

AMENDED DECISION AND ORDER

Decision Issue Date Monday, March 16, 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): TOMASZ DEBOWSKI

Applicant: TOMASZ DEBOWSKI

Property Address/Description: 67 MORSE ST

Committee of Adjustment Case File: 18 144547 STE 30 CO, 18 144554 STE 30 MV, 18 144555 STE 30 MV

TLAB Case File Number: 19 236325 S45 14 TLAB, 19 236326 S45 14 TLAB, 19 236327 S53 14 TLAB

Hearing date: Friday, February 28, 2020

DECISION DELIVERED BY SEAN KARMALI

APPEARANCES

Name	Role	Representative
Tomasz Debowski	Responding Party/Appellant/Owner	
City Of Toronto	Moving Party/Party	Jason Davidson

INTRODUCTION

April 28, 2020 and April 29, 2020 are the dates on which the merits of Mr. Debowski's Applications¹ on Appeal will be heard.

Mr. Davidson, on behalf of the City of Toronto (City), moves for an Order to dismiss Mr. Debowski's Applications on account of Mr. Debowski not having retained a land-use planner to support his Applications.

¹ COA Application File Numbers: B0045/18TEY (consent request) A0421/18TEY (variance requests for the retained lot) and A0422/18TEY (variance requests for the conveyed lot). Taken together, these constitute the Appeals, which derive from the Applications.

The Moving Party writes, "[T]he appeal should be dismissed because the TLAB will not be able to determine if the application and its requested severance and variances meet the requirements of sections 3, 45(1) and 53 of the *Planning Act*." In the alternative, the Moving Party seeks an Order to extend the exchange deadlines for Document disclosure and witness statements to April 3, 2020.

BACKGROUND

On September 26, 2019, the Committee of Adjustment (COA) of the Toronto and East York District heard the application for consent and the applications for variance together (Applications).

The consent for severance, if approved, would have produced two undersized residential lots. The variances requested for the retained lot would have maintained the existing three-storey semi-detached dwelling with two dwelling units. A new rear detached garage would be constructed on this lot. The variances requested for the conveyed lot would have maintained an existing detached garage. The conveyed lot would have seen the construction of a new three-storey detached dwelling.²

The COA decided to refuse the consent application because it found that the proposed land division was premature, not in conformity with the policies of the Official Plan, and not demonstrative of suitability for subdivision. The COA decided to refuse the variance applications because the variance requests did not meet at least one of the prescribed tests under the *Planning Act*.

On October 15, 2019, the Appellant filed three Appeals to the TLAB, which all followed the prescribed form i.e. Form 1.

On October 16, 2019, the next day, the TLAB received email correspondence from the Appellant who communicate that he is unavailable between January 1, 2020 and April 15, 2020. The Appellant stated his absence for this period was arranged 'long in advance' and requested the TLAB consider these circumstances when scheduling his hearing date.

On October 22, 2019, the TLAB issued a Notice of Hearing, which provided for the hearing dates of February 04, 2020 and February 14, 2020. Equally important, document submission deadlines were indicated on this Notice.

On October 30, 2019, the TLAB received a Notice of Intention to be a Party (Form 4) from Mr. Davidson on behalf of the City of Toronto.

² This paragraph indicates the purpose statements for each application. I note there is procedural history about the Applications before the COA decided on them. While the TLAB is a de novo appeal procedure, the *Planning Act* requires the TLAB give consideration to, among other things, the decision on initial consideration. This means that the Committee filings are not to be disregarded.

On November 25, 2019, Mr. Debowski sought agreement from Mr. Davidson for a consent adjournment given Mr. Debowski's unavailability. Mr. Davidson was friendly. The Hearing was adjourned to April 28, 2020 and April 29, 2020 on consent of the Parties. A revised Notice of Hearing was issued on November 28, 2019, which provided for the aforementioned hearing dates but with no new or updated document submission deadlines

On December 5, 2019 and December 23, 2019, the TLAB received Applicant's Disclosure (Form 3) and a Party Witness Statement (Form 12), respectively, from the Appellant.

On February 04, 2020, the TLAB received a Notice of Motion (Form 7) and Schedule A from Mr. Davidson along with an Affidavit (Form 10) and Schedule B.

On February 06, 2020, the TLAB communicated to the Moving Party that the last day to submit motion materials is February 06, 2020, and that the Notice of Response (Form 8) and the Notice of Reply (Form 9), are due February 13, 2020 and February 17, 2020 respectively.

