

PRE-HEARING CONFERENCE DECISION AND ORDER

Decision Issue Date Monday, October 26, 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): GUNTHER EYSENBACH

Applicant: LORNE ROSE

Property Address/Description: 440 LAKE FRONT

Committee of Adjustment Case File: 19 210064 STE 19 MVs

TLAB Case File Number: 19 264489 S45 19 TLAB

Hearing date: Wednesday, October 21, 2020

DECISION DELIVERED BY Ian James LORD

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Lorne Rose	Applicant	
Gunther Eysenbach	Appellant	Borden Lander Gervais Llp
Audrey Azad	Party	Dennis Wood / Angela Fang
Brent Crawford	Party	Dennis Wood / Angela Fang
Kathryn Nelson	Party	Maggie Bassanifor/Timothy Hill
Steven Nelson	Party	Maggie Bassanifor/Timothy Hill
Mandi Kimsa	Party	Johanna Shapira
Kevin Kimsa	Party	Johanna Shapira
Eleanor M. Guest	Party	Johanna Shapira

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William Guest	Party	Johanna Shapira
Barbara Leanne Rapley	Party	
Eric Tripp	Participant	
Holly Allen	Participant	
Eva Kralits	Participant	
Cynthia Friedrich	Participant	
Douglas Pringle	Participant	
Jeffrey Levitt	Participant	
Tom Mason	Participant	
Joe Bogdan	Participant	
Scott Cuthbertson	Participant	
Margot Campbell	Participant	
David Bryson	Participant	
Caron To	Participant	
Derek Stem	Participant	
Peter Lowe	Participant	
Ilana Kotin	Participant	
Patricia Graham	Participant	
Michael Macmillan	Participant	
Jennifer Sharp	Participant	
Saskia Rowley	Participant	
Irene Wake	Participant	
Birthe Joergensen	Participant	
David Bruce	Participant	
Barry Flath	Participant	

Maxim Flath	Participant
Michaele J. Pringle	Participant
Michael Brigham	Participant
Gillian Stewart	Participant
Emily Norris	Participant
Bonnie Mccabe	Participant
Theresa Oberndorfer	Participant
Alicja Wicinski	Participant

INTRODUCTION BACKGROUND AND MATTERS IN ISSUE

This is a matter convened at the request of the Toronto Local Appeal Body (TLAB) in respect of an appeal from a refusal by the Toronto and East York Panel of the City of Toronto (City) Committee of Adjustment (COA) for variances requested in respect of 440 Lake Front (subject property).

A prehearing conference was held Wednesday, October 21, 2020. The TLAB file showed some 11 parties listed and 30 participants. A significant number of the 45 invitees to the prehearing conference, a 'virtual' Hearing, were present through audio-visual or audio only participation.

The TLAB website for the subject property provides a 'People List' showing a list of the appellant, parties, participants, and legal representatives. As a result of the prehearing conference, I list below and confirm the counsel present and their respective Parties, by way of update:

Robert Wood, counsel for Gunther EYSENBACH

Dennis Wood, counsel for Audrey AZAD and Brent CRAWFORD

Maggie Bassani, counsel for Kathryn and Steven NELSON with Timothy Hill, co-counsel (but latter not present)

Johanna S. Shapiro, counsel for Mandy and Kevin KIMSA and Eleanor and William GUEST

I note that two other identified Parties were also on the original list but were not present.

Namely, I was advised by Mr. Dennis Wood, that Barbara Leanne RAPLEY has withdrawn as a Party and likely as a candidate Participant. Further, David BRYSON, who had previously indicated a request for Party status, was not present. The TLAB requests advice from David Bryson and Caron TO as to their intention in respect of status desired and participation in this appeal under the TLAB Rules of Practice and Procedure (Rules).

There was no advice as to a change in the status of any of the Participants', either in respect of a participation or withdrawal. The role of Participants is dealt with later in this decision and order.

I thank counsel for their assistance in dealing with the matters addressed under Rule 21 of the TLAB in this matter.

Counsel for the Applicant/Appellant, Robert Wood, confirmed the filing, on October 20, 2020 of a 'second document disclosure' dealing with the following matters:

One, a change in driveway width from 6.66 m to 12.32 m, arising by definition.

Two, a design change to a sloped roof causing the deletion of the variance for the number of storeys that would otherwise apply to a flat roof built building.

Three, an FSI (floor space index) change from 1.18x to 1.22x lot area, inclusive of basement space, or 0.76x, if calculated without 'basement' space.

Four, a recognition of a variance required to provide for the fact that the building is not abutting the street.

Five, recognition of the absence of lot frontage on a public street, thereby requiring a variance.

This 'second document disclosure' was accompanied with updated plans, a Zoning Examiner's list of variances and new renderings. It was filed with the TLAB and distributed as required by the Rules.

The Parties present were asked to provide a preliminary disclosure of intended witnesses, by subject area and the time, required for examination-in-chief and counsel responded as follows:

Robert Wood: a planner, and potential arborist - one full day

Dennis Wood: a planner, arborist, urban designer– 1 1/2 full days

Maggie Bassani: one lay witness, planner – 1/2 day

Johanna Shapira: planner - 1/2 day

From this preliminary canvas, although unusual for a TLAB variance hearing, it appeared five (5) days would be required to be set aside to provide adequate time for examination, cross-examination and Participants' evidence, as well as the argument of counsel for the Parties. It is noted that five (5) day variance appeals are not to be encouraged. The Member presiding has full procedural discretion to ensure the matter is completed in the time allocated and may require final written submissions.

In order to move the proceeding along, with reference to the exchanges contemplated by Rules 12 (Party) and 13 (Participant) of the TLAB, a schedule of dates to complete filings necessary to accommodate a five day Hearing in the New Year was tendered.

