

AMENDED DECISION AND ORDER

Decision Issue Date Friday, September 27, 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): ANDRIY DONCHENKO

Applicant: PETER HIGGINS

Property Address/Description: 183 CORTLEIGH BLVD

Committee of Adjustment Case File: 19 141885 NNY 08 MV

TLAB Case File Number: 19 183751 S45 08 TLAB

Motion Hearing date: Tuesday, September 03, 2019

DECISION DELIVERED BY SEAN KARMALI

APPEARANCES

Name	Role	Representative
Peter Higgins	Applicant/Appellant's Legal Rep	
Olga Timofeeva	Owner	
Andriy Donchenko	Appellant/Primary Owner	
City of Toronto	Party	Aderinsola Abimbola
William Black	Party	
Pamela O' Rorke	Participant	
Amy Lewtas	Participant	
David Matheson	Participant	
Scott Pennock	Participant	

INTRODUCTION

1. The oral hearing for this matter is scheduled for Friday, November 8, 2019.
2. This is a request for an adjournment of the scheduled oral hearing date.
3. The Moving Party, who lives next to the subject property at 181 Cortleigh Boulevard, requests an adjournment of the scheduled hearing date to another date in early 2020. The Moving Party requests the motion be held in writing.
4. The substance of the Motion, the Response to the Motion, and the Reply to the Response of the Motion is discussed under the Evidence section below.
5. There are no accompanying affidavits with the Response to the Motion and the Reply as required by Rule 17.10(c) and Rule 17.12(d) respectively.

MATTERS IN ISSUE

6. At issue is whether an adjournment should be granted to accommodate the availability of the Moving Party, Mr. Black, who has a scheduling conflict with the scheduled hearing date.

JURISDICTION

7. The TLAB Rules of Practice and Procedure govern the issue.
8. The Rules provide for Motions (Rule 17), relief in appropriate circumstances (Rule 2), and considerations in granting adjournment requests (Rule 23).
9. A Notice of Motion and a Notice of Reply to a Motion require an accompanying affidavit setting out a brief and clear statement of the facts upon which the Moving Party will rely [Rules 17.7(f) and 17.12(d), respectively]. A Notice of Response to a Motion requires an accompanying affidavit setting out a brief and clear statement of the facts upon which the Responding Party will rely [Rule 17.10(c)].
10. Rule 1.2 defines "Affidavit" as written evidence under oath or affirmation, using Form 10.
11. The considerations in granting an adjournment are captured in Rule 23.3, which states:

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.
12. The Rules shall be interpreted in a manner which facilitates the objective of the TLAB's commitment to fixed and definite dates (Rule 2.1).
13. The Rules shall also be liberally interpreted to secure the just, most expeditious and cost-effective determination of the matter on its merits (Rule 2.2).

EVIDENCE

14. On July 19, 2019, the TLAB issued a Notice of Hearing to all parties which indicated a scheduled hearing date of November 8, 2019. The Notice states hearing dates are firm, and adjournments will not be granted except in accordance with the Rules.
15. On August 19, 2019, the TLAB received a Notice of Motion (Form 7) from the Party, William Black. In his motion materials, which includes an Affidavit (Form 10) from Ms. Cynthia Findlay with referable exhibits (A, B, and C), Mr. Black states he has a scheduling conflict with the scheduled hearing date because of personal and professional reasons.
16. Mr. Black states he will be abroad on November 8, 2019 and November 9, 2019 to attend a family wedding. He also states he has a fixed trial date in the Superior Court of Justice in Kingston, Ontario on November 12, 2019. He believes the precise length of the trial is difficult to predict with certainty. He expects the trial to continue for a number of weeks. In her affidavit, Ms. Findlay believes the trial will likely finish close to Christmas. The Moving Party requests the hearing date be rescheduled to a date in early in 2020.
17. On August 26, 2019, the TLAB received a Notice of Response to Motion (Form 8) from the appellant's legal representative, David Bronskill. Mr. Bronskill requests the TLAB dismiss the motion filed by Mr. Black, or, in the alternative, that the TLAB allow the motion, and adjourn the hearing to a date in November or December 2019.

18. On August 29, 2019, the TLAB received a Notice of Reply to Response to Motion (Form 9) from Mr. Black. The Moving Party writes, among other things, it is unfair, prejudicial and financially punitive to compel him to proceed on a hearing date for which he is not available.

ANALYSIS, FINDINGS, REASONS

19. Ms. Cynthia Findlay is Mr. Black's spouse. She is the affiant for part of Mr. Black's motion materials.

20. Ms. Findlay attended the North York Committee of Adjustment (COA) public hearing on June 20, 2019. She states she made oral submissions on behalf of various neighbours who opposed the Appellant's minor variance application. She also states the COA rendered its amended decision in part because of her submissions.

21. Ms. Findlay states both she and Mr. Black are uniquely positioned to provide important and necessary information to the TLAB since they live next door to the subject property. While I find this statement to be true, it is unclear to me how Ms. Findlay, apart from her affidavit, can provide important and necessary information to the TLAB if she has neither elected to be a party nor a participant to the proceeding. There is, of course, no requirement for Ms. Findlay to participate at the TLAB hearing. Furthermore, it does not appear Mr. Black intends to call Ms. Findlay as a witness at the oral hearing as the TLAB has not received a witness statement to give effect to such an intention.

22. Mr. Black has elected to be a party to the de novo hearing of the TLAB. The reply record indicates Mr. Black has experience with calling evidence, cross-examination, and various other typical features of hearings like the TLAB hearing.

23. Ms. Findlay writes that both she and Mr. Black will be in North Carolina on the scheduled hearing date and on November 9, 2019, to attend their niece's wedding.

24. Mr. Bronskill, counsel for the Responding Party, states the only ground the appellant supports is the Moving Party being unavailable for the scheduled hearing because of his niece's wedding. Mr. Bronskill admits the appellant is prepared to consent to a short adjournment. I find this an appropriate gesture.

25. However, Mr. Bronskill seeks an order of the TLAB to dismiss Mr. Black's motion to adjourn if the TLAB is unable to find a new hearing date in 2019. Mr. Black, on the other hand, seeks an order that the request for adjournment be granted until early 2020.

26. Mr. Bronskill states the appellant cannot consent to a "lengthy delay" that would result from a longer adjournment requested by the motion.

27. It is unfortunate Mr. Black is unable to proceed on the scheduled hearing date. In addition to his matter at the Ontario Superior Court of Justice, which starts on November 12, 2019, a date his spouse swears has been in place for approximately 18 months, he will be abroad on the hearing date and on November 9, 2019 to attend his niece's wedding. It would appear that both events are beyond his control.
28. I find the consequences of the TLAB oral hearing are serious to Mr. Black. He is an adjacent neighbour to the subject property, and he has expressed a continuing intention to be a party to the proceeding, where he will represent himself.
29. I find Mr. Black would be prejudiced if the request for an adjournment to early 2020 was not granted. He, as a party, would be deprived of the right to a full and fair proceeding.
30. This is not a situation where a request for adjournment was made at the last minute to be clear. I believe Mr. Black made a good effort to communicate his scheduling conflict to the appellant. In fact, Mr. Black communicated his conflict within one week from the issue date of the TLAB Notice of Hearing as indicated in Exhibit B of Ms. Findlay's affidavit.
31. However, I also find the appellant would be prejudiced by a delay caused by an adjournment until early 2020. The appellant would like the matter decided expeditiously.
32. I find a prejudicial delay experienced by the appellant, however, does not outweigh Mr. Black's right to a full and fair hearing. It might have been helpful to know what other effects from a prejudicial delay are created for the appellant.
33. In Exhibit C of Ms. Findlay's affidavit on which the Moving Party relies, Mr. Bronskill writes that a delay until 2020 is problematic, and, as such the appellant cannot consent to an adjournment until 2020.
34. Apart from a prejudicial delay, I cannot speculate as to other types of prejudice the appellant might experience as a result of an adjournment until early 2020.
35. I also cannot speculate on the effect of an adjournment on other Parties, Participants, or other Persons as I do not have any information before me from the aforementioned.
36. I sincerely appreciate Mr. Bronskill stating the TLAB is committed to fixed and definite dates for its hearings.
37. The TLAB is committed to fixed hearing dates to also encourage Parties to contemporaneously assess settlement options, including mediation that can be TLAB sponsored, and to ensure a timely disposition of matters on appeal to the TLAB, I refer to Rule 19.

38. I believe this request for an adjournment is a unique circumstance where the Rules must be interpreted liberally to secure not only the most expeditious and cost-effective determination, but also a just outcome on its merits.

AMENDED DECISION AND ORDER

39. The Decision and Order issued by the TLAB on September 23, 2019 is revoked and not effective. There was an administrative oversight in the dates canvassed by the TLAB from the parties.

40. The following is an Amended Decision and Order to correct this oversight pursuant to TLAB Rule 30.

41. The request that the motion be in writing is granted.

42. The request for an adjournment of the scheduled hearing is granted.

43. The oral hearing will take place on Thursday, February 20, 2020 and, if required, on Friday, February 21, 2020.

44. The TLAB will issue/post a revised Notice of Hearing with the dates of hearing being Thursday, February 20, 2020 and Friday, February 21, 2020. There are to be no other changes to the Notice of Hearing.

45. Any witness intended to be called must have filed a Witness Statement and all applicable documents to which reference is intended.

X

Sean Karmali
Panel Chair, Toronto Local Appeal Body