

# DECISION AND ORDER

**Decision Issue Date**      Friday, September 20, 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): CAROLYN PASCOE

Applicant: ANDREW DEANE

Property Address/Description: 347 Cortleigh Blvd.

Committee of Adjustment Case File: 19 121451 NNY 08 MV (A0162/19NY)

**TLAB Case File Number: 19 161087 S45 08 TLAB**

**Hearing date:**      Tuesday, September 17, 2019

**DECISION DELIVERED BY G. BURTON**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
SILVANA COLAVECCHIA	Owner	
ANDREW DEANE	Applicant	
GINO DI GESO	Primary Owner/Party	IAN ANDRES
STEVE NEWMAN	Participant	
ELLEN K ROSENBLUTH	Participant	
DARREN SUKONICK	Party (TLAB)	
CAROLYN PASCOE	Appellant	ROBERT BROWN
TONY VOLPENTESTA	Expert Witness	

## **INTRODUCTION**

This is a decision on a Motion for an adjournment of the scheduled Hearing date of September 17, 2019, for the appeal to the Toronto Local Appeal Body (TLAB) by Ms. Carolyn Pascoe, a neighbour of the owners of 347 Cortleigh Boulevard. The owners Ms. Silvana Colavecchia and Mr. Gino di Geso had applied to the Committee of Adjustment (COA) for 14 variances for the construction of a new detached dwelling at the subject property. These were granted, with conditions, in a decision of May 8, 2019.

Ms. Pascoe appealed to the TLAB on May 28, 2019, giving reasons as is required. A Notice of Hearing was issued in the normal course on June 6, 2019. It contained dates for the required pre-filing of documents, again as is usual. Mr. Darren Sukonick requested Party status in the appeal on July 8. Two other persons sought Participant status.

## **BACKGROUND**

There has been a complicated series of events, which I will simplify as much as possible. The TLAB Notice of Hearing of June 6 set out a Hearing date of September 17, 2019. The last date for filing a Motion in the matter was given as September 3, 2019.

On July 12, 2019, the solicitor for the owners, Mr. Ian Andres, requested the consent of the Appellant Ms. Pascoe and the Party Mr. Sukonick for an adjournment of the scheduled Hearing date of September 17. Mr. Andres had a scheduling conflict. Both parties consented to an adjournment and provided dates on which they were **not** available for a new Hearing date. Mr. Andres responded a week later, on July 22, but in a reversal of his previous request, stated then that his client in fact did not consent to an adjournment of the September 17 date. Thus, he withdrew his request. By this time, however, Ms. Pascoe, a sole proprietor, had made other business plans for the September 17 date.

## **MATTERS IN ISSUE**

Is it appropriate to request an adjournment, creating the impression that proceeding on the scheduled date is impossible, then withdraw the request after other parties have relied on it?

## **JURISDICTION**

The TLAB Rules provide as follows:

**Consent adjournments Excepted Unless TLAB Directs Otherwise**

17.2 Where a Party has obtained from the TLAB an adjourn-to date and all Parties consent to an adjournment request and all Participants have been notified of the request no motion is necessary and the TLAB may issue a revised Notice of Hearing.

**Notice of Motion**

17.3 A Motion in a Proceeding shall be made by Notice of Motion, using Form 7. The TLAB may require a Motion to be held by Electronic Hearing.

**Date for Motion**

17.4 A Motion shall be heard by Oral Hearing and the Moving Party shall obtain from the TLAB a Motion date prior to Service of the Notice of Motion, unless the TLAB directs otherwise.

**TLAB may Require Motions to be in Writing or Electronically**

17.5 The TLAB may require a Motion to be held in writing upon such terms as the TLAB directs.

17.6 Where a Motion in writing is requested by a Party and where the TLAB agrees, the TLAB will provide the Moving Party with a date by which the Motion is to be Served. The Moving Party and any Responding Parties shall thereafter comply with the Rules (Rules 17.8-17.12) relating to the Service and Filing of any needed responses or replies.

And further, respecting adjournments:

**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;
- f) grant an indefinite adjournment if the request is made by a Party and is accepted by the TLAB as reasonable and the TLAB finds no substantial prejudice to the other Parties or to the TLAB. In this case, the Moving Party must make a request that the Hearing be rescheduled or the TLAB may direct that the Moving Party provide a timeline for the commencement or continuance of the Proceeding;
- g) convert the scheduled date to a Mediation or prehearing conference; or
- h) make any other appropriate order including an order for costs.

## **EVIDENCE**

In Ms. Pascoe's Notice of Appeal, she provided the following reasons. She mentioned that six neighbours had objected to the COA in writing to the application for minor variances, and one had appeared at the hearing. She cited the failure by the applicants to show neighbouring homes with comparable massing. The COA approved the application although the decision was not unanimous.

Then she referred to her substantive objections. "The overriding principle of the Planning Act is to respect and to reinforce the existing character of the neighbourhood. We believe that the massing of the proposed house including the total building height, side exterior main walls, prominent third storey, length of dwelling, side yard setbacks, and front porch with large entablature – taken as a whole – are potentially destabilizing to the character of the neighbourhood and are thereby contrary to the intent of the Zoning By-laws." In other words, the variances do not meet the tests in the Act.

Similarly, her Party Witness Statement of August 6 provided additional objections to certain of the variances, citing the adverse effects she foresees respecting her property. Mr. Sukonick's Witness Statement was filed the same day, both well beyond July 8, the date required in the Notice of Hearing for such filings. The two Statements raise similar objections to the variances.

Mr. Andres in an email to the Appellant Ms. Pascoe, copied to Mr. Sukonick, stated that he had sought an adjournment on July 12 because he had a scheduling conflict for September 17. He was registered for a planning conference out of town. His client later informed him that he in fact **did not consent** to an adjournment, and wished to proceed on September 17. Mr. Andres had not informed the Appellant earlier than one week

following of this withdrawal of his adjournment request, since his client had been overseas. He would now have to attend the scheduled Hearing on September 17, despite his other plans. He stated that since an adjournment had not been granted formally, it was not certain, and therefore premature for Ms. Pascoe to rearrange her work schedule. An adjournment would in fact further delay the approved construction. The owner is entitled to have a timely disposition of his appeal.

He claimed in his Response to Motion of September 6 that the Motion was not timely, being brought three weeks before the Hearing date, when the Appellant knew as of July 29 that the owner was not consenting to an adjournment. He claimed also that the opponents submitted additional evidence long after the filing dates for evidence had passed.

## **ANALYSIS, FINDINGS, REASONS**

The TLAB Hearing is a hearing *de novo*, meaning that what occurred at the COA is not relevant in the TLAB appeal. It is indeed a new hearing of the matter. Therefore anything occurring at the COA has no direct relevance to the TLAB.

There is some injustice for both parties here. The TLAB always has an interest in upholding scheduled hearing dates where possible. I regret the delay of three months here, that the owner says will be extremely prejudicial to him and his family. However, persons who appeal a COA decision also have the right to an oral hearing, meaning that their physical attendance is possible. In this circumstance I find that it was not unreasonable for Ms. Pascoe and Mr. Sukonick to reorganize their schedules based on the owner's initial adjournment request, as Mr. Andres claimed.

In his response to Mr. Andres' original message of July 12 requesting an adjournment, Mr. Sukonick **on July 15** provided the following requests:

"Given the preparations required for these holy-days and the fact that these holy-days result in shortened work-weeks, we request that the adjourned hearing occur on a date that is on or after Monday, October 28. Taking off an additional day for the hearing during the shortened work-weeks will result in some hardship, particularly for Ms. Pascoe who is selfemployed (*sic*).

We are both generally available the entire month of November, with the exception of Friday, November 8; Thursday, November 28; and Friday, November 29.

Please let me know as soon as possible whether you are amenable to rescheduling on the basis described above. Best regards, Darren."

It should have been very clear from this early response that the appellant Parties were relying on the adjournment request as virtually a given. The TLAB Rules provide for adjournments on consent. Mr. Andres was the one who resiled from his earlier request. I do not find it unreasonable that the appellant parties had made alternate work plans within the week of his adjournment request. Ms. Pascoe at least is unable to attend on the scheduled Hearing date.

The issues Mr. Andres and Mr. Di Geso raise concerning the legitimacy of the appellant parties' alternate business plans, and/or their lack of filing witness statements, must be minimized in deciding this adjournment Motion. There is no obligation upon an appellant to hire an expert witness. Should this occur, then the witness does have an obligation to file a statement.

There have been (albeit somewhat minimal) Party Witness Statements filed for this appeal. Mr. Andres also would reject the Motion on this ground. The Witness Statements expand somewhat upon the reasons provided in the Notice of Appeal. They were indeed filed well beyond the date required for such filings in the Notice of Hearing. However, I have seen many shorter Witness Statements, and less detailed. This lack of detail may go to the merits of Ms. Pascoe's appeal in the end, but should have no bearing on their requests for an adjournment. In the past, when assessing motions for dismissal of an appeal without a hearing, I have seen far less planning rationale provided (which is required by caselaw for these motions) than in this matter. I note that Mr. Andres made no such motion here. He could also have taken the route of filing a response to the Witness Statements, as set out in the Notice of Hearing ("**Response to Witness Statement** as per Rule 16.5 (Form 19) **DUE** no later than August 20, 2019"). No such objection about their sufficiency was made then.

I also find that there was no attempt to provide additional evidence in the Motion, as asserted by Mr. Andres. I do not see any such attempt in the Motion materials. The late-filed Party Witness Statements do provide some details of the earlier reasons for appeal, but not significantly so. I hereby grant an exemption for these late filings. The details can only be of assistance to the owner in preparing to meet the opposing case. I also acknowledge the timely filings by the owner's expert witness.

I have carefully considered the applicable sections of the TLAB Rule 23.3 respecting the appropriateness of an adjournment request. I find that the following provisions apply in this matter: clauses b), the interests of the Parties in having a full and fair Proceeding; c) the integrity of the TLAB's process; 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.

I find the most critical Rules for this matter are f), g) and h).

It is impossible to conduct a full and fair appeal Hearing in the absence of the Appellant. The TLAB Hearing would not be just in this circumstance. There will be carrying costs to the owner involved in an adjournment, and this is very regrettable. I have less sympathy with the argument about other persons being delayed – if approved, the home would not be built and available before 2020 in any event. However, I find that the original adjournment request by Mr. Andes was not withdrawn within a short timeframe. Since the opponents agreed to permit an adjournment at the time, given the Rule for adjournments on consent, **it was not unreasonable** for Ms. Pascoe to make alternate business arrangements within that time (at least a week before consent was withdrawn).

Should the Motion request for an adjournment have been made earlier than the last day given in the Notice of Hearing for Motions? Perhaps. Mr. Andres said that filing a Witness Statement implied that Ms. Pascoe intended to appear at the Hearing as scheduled. He argued that she then proceeded to make other business arrangements “at her own risk.” Ms. Pascoe mentions in her July 28 email message to Mr. Andres that a “neighbour meeting with our advisor” was postponed since there had been no response from Mr. Andres about his adjournment request. From the TLAB file, notice of her representative was given at a very late date, beyond the date of September 3 in the Notice of Hearing. My original suspicion was that the adjournment Motion resulted from this late hire, until I noticed the reference to an “advisor” in her earlier message. It may not be the same advisor. In any event, the Motion to adjourn was filed on the date permitted in the Notice of Hearing, that is, **within the given time frame for filing a Motion**. A Party should not be penalized if it/they follow the Rules.

## DECISION AND ORDER

The Motion is accepted. The Hearing in this Appeal will be on December 5, 2019.

The dates for required filings will be as set out in the new Notice of Hearing.

X 

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G. Burton

Panel Chair, Toronto Local Appeal Body