

(1) “(To adjourn) the Appeal due to the failure of the appellant to meet the timelines of the Notice of Hearing issued Jan. 27, 2021.

(2) To schedule a prehearing as per Rule 23.4 (b) for the earliest possible date, with a deadline extension for full Form 3 Applicant Disclosure to a date 14 days before the prehearing. The prehearing would assess the adequacy of the disclosure and the overall status of the Appeal, with the goal of rescheduling the Appeal hearing with a new Notice of Hearing and revised set of submission dates.”

This Motion is being heard as a written Hearing. A *Notice of Response to Motion* has been filed, as has a *Notice of Reply to Response to Motion*. A previous Motion was filed by Mr. Van-Lane seeking extended timelines for the submission of Document Disclosures and Witness Statements. A Decision and Order was rendered on the previous Motion on Jan 27, 2021, revising due dates for submissions.

The Hearing of the Appeal is set for April 1, 2021.

MATTERS IN ISSUE

Mr. Van-Lane contends that there is insufficient time to prepare Witness Statements and document disclosures following the Applicant’s Disclosure of revisions to the application. He contends that information is missing from the Applicant’s Disclosure.

In addition, Mr. Van-Lane contends that statements made in the Applicant’s Disclosure regarding the seeking of amended building permits should not be taken into account as an explanation or justification for the “lack of a timely full submission”.

In addition to the request for adjournment, Mr. Van-Lane seeks a prehearing conference to assess the adequacy of the Applicant’s Disclosure and the overall status of the Appeal, with the objective of setting revised dates for submissions.

JURISDICTION

TLAB Rules

Powers of the TLAB upon Adjournment Motion

23.4 On a Motion for adjournment the TLAB may:

- a) grant the Motion;
- b) grant the Motion and fix a new date, or where appropriate, the TLAB may schedule a prehearing on the status of the matter;
- c) grant a shorter adjournment than requested;
- d) deny the Motion;

- e) direct that the Hearing commence or continue as scheduled, or proceed with a different witness, or evidence on another issue;
- f) grant an indefinite adjournment if the request is made by a Party and is accepted by the TLAB as reasonable and the TLAB finds no substantial prejudice to the other Parties or to the TLAB. In this case the Moving Party must make a request that the Hearing be rescheduled or the TLAB may direct that the Moving Party provide a timeline for the commencement or continuance of the Proceeding;
- g) convert the scheduled date to a Mediation or prehearing conference; or
- h) make any other appropriate order including an order for costs.

APPLICANT'S DISCLOSURE

Whether or not Applicant is Appellant, Applicant Must Disclose

- 11.1 Whether or not an Applicant is an Appellant, an Applicant shall disclose any intended revisions or modifications to the application that was made to the Committee of Adjustment for the City of Toronto.
- 11.2 The Applicant shall File using Form 3 an Applicant's Disclosure, including text and plans, with the TLAB not later than **20 Days** after a Notice of Hearing is Served.

TLAB RULE 16. DISCLOSURE

Disclosure of Documents

- 16.2 Parties and Participants shall Serve on all Parties a copy of every Document they intend to rely on or produce in the Hearing...and File same with the TLAB not later than **60 Days** after a Notice of Hearing is Served.
- 16.3 Where a Party or Participant fails to disclose Documents in accordance with Rule 16.2 the TLAB may on objection disallow the Document to be entered as evidence and may make such other orders as it deems appropriate in the circumstances.

Party Witness Statement

- 16.4 If a Party intends to call a witness the Party shall Serve a witness statement on all other Parties and File same with the TLAB, using Form 12, not later than **60 Days** after a Notice of Hearing is Served...

Response to Party Witness Statement

- 16.5 If any Party needs to respond to a Party Witness Statement a Responding Party shall Serve on all Parties a Responding Party Witness Statement using

Form 19 and File same with the TLAB not later than **75 Days** after the Notice of Hearing is Served.