There being no concerns expressed in respect of the filing dates, they are set out in the order and decision, below. The consequences for the failure to meet these dates are also set out, below.

In addition, three sets of five-day Oral Hearing events were also tendered as applicable in January 2021. Counsel advised that these dates would be considered and canvassed with their respective witnesses proposed. The TLAB will canvas these dates for inclusion in a new *Notice of Hearing* appointment.

Any Hearing appointment will provide that in the event of space limitations, Toronto Public Health Unit restrictions or other unforeseen contingency, the Hearing may be held virtually. Counsel are to discuss amongst themselves whether a virtual Hearing is preferred and to advise the TLAB accordingly.

The January Hearing dates proffered were:

January 4 to 8; 11 to 15; and 25 to 29, 2021.

As the pre-hearing conference herein reported was held virtually, it is noted that persons not present can access a recording of the proceeding through consultation with the TLAB office.

Counsel advised that when the matter with before the COA, groups organized themselves with the appointment of spokespersons in order to avoid repetition and to ensure concerns were voiced. The TLAB commends that spirit of cooperation and requests of both of the Parties and Participants that they marshal the evidence with as few repetitive expert witnesses and subject areas as possible. I also request that the Participants communicate among themselves for the purpose of appointing spokespersons. It is a benefit to the public, to the TLAB and to all present if repetition is avoided and evidentiary submissions are focused.

Counsel for the Applicant/Appellant advised that the subject property, over the summer, has suffered fire damage, is uninhabited and constitutes a nuisance and eyesore to the public. The TLAB agrees that it is appropriate to use best efforts to expedite the consideration of this appeal, including by way of a possible virtual hearing as may be appropriate.

Mr. Dennis Wood raised the advice that the recent 'second disclosure' included renderings. He indicated he had requested of the Appellant, the essential inputs to such renderings for purposes of understanding and if necessary, challenging their authenticity/veracity. He indicated that counsel for the Appellant indicated that disclosure would be subject to a permission. However, Mr. Dennis Wood asserted that such evidence required clear and transparent access in order to assess its veracity and delay would be prejudicial.

Mr. Robert Wood responded with the intention of production within the legal limits of proprietary and intellectual property management, including that the author, Mr. Rose, was not intended to be called as a witness.

In reply, Mr. Dennis Wood suggested the response was inadequate. He submitted that if the renderings were intended to be relied upon and referred to, then there was an entitlement to understand their origin in evidence in advance as well to avoid the debate and delay on specificity that could arise in the course of a hearing.

The owner, Gunther EYSENBACH, interjected and advised that the architect claimed proprietary privilege and would not be voluntarily producing the technical elements of visual presentation.

My Ruling on this Motion, entertained pursuant to the scope of considerations available under Rule 21, is included in the decision and order portion of these reasons.

All present were thanked for their participation, civility and support for the matter having advanced in a deliberative fashion.

DECISION AND ORDER

1. The Applicant/Appellant shall forthwith prepare the specific list of requested variances in the format customarily attendant a COA/TLAB Application, in WORD format. This list shall be distributed to the Parties and Participants and included for posting by the TLAB. There is to be a notation thereon that the revised renderings were posted and distributed on October 20, 2020, accessible on the TLAB website.

2. The formal Hearing of this appeal shall be heard over the period to be finalized and set by the TLAB in a new *Notice of Hearing*. The Oral Hearing may be converted to

a virtual Hearing on short Notice. Objections to a virtual hearing, if directed, and will be required by Motion for which service under the Motion Rule may be foreshortened. Otherwise, the Hearing dates are peremptory. Parties and Participants are asked to be prepared to conduct the Hearing via 'virtual' attendance, preferably with audio and visual capability.

3. The following exchange dates apply:

Expert, Party and Participant Witness Statements are to be served and filed by **Monday, November 30, 2020.**

Responses to any Witness Statements are due to be served and filed by **Tuesday, December 15, 2020.**

Replies are due to be served and filed by **Thursday, December 30, 2020.**

The consequences of these disclosure obligations means:

A. A Party with a filed Witness Statement may testify and retain Party status and be represented throughout the Hearing through a lawyer, representative or through his/her own person. Any spousal Party so qualifying will be expected to provide testimony as a panel.

B. A party without a Witness Statement or Expert Witness Statement will have on the Hearing date, their technical status changed to a Participant with the rights prescribed under Rule 13. An Expert tendered without an Expert Witness Statement will not be heard. A Participant without a Participant's Witness Statement may be excused from giving evidence.

C. Late filings will be admitted only upon consent or via Motion decision, inclusive of Witness Statements, Responses and Replies.

Unless otherwise varied, the Rules of the TLAB apply.

4. Motion Ruling Disposition

Perspective or 'view plane' drawings that have been produced or are intended to be produced, as a visual aid to the Hearing, are subject to proof.

Where a Party has requested the inputs to the creation of such perspective or view plane drawings and such inputs have been refused on a technical or proprietary basis, the following provisions apply:

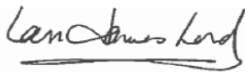
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- a). The requester may specify one or more perspective drawings or view planes be produced by the other refusing Party, not exceeding three in number.
- b). In the event of a refusal to produce in response to a request for additional drawings, a Motion to disallow the introduction of the challenged evidence is to be brought prior to year-end, 2020.
- c). Any such productions, excluding proprietorial tradecraft, are to be shared with the Parties and the TLAB, for posting.

This Ruling applies mutually as between the Parties. The Parties are urged to try and reach an accommodation that avoids a Motion or further Hearing submissions.

TLAB will issue a new *Notice of Hearing* based on the foregoing

X



Ian Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord