

DECISION AND ORDER

Decision Issue Date Wednesday, February 24, 2021

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): Elaine B Berger

Applicant: Taes Architects Inc

Property Address/Description: 3167 Bayview Ave

Committee of Adjustment Case File Number: 19 226241 NNY 17 CO (B0039/19NY);
19 226243 NNY 17 MV (A0614/19NY); 19 226248 NNY 17 MV (A0615/19NY)

TLAB Case File Number: 20 211282 S53 17 TLAB; 20 211288 S45 17 TLAB;
20 211232 S45 17 TLAB

Written Motion Hearing Date: Monday, February 22, 2021

DECISION DELIVERED BY D. Lombardi

INTRODUCTION AND BACKGROUND

This matter arises by way of a Written Motion requesting a Written Hearing and an extension of the deadlines to file witness statements and expert witness statements.

On October 7, 2020, the North York Panel of the City of Toronto (City) Committee of Adjustment (COA) issued its decisions granting approval of the consent and associated variance applications relating to 3167 Bayview Avenue (subject property). The consent approval allows the Applicant to sever the subject property into two undersized lots and the associated variance approvals, with conditions, permit the construction of a new residential dwelling on each of the newly created lots.

3167 Bayview Avenue is located in the Bayview Village Neighbourhood of the City. The Applicant's lands are generally located on the east side of Bayview Avenue, west side of Burbank Drive, and south of Finch Avenue East.

On October 26, 2020, the Appellant, Elaine Berger, appealed the COA's decisions to the Toronto Local Appeal Body (TLAB) which set a combined virtual Hearing date of

April 8, 2021, to hear the matter. The *Notice of Hearing* issued December 7, 2020, included certain due dates for the required filing of materials. This included:

- Document Disclosure due no later than February 5, 2021.
- Witness and Expert Witness Statements due no later than February 5, 2021.
- Response to Witness and Expert Witness Statements due no later than February 22, 2021; and
- Reply to Response to Witness and Expert Witness Statements due no later than March 2, 2021.

On February 8, 2021, the Appellant's solicitor, Lawrence Liquornik (Liquornik Law), submitted a Notice of Motion (Form 7) with the TLAB on behalf of the Appellant requesting the following relief:

1. *An Order extending the deadline for the Appellant to serve and file witness statements and any expert reports from February 5, 2021 to February 28, 2021.*
2. *Such further and other orders as may be deemed appropriate in the circumstances.*

Accompanying that Motion was the requisite Affidavit (Form 10) filed by Lynn Chazen, law clerk in Mr. Liquornik's office, attesting to the grounds for the requested extension of filing due dates for witness statements and expert reports in the matter at hand.

As a result, the TLAB issued a Notice of Motion setting the matter as a Written Motion with a return Hearing date of February 22, 2021. In that Notice, Tribunal staff set the following filing due dates – Notice of Response to Motion (Form 8) due no later than February 16, 2021 and Notice of Reply to Response to Motion (Form 9) due no later than February 22, 2021.

No Responses or Reply to Responses to the Motion were received by the TLAB by the requisite due dates.

MATTERS IN ISSUE

This Motion seeks an extension of the due dates from February 5, 2021 to February 28, 2021, to serve and file witness statements and any expert reports on the TLAB and the Parties.

If granted, this extension of filing due dates will also impact the requisite filing due dates for Document Disclosure, the exchange of Witness Statements and Expert Witness Statements, and Responses and Replies to Witness Statements and Expert Witness Statements set out in the Notice of Hearing on this matter. In the result, revised due dates for the serving of these documents would be required as per the requirements of the TLAB's Rules of Practice and Procedure (Rules).

JURISDICTION

This Motion relies on the TLAB's Practice Direction 2, "Default Format of Specific Motion Hearing," effective October 11, 2017.

As well, Rules 17.1 to 17.12 govern, *inert alia*, the filing of Notices of Motion, contents of Motion Material, and timelines for Notices of Response and Reply. Rules 16.1 to 16.13 govern Disclosure and the timelines for filing of documents, including Witness and Expert Witness Statements, Responses and Replies. Additionally, Rules 24.7 to 24.11 outline the procedures for the exchange of documents in a Written Hearing.

Under Rule 2.10, the TLAB is empowered to grant exceptions or other relief to the Rules as it considers appropriate to enable it to effectively and completely adjudicate matters in a 'just, expeditious, and cost-effective manner'. Rule 4.4 allows the TLAB to extend or reduce the time limits provided by the Rules. The availability of Parties and their ability to adhere to dates when scheduling a Hearing is an issue of procedural fairness and natural justice that the TLAB must take into serious consideration.

EVIDENCE

The Notice of Motion (Form 7), filed with the TLAB on February 8th, is accompanied by an Affidavit which sets out the facts upon which the Moving Party relies. Ms. Chazen, in her Affidavit confirms that the Appellant resides at 255 Burbank Drive in close proximity to the subject property.

She notes that the demolition of the current structure on the subject property and the subsequent constructed of the two proposed residential dwellings which will front onto Burbank Drive may cause further damage to the stability of the Appellant's property. The erosion of the slope at the rear of the properties at 251 to 257 Burbank Drive is the subject of a report prepared by Terraprobe Inc. dated August 29, 2017, prepared for the Toronto and Region Conservation Authority.

The Affidavit asserts that the Appellant is concerned about the further risk of erosion and slope instability with respect to her property due to the proposed development. She asserts that the City of Toronto has yet determine the extent of any repairs to those slopes and she is still seeking an expert opinion from an engineer concerning the impact of the proposed development on the slope at the rear of her property.

The Affiant submits that the Applicant also did not file with the TLAB and serve the Expert Witness Statement of David McKay, the Applicant's expert land use planner, until 10:00 pm on the due date of February 5, 2021. Furthermore, the Affiant asserts

that that document is lengthy in nature and could not be reviewed by Ms. Berger or her solicitor until February 8, 2021 because of its late filing, technically, with the TLAB.

The Affiant states that the Appellant is still in the process of seeking a written opinion from an expert regarding the impact on her property of the proposed development on the subject property based on the conclusions in the Terraprobe Report. The Appellant also requires additional time to retain an expert to review Mr. McKay's Expert Witness Statement.

The Affidavit asserts that the Appellant is not seeking an adjournment of the appeal nor a lengthy extension of the filing due dates for the documents in question, if applicable.

The Appellant, therefore, respectfully requests from the TLAB an extension of the filing due dates in order to serve and file such documents.

ANALYSIS, FINDINGS, REASONS

The Motion before me seeks to obtain a relatively short extension to the deadline to serve and file witness and expert witness statements, from February 5, 2021 to February 28, 2021. The requested extension is to allow the Appellant to seek written opinion from experts regarding the conclusions contained in a Report prepared by Terraprobe as well as regarding the Expert Witness Statement filed by Mr. McKay.

I note that the TLAB has received no Response to the Notice of Motion filed by the Appellant from any of the other Parties nor has it received any other submissions in this regard.

The Appellant's counsel requested a Motion date from the TLAB by email on February 3, 2021 and informed the Tribunal that an order was being sought extending the time to file witness statements. The Appellant's counsel was directed by TLAB staff to file a Notice of Motion by way of Forms 7 and 8 and was advised to do so by February 8, 2021. The Appellant did just that.

Consideration of the ability of Parties to have an opportunity to review filed witness statements and to obtain expert opinion in any proceeding is fundamentally an issue of procedural fairness and natural justice.

On the basis that the Applicant has not advised of any prejudice or hardship as a result of the relatively short extension of the deadline dates for filing witness statements and expert witness statements, and with the understanding that the TLAB will also extend the corresponding due dates for Response to and Reply to Response to Witness Statements accordingly, the TLAB agrees to the requested extension.

I concur that the extension of the filing due dates is appropriate and will allow sufficient time following the requested extended due date to permit the filing of Responses and Replies to Responses appropriately prior to the scheduled return virtual Hearing date of April 8, 2021.

I do not find that there would be any prejudice to any of the Parties or Participants in granting the relief sought in the Motion and do so order that the requested relief be granted.

On a matter of technicality, the Appellant has indicated an extension due date in the Motion that falls on a weekend. As a result, the TLAB has extended the requested due date to the following business day which is March 1, 2021. That date has been used to determine the due dates cited in the Decision and Order below.

DECISION AND ORDER

The requested relief in the Notice of Motion dated February 8, 2021 is granted.

TLAB staff are directed to re-issue the *Notice of Hearing* in this matter with revised due dates for filing Document Disclosure, Exchange of Witness Statements, Exchange of Expert Witness Statements, Response to Witness Statements and Expert Witness Statements, and Replies to Witness Statements and Expert Witness Statements as follows:

- Document Disclosure due no later than **March 1, 2021**.
- Witness Statement due no later than **March 1, 2021**.
- Response to Witness Statement due no later than **March 16, 2021**.
- Response to Expert Witness Statement due no later than **March 16, 2021**.
- Reply to Response to Witness Statement due no later than **March 26, 2021**.
- Reply to Response to Expert Witness Statement due no later than **March 26, 2021**.

The undersigned Member is not seized for the hearing of this matter. Apart from the foregoing, no other changes are made to the *Notice of Hearing* and the obligations set out therein.

Decision of Toronto Local Appeal Body Panel Member: D. Lombardi

TLAB Case File Number: 20 211282 S53 17 TLAB;

20 211288 S45 17 TLAB;

20 211232 S45 17 TLAB

X 

D. Lombardi

Panel Chair, Toronto Local Appeal Body