete evidentiary picture has been obtained.

If an appeal is dismissed without a hearing, this eliminates an appellant's statutory right to a hearing on the merits. Therefore the exercise of this jurisdiction must be closely considered to ensure that appeal is not prematurely dismissed.

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However, I am very aware of possible prejudice to other parties in preparing their cases, if the TLAB disclosure Rules are not met. Mr. Avery is within his right to object to failure to file documents to be relied upon at the hearing, if this has occurred. Mr. Fearn made reference to Planning Staff's approval of new plans, yet any such Report from them and the new plans themselves do not appear on the TLAB file. If new plans exist and will be entered into evidence and relied upon in any approval, they should be filed at least two weeks prior to the hearing date.

DECISION AND ORDER

For the above reasons, the Motion is denied. The Hearing of the Appeal will proceed on March 12, 2019 as scheduled. Any revised documents to be relied upon shall be filed by **Tuesday, February 26, 2019.**

X 

G. Burton

Panel Chair, Toronto Local Appeal Body