On February 13, 2020, the Moving Party sent Email correspondence indicating that it expects a Response by February 13, 2020.

On February 14, 2020, the TLAB received a Notice of Response to Motion from the Responding Party, which appears to have been sent on February 13, 2020. The Response was discovered by TLAB staff on February 21, 2020. The Responding Party did not provide an accompanying Affidavit.

On February 24, 2020, Mr. Davidson replied by Email. He stated that he, too, discovered the Response. Mr. Davidson indicated that the City is prepared to withdraw the dismissal aspect of the Motion if, among other things, the TLAB instructs Mr. Debowski to retain a planner in support of his Applications. The Moving Party did not provide a Reply in prescribed form.

MATTERS IN ISSUE

ISSUE 1: How did the TLAB decide that the motion aspects of dismissal and extension of time for filing are to be heard in writing?

ISSUE 2: Whether the facts of this appeal as cited in the Motion materials fall within the language of the *Planning Act* in respect of dismissal without a hearing?³

ISSUE 3: If the request for dismissal is not appropriate, should the TLAB, then, extend the submission deadlines to April 3, 2020, or to a date it considers appropriate?

³ The language in TLAB Rule 9 provides for similar powers.

JURISDICTION

Planning Act, RSO 1990 c P13

Dismissal without hearing

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process;

(b) the appellant has not provided written reasons for the appeal;

(c) the appellant has not paid the fee charged under the *Local Planning Appeal Tribunal Act, 2017*; or

(d) the appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal. 2017, c. 23, Sched. 5, s. 98 (5); 2019, c. 9, Sched. 12, s. 13 (2).

Representation

(17.1) Before dismissing all or part of an appeal, the Tribunal shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (17) (d). 2000, c. 26, Sched. K, s. 5 (3); 2017, c. 23, Sched. 5, s. 80.

Dismissal

(17.2) The Tribunal may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (17), as it considers appropriate. 2017, c. 23, Sched. 5, s. 98 (5).

All of the Rules generally apply. Some of the Rules relevant to this Motion are excerpted below.

RULE 17: Motions

17.1 Date by which Motions will be Heard

No Motion, except a Motion brought under Rule 28, shall be heard later than 15 Days before the Hearing, unless the TLAB orders otherwise.

RULE 24: Hearings

24.6 Factors Considered for Holding a Written Hearing

24.7 Procedure for Exchange of Documents in Written Hearing

24.8 Evidence in a Written Hearing must be by Affidavit

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.

RULE 4: Time

4.4 The TLAB may on its own initiative, or, on a Motion by a Party, extend or reduce time limit provided by these Rules on such conditions as the TLAB considers appropriate.

4.5 The TLAB may exercise its discretion under Rule 4.4 before or after the expiration of a time limit and with or without a Hearing.

RULE 2: Application of the Rules

2.2 These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits.

2.3 The TLAB may exercise any of its powers under these Rules or applicable law, on its own initiative or at the request of any Person.

2.6 Where procedures are not provided for in these 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.

2.11 The TLAB may grant all necessary exceptions to these Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner.

EVIDENCE

The Evidence for this written Motion consists of:

- Notice of Motion from Mr. Davidson (Form 7) with a schedule A
- Affidavit (Form 10) with a schedule B, affidavit of Ms. Lauren Pinder and five exhibits
- Notice of Response (Form 8) from Mr. Debowski with schedule A⁴
- Informal reply from Mr. Davidson by Email correspondence

ANALYSIS, FINDINGS, REASONS

ISSUE 1

I am mindful of the dismissal aspect of the Motion and its suitability, or lack thereof, for a Written Hearing. There is a presumption, however, that where a Party requests a date to file a Motion for a Written Hearing, “[t]he TLAB will treat and **require** the request to be conducted as a written Motion.”⁵ (Emphasis added.) Rule 17 stipulates the timeline for a Motion Exchange.

I find that since Mr. Debowski informed the TLAB of his unavailability between January 1, 2020 and April 15, 2020, an Oral Hearing for this Motion, at this time, would be impractical unless prior arrangements had been made for representation, for example.⁶

I have not observed any objection to the requested format of the Motion hearing.⁷ In fact, Mr. Debowski’s Response illustrates ‘In writing’ under Part 1.

For the reasons mentioned, I find a Written Hearing for the Motion matter at hand is, more likely than not, the most convenient format for all of the Parties and the TLAB.⁸

⁴ I will give Mr. Debowski the benefit of the doubt that the Response was sent and received on time in this instance.

⁵ Practice Direction 2: Default Format of Specific Motion Hearings, effective October 11, 2017. This should be read together with Rule 17.5 and 17.6.

⁶ Even though Mr. Debowski has said he is unavailable until the middle of April, he is responsible for responding to interlocutory matters, and every stage of the proceeding as required. As he has neither retained a lawyer nor a non-lawyer for representation, he may consider to carefully review Pages 14 and 15, and 17 of the Revised Toronto Local Appeal Body Public Guide (Public Guide). I note he is generally aware of the Public Guide based on Paragraph I.2 of Form 8, Schedule A.

⁷ Mr. Debowski has demonstrated an availability to participate in a Written Hearing as he had provided a Response.

⁸ I acknowledge that a motion brought to dismiss a Proceeding without a Hearing on the enumerated grounds contained in Rule 9 (9.1 and 9.2) has not been advanced here, at least not directly. At this stage, adjudicative screening in the bringing of the appeal may not apply. Mr. Debowski has also filed documents subsequent to his Notice of Appeal.

ISSUE 2

My task is not to make findings on the merits of the proposal, but on the legitimacy and authenticity of the appeal.

The City seeks the dismissal of the Applications without a hearing. The City also seeks confirmation of the decisions of the COA, which refused the Applications.

Where a Motion to Dismiss proves there is no planning ground on which the appeal can succeed, that motion is usually granted and the appeal dismissed without a hearing.⁹ If that happens, an applicant's statutory right to a hearing on its merits is abrogated.¹⁰ In a previous decision of the TLAB, Member Burton signaled caution when considering this type of Motion: "[t]he exercise of this jurisdiction must be carefully considered to ensure that appeal is not prematurely dismissed."¹¹

In the matter at hand, the motion for dismissal arises on account of the Appellant not having retained a land-use planner in support¹² of his Applications. Mr. Davidson helpfully provided recent and relevant Ontario Municipal Board (OMB) case law to advance the City's legal argument in this respect.

The cases are:

1. *1744656 Ontario Inc v Toronto (City)*, [2015] OMBD No 436
2. *Ding v Toronto (City)*, [2015] OMBD No 451
3. *Lotfi v Toronto (City)*, [2017] OMBD No 1224

I accept these cases as instructive in considering the matter. Mr. Davidson states that the cases give 'clear direction' that where there is no supportive expert land-use planner, "[t]he most just, expeditious and cost-effective manner for adjudication is to dismiss the Applications."¹³

In each of the OMB matters, however, I understand that the appellant or applicant, self-represented or represented by an agent or otherwise, was allowed to present their case and be heard. Mr. Debowski has a similar understanding.¹⁴ The OMB presumably drew its findings and conclusions, in part or whole, from the purported lack of planning evidence after the opportunity for a full and fair hearing.¹⁵

⁹ TLAB Case File Number: 19 127786 S45 04 - 33 Abbott Avenue, Member Burton, May 24, 2019 at 4 of 5.

¹⁰ *Ibid.* at 5 of 5.

¹¹ *Ibid.*

¹² To be clear, "support" includes answering technical questions and providing nonpartisan opinion evidence as per Page 17 of the Public Guide.

¹³ Paragraph 15 of Form 7, Schedule A

¹⁴ Paragraph I.1 of Form 8, Schedule A

¹⁵ This is not to suggest that there cannot be cases where a dismissal may be appropriately contemplated for the TLAB's consideration. As an example, there could be cases for which a dismissal is pertinent such as when the proceeding is frivolous, vexatious or not commenced in good faith. See Rules 9.1 (b) and 9.2 (b).

I generally accept the following finding the panel members made in *Ding*: “[I]t is incumbent upon those who are party to appeals before the Board to come prepared for the hearing and to offer planning evidence in support of their position where necessary.”¹⁶ While there is no requirement for an applicant to retain an expert in land use planning, the burden is on the applicant to prove its case. In other words, Mr. Debowski is not required to retain a professional land use planner, but he could opt to retain one. He writes that he will reconsider retaining an expert land use planner if the exchange of documents is set to ‘the later date’ i.e. April 3, as proposed by Mr. Davidson.¹⁷

A process that does not give a decision-maker confidence in his conclusions can never be the proportionate way to resolve a dispute.¹⁸ While the Motion materials from the City are well-prepared, I cannot appropriately find for a dismissal of Mr. Debowski’s Applications. The considerations involved in summarily dismissing an application depend, in large part, on what is fair and just. What is fair and just turns, in part, on the nature of the issues and the nature and strength of the evidence.¹⁹ It is clear that Mr. Debowski filed Appeals and subsequently provided the TLAB with Document disclosure. The nature and the strength of the evidence will be fully known to the Presiding Member at the Hearing. Mr. Debowski acknowledges his onus of proof and his intention to present factual evidence at that time.²⁰ In the circumstances, no dismissal is warranted, and the appeal shall proceed. The Hearing dates are now to be considered peremptory.

ISSUE 3:

Since I have not granted the Motion for summary dismissal, I now turn to the alternative relief requested by the City. Mr. Davidson writes that the City is prejudiced by the Documents Mr. Debowski submitted on December 23, 2019. This is the submission deadline indicated on the original TLAB Notice of Hearing for Document disclosure and the witness statement.²¹ Mr. Davidson writes that he had “without prejudice” discussions with Mr. Debowski in November 2019 to extend the deadline for exchanging Document disclosure and witness statements.²² He writes his discussions also contemplated the submission of a prospective motion to request an extension of the submission deadlines at a later time.

The TLAB may issue a revised Notice of Hearing where there is an adjournment request consented to by all of the registered Parties. This is an exception to the rule that adjournments must be brought by way of motion. The revised Notice does not provide for updated submission deadlines for a matter waiting to be heard for the first time. I understand this caused some anxiety for Mr. Debowski because he did not know when

¹⁶ *Ding v Toronto (City)*, [2015] OMBD No 451 at para 15 (in the attachments to Form 7, Schedule A).

¹⁷ Paragraph I.5 of Form 8, Schedule A

¹⁸ *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 59. I recognize this case concerns the pre-trial procedure of summary judgement, which is not dissimilar from the pre-trial interlocutory procedure of summary dismissal.

¹⁹ *Ibid.* at para 50.

²⁰ Paragraph I.4 of Form 8, Schedule A

²¹ Paragraph 9 of Form 7, Schedule A

²² Paragraph 9 of Form 7, Schedule A

to file his documents.²³ While the TLAB is committed to fixed and definite dates, a Party can bring a motion before the scheduled hearing so long as the motion is heard no later than 15 days before the hearing. Mr. Davidson has made this move.

Both Mr. Davidson and Mr. Debowski agree to an April 3, 2020 document exchange deadline. I find this deadline reasonable. Accordingly, I have developed a Timetable that should be adhered to in Appendix A.

DECISION AND ORDER

The Motion was heard in writing.

The Motion is granted in part:

The Motion for an extension of time to April 3, 2020 for the Parties to submit document disclosure and witness statements is granted. The Timetable in Appendix A shall be adhered to. Each Party must ensure proper filing and service of Documents on the other Party and the TLAB.

The part of the Motion for the summary dismissal of the Applications is denied. The appeal will proceed as scheduled.

If there are continuing concerns raised on or before noon, March 23, 2020 with a copy to the Parties and the TLAB, the TLAB will convene and provide directions for a teleconference at 1:00 pm EST, March 24, 2020 at 1:00 pm.

If there are any questions about the above Orders, the TLAB may be spoken to.

X 

Sean Karmali
Panel Chair, Toronto Local Appeal Body

²³ Paragraph II.2 of Form 8, Schedule A

APPENDIX A: TIMETABLE FOR SUBMISSIONS

Authorized Representative (Form 5)	DUE no later than March 20, 2020
Acknowledgement of Expert's Duty (Form 6)	DUE no later than March 20, 2020
Request for Summons (Form 11) as per Rule 25 (There are specific service requirements to comply with here, please refer to the Rule. Strict adherence.)	DUE no later than March 20, 2020
Witness Statement (Form 12) as per Rule 16 <u>and/or</u> Expert Witness Statement (Form 14) as per Rule 16	DUE no later than April 3, 2020
<u>Response to (if needed):</u> Witness Statement (Form 19) as per Rule 16 <u>and/or</u> Expert Witness Statement (Form 21) as per Rule 16	DUE no later than April 9, 2020
<u>Reply to (if needed):</u> Witness Statement (Form 20) as per Rule 16 <u>and/or</u> Expert Witness Statement (Form 22) as per Rule 16	DUE no later than April 14, 2020
Document Disclosure as per Rule 16	DUE no later than April 03, 2020