

DECISION AND ORDER

Decision Issue Date Tuesday, May 19, 2020

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 E PULLEYBLANK

Applicant: NICHOLAS JOHN PYLE

Property Address/Description: 410 EUCLID AVE

Committee of Adjustment Case File Number: 19 207506 STE 11 MV

TLAB Case File Number: 19 264305 S45 11 TLAB

DECISION DELIVERED BY Ian James LORD

INTRODUCTION

This matter involves a Notice of Motion dated 2020/03/31 (Motion) by which the moving Party, Mr. David Pulleyblank (Appellant) seeks interlocutory relief, as below described, in advance of an oral appeal Hearing of the Toronto Local Appeal Body (TLAB) in respect of 410 Euclid Avenue (subject property).

It appears that the Notice of Motion (Form7) was served by the Appellant without a return date specified by the TLAB. However, the Motion shows on its face a 'Motion Hearing Date' of 2020/04/15.

The Notice of Motion was responded to by a Notice of Response to Motion (Form 8) by Ms. Jacqueline Orr, an owner of the subject property and one of the Applicants, and was served 2020/04/07 (Response).

In turn, a Notice of Reply to Response to Motion (Form 9) by Mr. Pulleyblank, the owner of the semi-detached dwelling unit at 408 Euclid Avenue, attached to the subject property, was served 2020/04/13 (Reply).

The above constitutes the filings in respect of the Motion issues.

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All of the above dates fall within the TLAB Suspension Period arising under the government Order (Ont. Reg 73/20) and the TLAB's proclaimed cessation of public hearings and performance dates, caused by the COVID – 19 pandemic crisis.

During the Suspension Period, which, as at the issue date of this decision and order, runs from March 16, 2020 through to May 29, 2020, only limited business is conducted by the TLAB using skeletal Staff. By way of its published Information Circular, TLAB Members are only completing decision writing and considering virtual Settlement Hearings, written motions and consent matters that are eligible to be advanced through completed filings.

As such, while no Motion Hearing Date was authorized and no Hearing was convened or conducted on 2020/04/15 as the indicated intention in the Notice of Motion, the TLAB is prepared to recognize the completeness of the submissions and treat the matter as a Written Motion, on consent.

All of the Parties and their interests appear represented in the submissions.

There is no expert evidence and no affidavit in support of the Motion, as required by the TLAB *Rules of Practice and Procedure* (Rules).

BACKGROUND

This matter involves the appeal of Committee of Adjustment (COA) approval granted for variances sought to alter the existing 2½-storey semi-detached dwelling on the subject property by constructing a rear third storey addition.

An earlier Notice of Motion by the Applicants for an adjournment of an April 15, 2020 TLAB appointment date was abandoned, in part assisted by a TLAB *Notice of Postponement* arising from the COVID – 19 cessation of public and private business.

The current Motion seeks:

- a. An Order for production and discovery of the Applicants engineering drawings and materials and from named sources associated with construction that occurred on the subject property between 2015-2016 and as proposed;
- b. An adjournment of the April 15, 2020 date to a new date excluding, effectively, two identified one-month periods of attendance conflict.

MATTERS IN ISSUE

From the materials filed, it is argued that the variances required to alter the existing 2½-storey semi-detached dwelling by constructing a rear third storey addition on the subject property engages a concern that the common party wall between the Parties' properties may be compromised or may not support the proposed project.

The request for production and discovery is resisted on the basis of the adequacy of disclosure, the absence of jurisdiction of the TLAB over the subject matter of *Ontario Building Code* compliance, and the absence or lack of relevance to authentic land use planning grounds being set out in the appeal.

JURISDICTION

Motions are the most flexible vehicle available in the Rules for the identification and resolution of issues. The Motions Rule, Rule 17, and the Discovery Rule, Rule 18, provide procedural directions and expectations that are presumed to be known by Parties.

These Rules are aided by the interpretive provisions of Rule 2, which includes that the TLAB is empowered to grant the relief it considers appropriate “to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner (Rule 2.11).”

The ‘Discovery’ Rule provides as follows:

18.1 The TLAB may make an order for discovery for a Party to obtain relevant and necessary information from any Person.

18.2 A Motion for an order for discovery, using Form 7, shall be by Written Hearing, unless the TLAB directs otherwise, and shall be Served on all Parties and Filed with the TLAB.

18.3 A Notice of Motion for discovery shall be accompanied by an Affidavit. The Affidavit in support of the Motion for discovery shall set out the efforts made to obtain the desired information and the reasons which demonstrate the information sought is both relevant and necessary to the disposition of the issues in the Proceeding.

18.4 An order for discovery shall only be issued if the Party seeking an order for discovery has already requested the information sought and it has been refused or no answer has been received from the other Party, and the TLAB is satisfied there is good reason to order discovery.

18.5 On a Motion for discovery the TLAB may order:

a) any Person to provide an Affidavit containing a list of relevant Documents in their possession and a list of Documents for which privilege is claimed;

b) the delivery of some or all of the Documents;

- c) an oral examination or cross- examination of any Person or Party;
- d) an examination for discovery by written questions;
- e) the inspection and testing of property;
- f) the examination of a witness before the commencement of a Proceeding;
- g) any other form of discovery; and
- h) conditions concerning the timing, scope and duration of discovery.

Rules of Civil Procedure Apply to Discovery

18.6 If an order for discovery is granted the TLAB may make any further order or give any direction necessary for the discovery process. The TLAB may refer to, vary or order that portions of the Rules of Civil Procedure, pertaining to discovery, apply

EVIDENCE

While there is no affidavit produced under Rule 17 or 18, there is no objection to its absence and the moving Party has arguably indicated that its Form 7 can be treated as an Affidavit.

Since the Parties fully exhausted their rights of Response and Reply, some assurance can be taken that issues of inaccuracy or defect, if any, have had the opportunity to be aired and, consequently, considered.

Mr. Pulleyblank seeks by Motion permission for access to original “engineering drawings” supportive of renovations to the subject property that took place in 2015-16, presumably prepared on behalf of a former owner of the subject property. He has been specific as to the named individuals who may be in possession of these drawings. Certain of these individuals have been contacted by or engaged by the current owners.

At issue, is whether a single course of bricks (single whythe brick) constituting the common party wall has or could have been compromised by the earlier renovations and whether the Application would further constitute works that could reflect

detrimentally on the load bearing capacity of the party wall and any extension thereto, inherent in the proposed further improvements.

The moving Party frankly acknowledged receipt of two engineer's 'reports' from the owners indicating that the new structure has sufficient support to carry the load of the proposal. However, the request is to examine and test the original plans and "all available evidence" presumably upon which these opinions were rendered, including Reports, photographs and information passed forward by the previous owner.

In partial fulfillment of Rule 18.4. Mr. Pulleyblank has unsuccessfully requested access to this information from the identified individuals, the Applicants and the City. The latter source had not yet responded due to the COVID 19- shutdown of all but essential City services.

Finally, he asserted that while "structural issues' are not normally considered by the TLAB, the obligation of the COA and the TLAB to test the 'appropriateness' of the proposal on the 'building' is a sufficient nexus to the variances to permit of an inquiry into structural issues if the result is that the Application will "adversely affect the attached property."

In the Response, the Applicants made the following assertions:

1. Matters of structural integrity of buildings are issues to be addressed and satisfied by the Buildings Department at the time of building permit issuance', and monitoring construction.
2. Construction plans pre-dating the Application are not of a planning related nature or subject to the review tests of a variance application.
3. The 2015 renovations supported the home on the subject property without reliance on the party wall.
4. The proposal that is subject to the Application variances does not, by design, rely upon the party wall.
5. Both an explanation by the Applicants project architect at the COA and production of a 2015 report with stamped engineering drawings and a second engineer report (attached to the Response) has 'done everything necessary' to allay fears and to continue "borders of obfuscation and is time wasting."
6. The Response attaches the letter from Blackwell Structural Engineers dated 20/02/19. It provides: "a new stud wall supports the gravity loads from the floors and roof at 410 Euclid...and does not rely on the single whythe masonry party wall...nor would it pose any negative impact."

The Response requests the Motion be denied.

In the Reply, the moving Party asserts that the request for discovery relates to the suitability of the proposal vis-à-vis the existing conjoined buildings. It asserts the Application suggests an overlap with the existing Party wall and that the 2015 framing is not independent of but is attached to the Party wall 'implying' and creating "obvious

paths of load transfer” from the new stud wall to the original single whythe party wall and joists installed in 1888.

It is this concern for a lack of independence between load bearing structures that appears to be at the core of the complaint, with largely unspecified ramifications.

Insofar as the second ground for relief is concerned, it is not necessary for the TLAB to review any differing positions.

