

DECISION AND ORDER

Decision Issue Date Wednesday, June 12, 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): DAVID HIRTENFELD

Applicant: MEMAR ARCHITECTS

Property Address/Description: 271 DELAWARE AVE

Committee of Adjustment Case File: 18 201669 STE 19 MV

TLAB Case File Number: 19 122116 S45 09 TLAB

Motion Hearing date: Monday, June 10, 2019

DECISION DELIVERED BY G. BURTON

APPEARANCES

NAME	ROLE	REPRESENTATIVE
MEMAR ARCHITECTS	APPLICANT	
DAVID HIRTENFELD	APPELLANT/OWNER	AMBER STEWART
AMANDA MARIA HEYDON	PARTY	
MARIOS THOMAIDIS	PARTY	
ELISSA JOHNSON	PARTICIPANT	
STEVEN JACOME	PARTICIPANT	

INTRODUCTION AND BACKGROUND

This was an appeal to the Toronto Local Appeal Body (TLAB) from a Committee of Adjustment (COA) decision dated February 13, 2019, refusing 8 variances for the construction of alterations to the existing two storey detached dwelling at 271 Delaware

Avenue. A secondary suite, a two storey rear addition and a third floor addition are proposed. TLAB had fixed a Hearing date for the appeal, July 8, 2019, in the normal course. Notice of this date was provided by Notice of Hearing on April 1, 2019.

One of the parties, Ms. Amanda Heydon, then filed a Motion on May 24, 2019, stating in essence that she and another party, Mr. Mario Thomaidis, would be out of the country and unable to attend on the July 8 Hearing date. She stated, and Mr. Thomaidis' affidavit confirmed that the participants, Elissa Johnson and Steven Jacome, were also unable to attend on July 8. None of them is represented by counsel. Thus, Ms. Heydon requested an adjournment. Alternate hearing dates were then provided by TLAB staff according to the usual practice.

MATTERS IN ISSUE

Does the unavailability of a principal objector to the proposal mean that an adjournment should be granted? And if so, should timing issues facing the proponent be a governing factor respecting the new Hearing date?

JURISDICTION

Adjournments maybe granted under Rule 23 of the TLAB Rules of Procedure (Rules). The relevant portion of Rule 23 states:

23. ADJOURNMENTS

Hearing Dates Fixed

23.1 Proceedings will take place on the date set by the TLAB and provided in the Notice of Hearing, unless the TLAB orders otherwise.

Request for Adjournment must be on Motion

23.2 A Party shall bring a Motion to seek an adjournment, unless the adjournment is on consent in accordance with Rule 17.2.

Considerations in Granting Adjournment

23.3 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.

Powers of the TLAB upon Adjournment Motion

23.4 On a Motion for adjournment the TLAB may:

- a) grant the Motion;
- b) grant the Motion and fix a new date, or where appropriate, the TLAB may schedule a prehearing on the status of the matter;
- c) grant a shorter adjournment than requested;
- d) deny the Motion;
- e) direct that the Hearing commence or continue as scheduled, or proceed with a different witness, or evidence on another issue;....or
- h) make any other appropriate order....

EVIDENCE

The Moving Party, Ms. Amanda Heydon, had originally requested an adjournment of the July date informally through Ms. Stewart, counsel for the proponent owner. Ms. Heydon and Mr. Thomaidis, both Parties to the appeal, would be out of the country on July 8. Ms. Stewart initially indicated that her client would consent to this (and so avoid the need for a Motion under Rule 17.1 when an adjournment is opposed). However, the owner, Mr. Hirtenfeld, then received additional information about the timing for construction of the proposal, should it be approved. He could no longer consent to an adjournment, given that construction might then have to take place in winter months. He wished to retain the July date. Therefore, Ms. Heydon needed to bring a Motion to request an adjournment of this Hearing date.

As mentioned, the two Participants in this appeal, Elissa Johnson and Steve Jacome, also cannot attend on July 8, and they consent to a brief adjournment.

Ms. Heydon stated that if the adjournment from the July 8 date is not granted, prejudice will result to herself and Mr. Thomaidis because they will be unable to attend the Hearing and present their position. They are not represented by counsel, and must therefore be able to attend in person in order to ensure a full and fair proceeding. Mr. Thomaidis put it in his supporting affidavit that all the opponents will be representing themselves. If none can attend, none of their concerns will be heard by the TLAB. Moreover, TLAB will not have the benefit of hearing the answers to the questions posed by either Ms. Heydon or Mr. Thomaidis to the appellant's witnesses. The opponents' interests will be prejudiced. On the original date of July 8, only the appellant could be in attendance. Such a Hearing would be unfair in the circumstances.

Ms. Heydon added that no prejudice will result for the owner, as the adjournment request was made sufficiently in advance of the Hearing to allow for the Hearing date to be rescheduled without requiring personal attendance to argue the Motion. In an earlier email of May 3 to staff she had confirmed that the Parties would be out of the country on July 8th but could be available for a hearing "anytime after July 14, with the exception of the week of August 26." That email is attached as Exhibit "B" to Mr. Thomaidis' Affidavit in support of the Motion.

In his Response to the Motion filed June 3, 2019, the applicant/appellant Mr. Hirtenfeld reiterated the reasons for now requiring as early a date as possible for the Hearing, even though he had originally agreed to an adjournment of the July date.

Firstly, he is now renting accommodation elsewhere, and he intends to live in one of the two units now proposed and to rent out the second unit. To date, he has personally managed the development here, including directing the preparation of plans and the minor variance application. He is not a developer or builder by profession. This is his first experience with a project of this nature and magnitude.

Secondly, Mr. Hirtenfeld had inquired further of his architect and a potential builder respecting adjournments. He was advised that a delay in the Hearing could have serious implications for the timing and cost of construction. A building permit could take at least four weeks after any TLAB approval and application made. If construction is not commenced by the end of October this year, there could be increased construction costs (demolition, construction of the foundation and exterior walls in the winter months, requiring heaters for excavation and concrete work, premiums on labour costs, and additional materials costs - for example, a different concrete mix is needed for foundations in winter). He was further advised that if the shell of the building cannot be completed before the winter, it may be more economically feasible to commence construction in spring.

As a result, a delay in the Hearing of even two months would likely cause Mr. Hirtenfeld to lose this construction season and delay the project by at least six months. He would experience such financial prejudice that he might not be able to proceed with the project at all. He is currently renting a condo, and the costs of carrying the subject property (approximately \$3,000 per month) and additional construction costs would possibly necessitate abandonment of the project. Thus he could not consent to the Motion adjourning July 8 without having an alternative early Hearing date.

Ms. Stewart advised Ms. Heydon of this issue by email, with a later phone conversation to explain the circumstances, i.e., the reasons for failing to consent to the adjournment sought, and for requiring an early Hearing date.

An adjournment request that is not on consent must be made by way of Motion. Following the submission of this Motion for an adjournment, Ms. Stewart and Ms. Heydon each requested available Hearing dates from staff. **TLAB staff provided dates of August 15, August 19, and September 10.**

Ms. Stewart, Mr. Galbraith (the Expert Witness) and Mr. Hirtenfeld are available on these dates. In email messages, it was stated that while Ms. Heydon could be present on August 15, Mr. Thomaidis could not. Neither are available on August 19. Ms. Johnson can attend on August 15 or September 10.

In his Motion Response, the owner, Mr. Hirtenfeld, stated that his first preference remains to proceed on July 8, the original scheduled Hearing date. Due to the

seriousness of the implications of delay, he is even prepared to proceed on this original date with other legal representation if necessary (because Ms. Stewart is scheduled to be in another hearing that day).

However, in an effort to reach a reasonable compromise, the owner was prepared to consent to an adjournment to either August 15 or 19 (again, dates supplied by staff). This would provide an appropriate balance, he stated, between prejudice to the other Parties and Participants and the significant prejudice to the owner in light of all of the factors mentioned above.

These additional points were made in the owner's Response:

(a) If the Hearing proceeds on July 8, it may be possible for any other Parties or Participants to participate by telephone; or

(b) If the Hearing proceeds on August 15, it would be possible for Ms. Johnson, Mr. Jacome, and Ms. Heydon to participate in person. Given that Ms. Heydon and Mr. Thomaidis reside at the same address, Ms. Heydon could speak on behalf of both herself and Mr. Thomaidis. If Mr. Thomaidis wishes to separately address the TLAB, perhaps he could be available for part of the day (at lunchtime or later in the afternoon), and his evidence could be submitted by telephone at a set time.

c) Alternatively, if there is the possibility that a different date becomes available at the TLAB (even an earlier date), the owner requests that the date be provided to everyone for consideration.

Mr. Thomaidis then filed, beyond the required filing date, a very lengthy rationale for not granting an adjournment to the August 15 date. He has no objection to the date of September 10, 2019. He swears in his affidavit that the appellant on May 8, 2019 unconditionally consented to a new Hearing date (i.e., other than July 8, since both objecting Parties would be away), the reason being that his counsel is not available on July 8. Mr. Hirtenfeld then failed to file his consent, thus causing the need for this present Motion. Mr. Thomaidis relied on the owner's assurance of an adjournment on consent, he says, to plan his participation in a criminal trial on August 15. The owner left his objection to July 8 almost too late for them to file the present Motion to adjourn this date. Their adjournment Motion was brought immediately after he "revoked his consent to the adjournment". Mr. Thomaidis states that the request for a different date could have been brought informally before the week of May 21, and thus the August 15 date could have been secured. Since the appellant's "11th hour "flip-flop" in withdrawing his consent, the present Motion was required. "By the time the appellant bothered to advise the parties and participants of his new position, my schedule for August 15 and 19, 2019, had changed.", he states.

However, Mr. Thomaidis points to another problem. He states that the owner now seeks to "in effect eliminate me from the hearing altogether." As an opposing Party, he can cross-examine the appellant's witnesses. He elected to be a Party

primarily so that he could do this. This is impossible by telephone, as was suggested, given the extent of the physical evidence here, nor can he delegate this function to another Party. “Moreover, the suggestion that I give up my right to cross-examine and merely make submissions by telephone during lunch makes no practical sense as I would not know the evidence that had been presented (in chief or in cross examination) nor would I know any of the submissions of the appellant or any of the parties or participants who made submissions before me.” In any event, he will not have time available for such activity in mid-trial.

Mr. Thomaidis continues that the appellant also claims financial hardship as a factor for having TLAB conduct - in effect - an “unopposed” appeal Hearing on July 8, or to effectively remove Mr. Thomaidis as a Party for August 15 (his absence based on the previous explanation above). Mr. Thomaidis says that this “supposed hardship is based on a self-imposed timeline following a unanimous rejection of all of the appellant's requested variances (without right to resubmit)”. (He implies that) the owner is throwing himself on the mercy of the TLAB to allow his appeal and to issue an early decision. Mr. Thomaidis finds this dictatorial. The owner could merely lease the now-vacant property, or use it himself, he states, if he is experiencing financial hardship, “his choice not to do so should not prejudice my rights as a party to this appeal.”

There is no dispute, he continued, that he and all the other Parties, Participants, witnesses, counsel for the appellant, and TLAB are available for a hearing on September 10, 2019.

ANALYSIS, FINDINGS, REASONS

This was a Motion for Adjournment filed by the objectors. They wish to adjourn the fixed Hearing date of July 8 because of a vacation. Mr. Thomaidis appears to be attempting in every way to throw the “fault” of this request back onto the owner. I find that this is not reasonable, no matter the claims or the timing of consent or non-consent. It was TLAB staff that provided the date of August 15 for the adjourned Hearing. It seems difficult to understand how the objector could have been misled by the appellant/owner. I find it distasteful that the Parties now attempt to turn all of the responsibility for the adjournment request back upon the owner. I do not find his desires to construct as quickly as possible to be somehow blameworthy, but instead logical. He should not have to utilize the property himself to somehow mitigate his damages. In any event, the TLAB has no jurisdiction to consider any non-land use planning factors such as rent or construction costs in this matter.

However, it is likewise not reasonable for the owner to argue that he is willing to proceed with another counsel on the original hearing date of July 8. Both of the other Parties swore that they cannot attend on that day. The Hearing will not proceed on that date.

Mr. Thomaidis argues that the fact that he himself cannot attend on August 15, **the date supplied by TLAB staff**, is somehow attributable to the owner failing to agree sufficiently early to their adjournment request. They then had to file this formal Motion to adjourn the July date in order for them to go on holiday (no facts are given), as the TLAB Rules respecting Motions require. This is also not logical, since they are the instigators of the adjournment request. As Ms. Heydon had stated in her email of May 3 to staff, she had confirmed that the Parties would be out of the country on July 8th but could be available for a hearing “anytime after July 14, with the exception of the week of August 26.” (attached as Exhibit “B” to Mr. Thomaidis’ Affidavit in support of the Motion). Both staff and Parties should have been able to rely on this information.

He also chides the owner when he states that at the COA there was: “a unanimous rejection of all of the appellant's requested variances (without right to resubmit).” This is in error, as the appeal provides a hearing *de novo*. It is, in effect, an opportunity to “resubmit.” It matters not what the COA did or did not do on the application to them, although the TLAB must consider their finding and the materials before them.

The more serious point made by Mr. Thomaidis is that in fixing a hearing date on which he, a Party, cannot attend, is (in effect) a breach of natural justice. While I am fairly certain that Ms. Heydon, as a fellow Party, could more than adequately examine, cross examine, and summarize as well as Mr. Thomaidis (as the owner suggested, and is evident in her thorough Motion), Mr. Thomaidis seems to not believe that this is true. He demands to attend, as is his right. The TLAB must do all in its power to support the right of Parties to participate fully in appeal hearings. Therefore, with sympathy for the owner’s time constraints, I fix the Hearing date for this matter for September 10, 2019, when all Parties and Participants have confirmed that they are available.

In assessing the adjournment request, the applicable Rule 23.3 of the TLAB Rules requires regard for:

c) the integrity of the TLAB’s process;.... It is questionable whether the process would be adversely affected, if one objector cannot attend, but another with presumably similar views can, and can ask questions of witnesses on behalf of both. This has occurred before. The Motion and supporting Affidavit were similar in content and phraseology.

e) the position of the other Parties on the request;The owner strongly opposes an adjournment. (It is to be noted that Participants are not included in the wording of this Rule). I also consider that there is some unfairness to the owner here. The Mover of the Motion received a Notice of Hearing on April 1, 2019 and then waited until May 24, 2019, approximately two months, before formally requesting an adjournment. I realize that negotiations were being conducted, but delay is a factor.

f) whether an adjournment will cause or contribute to any existing or potential harm or prejudice to others, including possible expense to other Parties;.... The owner’s views here are clear.

g) the effect an adjournment may have on Parties, Participants or other Persons;....
The owner swears to significant prejudice.

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: ... While one Party cannot be present, it appears from the evidence on the Motion that he would be fairly represented by the other person at his residence. However, I recognize every Party's right to attend the oral Hearing.

The owner stated in his Response that refusing or modifying the relief sought in the Motion would allow the TLAB to balance the interests of all Parties and Participants. Unfortunately, it appears that the only possible date for the Hearing as of now is September 15, 2019.

DECISION AND ORDER

The Motion is granted, and the Hearing of this appeal will proceed on September 10, 2019. There will be a new Notice of Hearing provided. Required filings have already occurred under the dates in the previous Notice. If anyone wishes to file additional materials, their acceptance will be determined by the Member presiding at the Hearing.

X 

G. Burton

Panel Chair, Toronto Local Appeal Body