

# DECISION AND ORDER

**Decision Issue Date**      Wednesday, February 19, 2020

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): HOMAYOUN NABAVI

Applicant: TJ CIECIURA

Property Address/Description: 36 CLISSOLD RD

Committee of Adjustment Case File: 18 130490 WET 05 CO, 19 228216 WET 03 MV, 19 228215 WET 03 MV

**TLAB Case File Number: 18 214914 S53 05 TLAB, 19 250468 S45 03 TLAB, 19 250463 S45 03 TLAB**

**Last submission date:**      Friday, January 31, 2020

**DECISION DELIVERED BY SEAN KARMALI**

## APPEARANCES

Name	Role	Representative
TJ Cieciura	Applicant	
Soheila Borghei	Owner	
Homayoun Nabavi	Appellant	
City of Toronto	Party	Aderinsola Abimbola
Olivia Antonel	Expert Witness	
Max Dida	Expert Witness	
Valentyna Shevchenko	Participant	
Jennifer Kosiw	Participant	
Boris Horciak	Participant	

Name	Role	Representative
Lynn Zalany	Participant	
Mohammad Zeidi	Participant	
Paul Leunissen	Participant	
Ivan Kraljevic	Participant	

## **INTRODUCTION**

The online application details in respect of the TLAB indicate that Ms. Lynn Zalany is a registered participant<sup>1</sup> in the appeal of 36 Clissold Road (subject property). She moves to elect for party status for the upcoming two-day proceeding scheduled for March 23, 2020, and March 26, 2020. She seeks permission to submit a party witness statement and document disclosure by February 07, 2020, or on a date so appropriately ordered by the TLAB. She requests that this motion be heard in writing, as the moving party. The responding party is Mr. Homayoun Nabavi, who is the appellant.

## **BACKGROUND**

There is considerable procedural (interlocutory) history about this matter, which I have carefully read. The matter is now consolidated, with both the refused consent application and refused variance applications under contemporaneous appeal before the TLAB.

The decision to move to consolidate the applications prompted a new notice of hearing (Notice), with attendant form and document deadlines. The Notice appears to have been properly served on December 9, 2019, on the appellant, parties, participants, and legal representative(s). The Notice indicated that a notice of intention to be a party (Form 4) was due on January 8, 2020. The Notice also indicated a witness statement (Form 12), and document disclosure was due on February 07, 2020.

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<sup>1</sup> Ms. Zalany originally submitted a notice of intention to be a participant on October 9, 2018. That form had a standard note, which reads: "The expression of intention in this Form governs unless there is an order of the TLAB to the contrary. For rights and privileges of a Party, see Rule 12.6. For rights and privileges of a Participant, see Rule 13.7." Ms. Zalany also provided a participant witness statement and other disclosure items on November 5, 2018. The notice, statement and other disclosure appear to have been received on time to the TLAB.

## **MATTERS IN ISSUE**

1. Should this motion request be heard in writing pursuant to Rule 24?
2. Should Ms. Zalany be recognized or not recognized as a party?
3. If Ms. Zalany is recognized as a party by order of the TLAB, what should be the new deadlines for document disclosure, and the witness statement, and exchange of documents i.e. response and reply to the witness statement?

## **JURISDICTION**

The motion is governed by the Rules of Practice and Procedure adopted in 2017 (Rules) by the Toronto Local Appeal Body pursuant to the *Statutory Powers and Procedures Act*.<sup>2</sup>

Where procedures are not provided for in the Rules, the TLAB may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner pursuant to Rule 2.5.

The Rules pertinent to a decision on this motion include:

### **RULE 12: PARTIES**

12.3 The Local Appeal Body may name Persons to be Parties for all or part of a Proceeding on such conditions as it considers appropriate. A Party to a Proceeding is not a Participant to a Proceeding.

12.4 In deciding whether a Person's status as a Party to a Proceeding should be denied, at any time, the Local Appeal Body may consider, among other things:

- a) whether the Person's interests may be directly and substantially affected by the Proceeding or its result;
- b) whether the Person has a genuine interest, whether public or private, in the subject matter of the Proceeding; and
- c) whether the Person is likely to make a relevant contribution to the Local Appeal Body's understanding of the issues in the Proceeding.

### **RULE 13: PARTICIPANTS**

13.8 A Participant to a Proceeding may not:

- b) bring Motions, except a Motion to seek Party status

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<sup>2</sup> The original Notice of Hearing was issued prior to May 6, 2019. It appears a number of the online filings were made pursuant to the Rules adopted in 2017, not the Revised Rules.

## **RULE 17: MOTIONS**

17.1 No Motion, except a Motion brought under Rule 28, shall be heard later than 30 Days before the Hearing, unless the Local Appeal Body orders otherwise.

17.2 A Motion in a Proceeding shall be made by notice of Motion, using Form 7.

17.3 A Motion shall be heard by Oral Hearing and the Moving Party shall obtain from the Local Appeal Body a Motion date prior to service of the notice of Motion, unless the Local Appeal Body directs otherwise.

17.4 The Local Appeal Body may require a Motion to be held by Written Hearing or by Electronic Hearing upon such terms as the Local Appeal Body directs.

17.5 A notice of Motion to be heard by Oral Hearing, by Electronic Hearing or by Written Hearing shall:

- a) state the date, time and location of the Motion, unless the Motion is to be by Written Hearing;
- b) state the precise relief sought;
- c) state the reasons and grounds to be argued, including a reference to any statutory provisions or Rules to be relied on;
- d) list and attach the Documents to be used in the Motion;
- e) be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the Moving Party will rely; and
- f) state the names and contact addresses of the responding Parties or their Representatives and all Persons to whom the notice of Motion is to be given.

17.6 A Moving Party shall serve a notice of Motion on all Parties and File same with the Local Appeal Body at least 15 Days before the date the Motion is to be held by Oral Hearing or by Electronic Hearing, unless the Local Appeal Body directs otherwise.

17.7 If a Party intends to respond to a Motion a responding Party shall serve on all Parties a notice of response, using Form 8 and File same with the Local Appeal Body at least 7 Days before the Day the Motion is to be held by Oral Hearing or by Electronic Hearing, unless the Local Appeal Body directs otherwise.

17.8 A notice of response shall:

- a) state the responding Party's response, including a reference to any statutory provisions or Rules to be relied on;

- b) list and attach the Documents to be used in the Motion; and
- c) be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the responding Party will rely.

17.9 If a Moving Party intends to reply to new issues, facts or Documents raised in the notice of response to Motion the Moving Party shall serve on all Parties a notice of reply, using Form 9, and File same with the Local Appeal Body at least 4 Days before the Motion is to be held by Oral Hearing or by Electronic Hearing, unless the Local Appeal Body directs otherwise.

17.10 A notice of reply shall:

- a) only address new issues, facts and Documents raised in the notice of response;
- b) state the Moving Party's reply, including any reference to any statutory provisions or Rules to be relied on;
- c) list and attach the Documents to be used in the Hearing relating to those matters addressed in the reply; and
- d) be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the Moving Party will rely

## **RULE 24: HEARINGS**

24.6 The Local Appeal Body may consider any relevant factors in deciding to hold a Written Hearing, including:

- a) the convenience to the Parties and the Local Appeal Body;
- b) the likelihood of the process being less costly, faster and more efficient;
- c) whether it is a fair and accessible process for the Parties;
- d) the desirability or necessity of public participation in or public access to the Local Appeal Body's process;
- e) whether the evidence or legal issues are suitable for a Written Hearing;
- f) whether credibility may be an issue or the extent to which facts are in dispute; or
- g) whether a Written Hearing is likely to cause significant prejudice to any Party or Participant.

24.7 If a Hearing proceeds as a Written Hearing the Appellant shall serve on all Parties and Participants and File with the Local Appeal Body all evidence and submissions within 30 Days after the Local Appeal Body's notice of Written Hearing is served.

24.8 Parties and Participants who wish to respond to the Appellant's submissions shall serve on all Parties and Participants and File with the Local Appeal Body all responding submissions and evidence within 20 Days of service of the Appellant's submissions.

24.9 The Appellant may serve a reply to the other Parties and Participants' submissions and File a copy of the reply with the Local Appeal Body within 10 Days of receipt of the responding submissions. The reply shall be limited to any new evidence and new submissions in the responses.

24.10 Following the expiry of the time for any reply submissions the Local Appeal Body shall make its decision.

24.11 Evidence in a Written Hearing must be by way of Affidavit and any Documents and relevant portions of public documents to be relied on shall be attached to the Affidavit.

## **EVIDENCE, ANALYSIS, FINDINGS & REASONS**

The written evidentiary record consists of the motion and the exchanges of response and reply:

- Ms. Zalany's notice of motion (Form 7)<sup>3</sup> filed on January 16, 2020;
- Ms. Zalany's accompanying affidavit (Form 10) with referential exhibits filed on January 16, 2020;
- Ms. Zalany's a notice of intention to be a party (Form 4) on January 16, 2020;
- Mr. Nabavi's notice of response to motion (Form 8) filed on January 20, 2020;
- Mr. Nabavi's accompanying affidavit (Form 10) filed on January 20, 2020;
- Ms. Zalany's notice of reply to response to motion (Form 9) filed on January 31, 2020; and,
- Ms. Zalany's affidavit (Form 10), also with referential exhibits filed on January 31, 2020

My task is to examine, assess, and adjudicate the relevant considerations of this record to an adequate degree.

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<sup>3</sup> Included is a statement of relief sought and reasons for the request.

The reasons for the request in Ms. Zalany's notice of motion trace a significant amount of procedural history, which is useful but not vital to the determination of the motion. Ms. Zalany contends, at paragraph 14 of the attachment to Form 7, that she would like to participate fully by providing opening and closing submissions, ask questions, cross-examine, among other party-elect allowances afforded by the Rules. At paragraph 15 of the same, she states that the motion will not inconvenience any party, participant or the TLAB because she will be able to meet the February 7, 2020 deadline for document disclosure and provision of a party witness statement.<sup>4</sup>

Ms. Zalany's notice of motion does not illustrate why she could not elect to be a party before the January 8, 2020 deadline. She mentions she did not have the opportunity to provide a notice of intention to be a party on the entirety of the appeal. With respect, Ms. Zalany elected to be a participant when the matter was not consolidated. She had the opportunity to elect to be a party before or after consolidation, respectful of the deadlines set by the TLAB. Her request to become a party, on the one hand, is limited by virtue of the deadlines mentioned above. On the other hand, Ms. Zalany is free to assert a (perfected) notice of motion no later than March 09, 2020, as per the Notice, which she seems to have done.

In his response to the notice of motion, Mr. Nabavi indicates that Ms. Zalany cannot make a motion to seek party status, and she cannot become a registered party because she submitted her party intention on January 16, 2020, more than a week after the requisite submission deadline as per the Notice. With respect, Mr. Nabavi ought to have observed Rule 13.8(b), which is noted above. Ms. Zalany, a participant, can seek party status by way of motion. I have further assessed the merits of the motion below.

In her reply, Ms. Zalany writes that she had two telephone conversations with TLAB staff (Staff). In the first conversation, on January 2, 2020, Ms. Zalany claims she was informed by Staff that the January 8, 2020 deadline on the Notice was meant for new party/participant elections only.<sup>5</sup> She was further informed by Staff that should she want to change her status for the proceeding, she would need to start by stating this intention electronically and directly to Staff. Ms. Zalany sent this email on January 10, 2020 (Exhibit A of the Reply). In the second conversation, on January 6, 2020, Ms. Zalany claims Staff informed her about the TLAB's motion procedure.

Ms. Zalany appears to raise new issues in her reply, which she believes are germane to her motion. Her reply, however, and under the Rules, should only address new issues, facts, and documents raised in Mr. Nabavi's notice of response. It is not clear to me why Ms. Zalany did not articulate these concerns in her notice of motion. The Rules are available to everyone for review. Those involved and registered in an appeal process of the TLAB are to comply with these Rules. Accordingly, I place significantly less weight on the reply than on her notice of motion.

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<sup>4</sup> Elsewhere, Ms. Zalany writes that she would like to submit an expert witness statement as a party. This could have been a mistake on her part. There is no notice of intention to be an expert witness before me. I will not entertain a request of this kind at this time.

<sup>5</sup> It would appear that Ms. Zalany believed that since she elected to be a participant in the Fall of 2018, when the matter was not consolidated, the January 8, 2020 deadline did not apply to her.

Still, Rule 12.4 offers some helpful factors to consider when deciding whether a person should be denied status as a party to a proceeding. I have applied these factors to the current situation.

Will Ms. Zalany's interests be directly and substantially affected by the proceeding or its result if she were denied party status? I find so, on a balance of probabilities. Ms. Zalany lives at 42 Clissold Road, the property immediately south of the subject property. I also find that Ms. Zalany expresses a genuine private interest in the matter. She could provide relevant contributions to the TLAB's understanding of the issues, including her perspective of any immediate impacts resulting from the proposal. Although not determinative, I find Ms. Zalany also expresses a genuine public interest in the matter as, over time, she has participated in quasi-judicial and administrative processes concerning proposed developmental changes to the subject property.

If Mr. Nabavi suggests that the denial of his request for appeal from the refused variances somehow prevents Ms. Zalany from participating at the hearing either as a participant or party, this suggestion cannot withstand scrutiny. For instance, had the appeal been in consolidated form at the outset with no need to pause the matter, and had Ms. Zalany somehow missed the deadline to file for party election in the original TLAB notice, she could still bring an on-time motion request, as she has done here, which would be assessed on its merits.

I find that Ms. Zalany demonstrates an intention to be a party. I also find there were no objections raised against the request that the motion be heard in writing. I have considered Rule 24.6, and have determined that factors (a), (b), (c), and (e) are relevant, applicable, and supportive of a hearing in writing. Arguments of prejudice were not raised to be clear.

Finally, under no circumstance should this interlocutory decision be construed as having provided comments on the merits of the consent and variance appeals. To date, all matters in respect of the subject property have been efforts of a procedural nature. The appeals will be heard in March 2020 and determined on its merits or demerits.

## **DECISION AND ORDER**

1. The request that the motion be heard in writing is accepted.
2. Ms. Zalany is afforded (non-expert) party status along with its attendant privileges under Rule 12.
3. Ms. Zalany is permitted until February 21, 2020 to submit her party witness statement and disclosure of documents.
4. In the interest of fairness, if Mr. Nabavi needs to respond to Ms. Zalany's party witness statement, he is permitted until March 6, 2020 to provide such a response.
5. In the interest of fairness, if Ms. Zalany needs to reply to the response of Mr. Nabavi, she is permitted until March 10, 2020 to provide such a reply.



6. The TLAB may be spoken to if the direction provided is not clear to you.

**X**

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Sean Karmali  
Panel Chair, Toronto Local Appeal Body