The efforts at rescheduling a Hearing and associated delays have been entirely superseded by the COVID-19 crisis placing in abeyance and in queue the assignment of TLAB Hearing dates for all proceedings, including the subject.

ANALYSIS, FINDINGS, REASONS

The role of the TLAB is to address appeals to it on matters limited to applications under the *Planning Act* in respect of variance and consent appeals. While this function appears straightforward, the experience of the Tribunal suggests that it is far from simplistic. On each appeal, the TLAB is frequently called upon to address matters that require the interpretation, including jurisdiction, as to the scope of its authority.

The use of language in the delegated power is no exception to these issues of interpretation. The moving Party herein makes the point of view that the scope of the delegated power includes the consideration of “land, buildings and structures.” This language is used in conjunction with the variance granting power and parallel jurisdictions involving legal non-conforming uses and uses similar to the uses permitted by the (zoning) by-law.

The difficulty with the Applicants argument is that the scope of the power in issue herein relates to requested variances from the applicable zoning by-laws. As a zoning by-law is not an instrument governed or regulated by the *Ontario Building Code Act (OBCA)*, so to a variance from zoning is in the same plight.

Matters of building integrity, structural design and building or materials standards are part and parcel of the jurisdiction regulated and governed by the *Ontario Building Code*, an Ontario regulation under the *OBCA*.

It is no part of the business of the TLAB to attempt to advance the objectives of another provincial statute over which it lacks direct statutory authority. To do so could constitute an assumption of jurisdiction never remitted to the TLAB. That being said, there may be a circumstance where the issue intersects between planning and building so as to create an area of concurrent jurisdiction. To find that, the circumstance would best be clearly defined, be based upon qualified and professional evidence and the application of the two interpretations would need to be shown they cannot work together, without conflict, where the enforcement of one forestalls the application or right attendant the other in a superior/subordinate relationship.

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In this circumstance, it is the case that 410 and 408 Euclid Avenue constitute a building that houses, presently, two dwelling units. The variances sought seek approvals to accommodate changes to one of the dwelling units in a manner that requires the resolution of objections on the basis of defined, statutory policies and tests focused on the variances. The merits of the changes are directed to an evaluation of the policy framework behind the regulatory tools used in the subject zoning by-laws that are employed to present, preserve and protect the existing physical character of the area.

The moving Party has pointed to no policy, regulation, law or planning principle under the *Planning Act* engaging the variance power that is claimed to be offended by the application of the test for a variance, let alone its application in this circumstance. There is no professional opinion evidence drawing a linkage between the variances sought and issues of structural support as between the dwelling units.

Whether, as is claimed, a party wall agreement is required or should be mutually engaged in by the Parties, on the evidence demonstrated in this Motion, is not an axiomatic derivative matter of the Tribunal's jurisdiction. Matters of building integrity and issues of health and safety associated with that are, in the main, vested in the Chief Building Official, the Fire Marshall and other specialized agencies with the acumen and experience of dealing with building, fire and environmental standards.

Had the 2015-16 structural drawings resulted in an order under the *Building Code Act* and had non-compliance been tied in an evidentiary sense to one or more of the variances sought in a manner sufficient to argue offence to a relevant test, the matter might be different.

This has not been the direction of the Motion to compel Discovery. And while the Hearing into the merits of the variances may yet draw such linkages, it will be for the Member hearing the matter to consider the justification as to whether the applicable policy and tests have been satisfactorily met.

For the purposes of this Motion, I am not satisfied a linkage has been established or that the materials sought to be produced, plans and pictures, in the conduct of a Discovery are connected to a variance or planning policy or test. I am not satisfied that good reason has been established that is relevant to the planning elements engaged by the variances, to warrant an order for discovery.

This finding is not intended to preclude, in the hearing of the matter, an attempt to adduce in cross examination or call evidence or to establish a basis to compel production provided it is for a purpose germane to the variance approvals sought, or their implications.

Indeed, the moving Party has those options open, as well as calling witnesses or City representatives, provided the evidence sought, on objection, is established as relevant to the variances sought.


DECISION AND ORDER

The Notice of Motion is worthy of consideration in written form.

No good reason has been established that links the subject matter of structural and engineering concerns in the Appellant to any of the variances sought by the Applicants.

The Motion for Discovery is denied without prejudice to addressing the matter with further and additional evidence in the hearing of the appeals.

X



Ian Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord