

# DECISION AND ORDER

**Decision Issue Date**      Wednesday, May 15, 2019

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): KEN ZUCKERMAN

Applicant: KEN ZUCKERMAN

Property Address/Description: 121 AVENUE RD

Committee of Adjustment Case File: 18 153123 STE 27 MV

**TLAB Case File Number: 18 246813 S45 27 TLAB**

**Written Motion Hearing date:**      Friday, May 03, 2019

**DECISION DELIVERED BY S. TALUKDER**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
ALDERGREEN ESTATES INC	OWNER	
KEN ZUCKERMAN	APPLICANT/APPELLANT	CALVIN LANTZ MARY FLYNN- GUGLIETTI
ALUN LLOYD	EXPERT WITNESS	
LOUIS TINKER	EXPERT WITNESS	
ROBERT GLOVER	EXPERT WITNESS	
MICHAEL MCCLELLAND	EXPERT WITNESS	
ABC RESIDENTS ASSOC.	PARTY (TLAB)	ANDREW BIGGART

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DANIEL LUBLIN	PARTY (TLAB)	ANDREW BIGGART
AARON MITCHELL	PARTY (TLAB)	ANDREW BIGGART
CHRISTOPHER WEIN	PARTY (TLAB)	ANDREW BIGGART
MARIE FOSS	PARTY (TLAB)	ANDREW BIGGART
RONALD FREIMAN	PARTY (TLAB)	ANDREW BIGGART
HEATHER RIDER	PARTY (TLAB)	ANDREW BIGGART
ELEANOR HIRSHFELD	PARTY (TLAB)	ANDREW BIGGART
JOHN LOHMUS	EXPERT WITNESS	
CITY OF TORONTO	PARTY (TLAB)	MARC HARDIEJOWSKI NATHAN MUSCAT
ALAN YOUNG	EXPERT WITNESS	

## **INTRODUCTION**

1. This motion is for an adjournment of the hearing scheduled for two days on September 16, 2019 and September 17, 2019 for the property located at 121 Avenue Road (Property), and to have the motion for adjournment be heard in writing.
2. The motion is filed by Mr. Andrew Biggart, as lawyer representing eight parties in the proceeding.
3. The motion is contested by the Applicant (and Responding Party) Zinc Developments Inc., owner of the Property. The Applicant's counsel, Ms. Mary Flynn-Guglietti, filed a response to the motion on behalf of the Applicant.
4. The remaining party to the proceeding, The City of Toronto, has not filed any response to Mr. Biggart's motion.
5. A hearing date was scheduled for March 20, 2019, which was converted into a mediation. The parties were not able to reach any agreement during mediation. As a result, the September hearing dates were scheduled by TLAB after the mediation.
6. The substance of the motion and the response of the motion is discussed under the Evidence section below.

## MATTERS IN ISSUE

7. At issue is whether an adjournment should be granted to accommodate the availability of a Party and a Party's counsel who have scheduling conflicts with the scheduled hearing dates.

## JURISDICTION

8. The TLAB Rules of Practice and Procedure provide for Motions (Rule 17) and Adjournments (Rule 23), and relief in appropriate circumstances (Rule 2).
9. Rule 23.3 states that:

In deciding whether or not to grant a Motion for an adjournment the TLAB may, among other things, consider:

- a) the reasons for an adjournment;
- b) the interests of the Parties in having a full and fair Proceeding;
- c) the integrity of the TLAB's process;
- d) the timeliness of an adjournment;
- e) the position of the other Parties on the request;
- f) whether an adjournment will cause or contribute to any existing or potential harm or prejudice to others, including possible expense to other Parties;
- g) the effect an adjournment may have on Parties, Participants or other Persons; and
- h) the effect an adjournment may have on the ability of the TLAB to conduct a Proceeding in a just, timely and cost-effective manner.

## EVIDENCE

10. On April 9, 2019, the TLAB sent a notice to all parties asking for their availability for a hearing in September 2019. The TLAB set April 11, 2019 at 4:30 p.m. as the deadline to provide TLAB with the parties' schedules. On April 12, 2019, the TLAB sent an e-mail and a formal Notice confirming that the hearing dates were scheduled for September 16, 2019 and September 17, 2019.
11. Mr. Biggart, in his affidavit dated April 17, 2019, stated that he when received the e-mail from TLAB on April 9, 2019, he wrote to his clients and asked for their availability in September 2019. He received a response from Mr. Daniel Lublin who

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stated that he was not available the entire month of September. Mr. Lublin resides on the property adjacent to the subject property.

12. Mr. Biggart drafted an e-mail to TLAB advising that Mr. Lublin was not available in September 2019. Mr. Biggart himself was only available on September 12 and September 13. Then, Mr. Biggart, by error clicked the save button in his e-mail software instead of clicking the send button. As a result, Mr. Biggart's e-mail did not reach the TLAB and when the deadline passed, TLAB issued the hearing dates.
13. Mr. Biggart realized his mistake after receiving TLAB's e-mail regarding the scheduled hearing dates on April 12, 2019. He wrote to TLAB within less than half an hour of receiving the e-mail from TLAB, advising TLAB of his mistake and that both Mr. Lublin and himself would not be available on the scheduled dates.
14. Mr. Biggart also requested for a motion to seek an Order adjourning the hearing on the same day.
15. Mr. Biggart submitted that his clients will suffer prejudice and irreparable harm if the hearing is not adjourned, as it will deprive some of the parties of their right to be heard at the appeal and deprive his clients to have their counsel at the hearing.
16. Ms. Jocelyn Diane Lee, legal assistant to Mr. Flynn-Guglietti, filed an affidavit on behalf of the Applicant opposing the motion. In her affidavit, Ms. Lee mentioned the numerous correspondence the parties had with respect to scheduling hearing dates, which led to TLAB issuing dates for the hearing.
17. Ms. Lee submitted that as Mr. Lublin was not in attendance at the original date scheduled for the hearing, which was March 20, 2019, Mr. Lublin would not be called as a witness at the hearing and would not be providing oral testimony.
18. Ms. Lee also mentioned that the City of Toronto would not be available during October 2019.
19. Ms. Lee also provided a timeline of the proceeding, which started with the filing of the appeal in October 2018 and a hearing date scheduled for March 20, 2019, which was converted to mediation. If a hearing is not heard by November 2019, it will be a year since this matter has been at TLAB without a hearing.
20. In its Notice of Response to Motion, the Applicant mentioned that the Applicant will suffer irreparable harm, prejudice, stress and financial expenses if the adjournment is granted and that the adjournment will impede the TLAB's ability to conduct the hearing in a just manner. These submissions were substantiated as evidence in Ms. Lee's affidavit.
21. Mr. Biggart filed an affidavit dated April 26, 2019 in response to the Applicant's Notice of Response to Motion. In his affidavit, Mr. Biggart further explained the prejudice that his clients would face if the hearing was not adjourned.

## **ANALYSIS, FINDINGS, REASONS**


22. The hearing will be adjourned subject to specific conditions to address the concerns of all parties.
23. Honest mistakes by parties and their lawyers should be tolerated even though the result of this specific mistake by Mr. Biggart has unfortunate consequences. Not allowing the adjournment will lead to significant unfairness and prejudice to a number of parties for two main reasons.
24. First, Mr. Biggart is the counsel on record for eight parties in this proceeding. The remaining parties are the City of Toronto and the Applicant. Mr. Biggart is not available on the current scheduled dates. Eight parties will not be represented by counsel if the hearing is not adjourned. Parties may have the right to counsel, but such right is not absolute. I would have asked these eight parties to consider retaining another lawyer in the same law firm as Mr. Biggart to take carriage of their case if the adjournment was requested at the initial stage of the proceeding. However, the parties have already engaged in mediation with Mr. Biggart as their counsel. It is hoped that the oral hearing will be the final stage of this proceeding. It is highly prejudicial to the eight parties if they need to find new counsel at this later stage in the proceeding.
25. Second, Mr. Lublin is a party to the proceeding and will not be available on the hearing dates. If the hearing is not adjourned for an error not created by Mr. Lublin, the TLAB will not benefit from hearing from him. I do not see how TLAB can fairly adjudicate the issues at the hearing without hearing from Mr. Lublin, if he chooses to testify. He has not given up his right to provide oral testimony. The Applicant's submission that Mr. Lublin does not plan to testify at the hearing because of his absence during mediation is without merit. The TLAB is not in a position to analyze Mr. Biggart's litigation strategy on whether or not to call Mr. Lublin as a witness. Mr. Lublin has filed a witness statement and therefore is entitled to give oral testimony at the hearing if he chooses to do so.
26. Mr. Biggart's frank admission of his mistake and his prompt attention to addressing the consequence of his mistake are factors that I considered in granting the adjournment. Mr. Biggart discovered his mistake on April 12, 2019 and requested a motion to seek an order for adjournment on the same day.
27. I also acknowledge the Applicant's concern with the length of time this proceeding has taken. The Applicant filed the appeal on October 2018 and the hearing date is scheduled for September 2019. An appeal before the TLAB does not need to take this many months to complete. The delay in this proceeding is not due to actions of any specific party. The delay is due to the parties' attempt at mediation on March 20, 2019 (which is encouraged by the TLAB), and scheduling conflicts between parties, which is common when multiple parties attempt to come up with mutually agreeable dates. The delay of such length is prejudicial to the Applicant.
28. The new hearing dates must be on or before December 13, 2019, to ensure that the Parties get a fair hearing as soon as possible. This deadline will provide enough

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flexibility to the Parties to agree upon dates based on their availability. I also request the TLAB staff consider all available dates, including non-consecutive dates, from the date of the issuance of this order to December 13, 2019, to schedule two dates for the hearing.

**DECISION AND ORDER**

29. The request that the motion be in writing is granted.
30. The request for an adjournment of the hearing scheduled for September 16, 2019 and September 17, 2019 is granted, provided that the parties schedule the new hearing dates such that the hearing is completed by December 13, 2019.
31. I request that TLAB staff follow its protocol in scheduling two new dates for the hearing, which can be non-consecutive days, with the deadline for the completion of the hearing being December 13, 2019. I encourage the parties to decide on any mutually available dates between the issuance of this order and December 13, 2019.

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Shaheynoor Talukder  
Panel Chair, Toronto Local Appeal Body  
Signed by: Shaheynoor Talukder