Reply to Response to Party Witness Statement

- 16.6 If a Party needs to reply to new issues, facts or Documents raised in the Responding Party Witness Statement a Replying Party shall Serve on all Parties a Reply to Responding Party Witness Statement using Form 20 and File same with the TLAB not later than **85 Days** after the Notice of Hearing is Served.

Participant Witness Statement

- 16.7 Participants shall serve a Participant Witness Statement on all Parties and File same with the TLAB, using Form 13, not later than **60 Days** after a Notice of Hearing is Served...

Expert Witness Statement

- 16.8 Parties shall Serve an Expert Witness Statement on all Parties and File same with the TLAB, using Form 14, not later than **60 Days** after a Notice of Hearing is Served.

Response to Expert Witness Statement

- 16.9 If a Party needs to respond to an Expert Witness Statement a responding Party shall Serve on all Parties a Responding Expert Witness Statement using Form 21 and File same with the TLAB not later than **75 Days** after the Notice of Hearing is Served.

Reply to Response to Expert Witness Statement

- 16.10 If a Party needs to reply to new issues, facts or Documents raised in the Responding Expert Witness Statement a Replying Party shall Serve on all Parties a Reply to Responding Expert Witness Statement using Form 22 and File same with the TLAB not later than 85 Days after the Notice of Hearing is Served.

EVIDENCE

By Order of the previous Motion Decision revising submission due dates, a Revised Applicant Disclosure was due no later than February 1, 2021. This Disclosure was to include a revised list of variances, Zoning Notice and updated site plan and elevations. Mr. Van-Lane contends that information that should have been provided in the Applicant's Disclosure is missing. He asserts that there is insufficient time for Opposing Parties to prepare Witness Statements and Disclosures as the Applicant "has again

submitted a deficient Form 3 Disclosure.” He notes that under the TLAB Rules, 40 days are allowed after the deadline for Applicant Disclosure for Document Disclosure and Witness Statements to be submitted. This timeline was reduced to 28 days by the Decision of January 27, 2021 and exacerbated by the incompleteness of the Applicant Disclosure.

Mr. Van-Lane asserts that the lateness and incompleteness of the Applicant’s Disclosure means that the “architectural plans” his consultant requires for a shadow study (specifically for a covered deck) were not included. Further, even if now provided with the plans, his consultant cannot complete a shadow study in time.

Mr. Van-Lane identifies that there are now additional variances to those that were addressed at the COA meeting “in the as-built structure”. He wishes to fully evaluate the completeness of the new Zoning Review/ List of Variances, for which, he asserts, a full set of architectural plans is needed. He indicates that the process will likely involve interaction with Plans Examination staff of the City of Toronto (City) Buildings Department to verify applicability of the Zoning By-law and asserts that the remaining time is not sufficient for him to accomplish this. Further on this theme, he asserts that a full set of architectural plans should be provided as their inclusion is part of a COA application.

On the second matter at issue, that of statements in the Disclosure regarding the Applicant’s seeking of amended building permits, Mr. Van-Lane contends that the Applicant’s pursuit of building permits and addressing of Orders to Comply should not be taken into account as an explanation or justification for the tardiness of the Applicant in making a full Applicant Disclosure.

In the *Notice of Response to Motion* (Response), Ms. Stewart, the Applicant’s legal representative, states that the Appellant, Applicant and Owner, Mr. Weinberg, wishes to proceed with the Hearing on April 1, 2021. She asserts that Mr. Van-Lane has not established prejudice in his Motion as the Owner has complied with the direction of the TLAB’s Order of January 27, 2021.

As regards to Mr. Van-Lane’s requirement of complete floor plans for the purpose of preparing shadow studies, Ms. Stewart notes that the resulting shadow will be the same as that resulting from the building permit plans, given that the length, height and setbacks are the same. (I presume the building plans to which she refers are the plans included in the November 16, 2020 Applicant’s Disclosure). The TLAB Motion Decision and Order of January 27, 2021, did not require floorplans of the interior of the building, instead stipulating that exterior elevations be provided (for the purposes of a shadow impact study). These plans were filed with the Applicant’s Disclosure on February 1, 2021, as directed. The Owner has concerns regarding the public exposure of interior floor plans; nonetheless, the Owner has agreed to provide the floorplans to Mr. Van-Lane under separate cover.

Ms. Stewart asserts that Mr. Van-Lane has characterized the lack of a Zoning Notice as representing incomplete disclosure. Although a Zoning Notice is preferred, an applicant is entitled to apply for variances under a waiver, submitting an applicant’s list of

variances instead. Ms. Stewart attests that as the City did not issue the Zoning Notice until February 11, 2021, the Applicant's list of variances was provided for the deadline of February 1, 2021. Now having the Zoning Notice in hand, Ms. Stewart advises that the only difference between the Applicant's statement of the Variance required and the Zoning Notice is that the latter identifies the floor space index (fsi) as 1.19, whereas the Applicant's Disclosure had rounded the number to 1.2. The TLAB will rely on the Zoning Notice issued by the City, as is practice. Ms. Stewart is of the opinion that there is no prejudice to Mr. Van-Lane as there is no different information to be provided in response to the Motion Request.

In response to Mr. Van-Lane's concerns regarding the statements in the Applicant's Disclosure regarding the pursuit of a building permit, Ms. Stewart asserts that these statements are not irrelevant, that they demonstrate compliance of the building envelope with the Zoning. Noting that Mr. Van-Lane has expressed a desire to confirm that the as-built structure is reflected in the plans, Ms. Stewart clarified that the Owner is proposing to further reduce the as-built structure to achieve compliance. It is Ms. Stewart's opinion that the Owner's efforts to achieve compliance are to be encouraged.

Ms. Stewart has proposed a revised schedule of submissions that would allow Mr. Van-Lane additional time to prepare his material. In her submission, the revised schedule would address the concerns raised and maintain the scheduled Hearing date, which is the wish of her client.

Mr. Van-Lane has provided a lengthy 62 page *Notice of Reply to Response to Motion* (Reply). As a tribunal, the TLAB is a less formal and more accessible venue than the courts, but even so, the basic legal rules of fairness apply. In this circumstance, a Reply to a Response to a Motion is to address a new issue or topic if raised in the Response. It is not an opportunity for continuation of arguments previously made. Mr. Van-Lane has provided extensive additional information which can not be sheltered under the opportunity for Reply to Response to the Motion. Much of what Mr. Van-Lane submits in his Reply relates to the substance of his Appeal and is not timely for the consideration of this Motion.

I note that Mr. Van-Lane, in his Reply, has raised the prospect of a future review of this Decision if the Motion to Adjourn is not granted.

ANALYSIS, FINDINGS, REASONS

I recognize that Mr. Van-Lane has a very direct interest in what is permitted to be built on the subject property. There is a history of unsanctioned construction, an Order to Comply (under the Building Code Act) and ongoing building permit applications on the subject property, which, understandably, have caused stress and disruption for Mr. Van-Lane who lives at the adjacent property. In this matter, Mr. Van-Lane is not represented by Legal Counsel and is not intimately familiar with the TLAB appeal process. Some latitude can, and will, be given to Mr. Van-Lane in this regard as the TLAB labours to sustain an accessible forum for the resolution of land use disputes within its mandate.

Mr. Van-Lane contests the correctness or accuracy of the Zoning Notice and/or the list of Variances requested and asserts that there is not enough time before the Appeal Hearing date for him to consult with Plans Examination staff at the City. As was stated in the TLAB Decision and Order on Mr. Van-Lane's previous Motion, the burden is on the Applicant to prove its case. The Applicant is required to satisfy the TLAB that its application meets the four statutory tests mandated by s 45(1) of the Planning Act. If the Applicant fails to apply for a variance that they later rely on for the issuance of building permits, that is a consequence that falls on the Applicant and achieves no beneficial outcome for the Applicant. Building permits can be issued only in conformity with the precise Variances that are granted. The TLAB will not verify the accuracy of the Variances, it will consider the application on its face, i.e., it will address the specific Variances that are requested by the Applicant.

Mr. Van-Lane desires time to consult with Plans Examination staff on the correctness of the Variances requested, but the TLAB will not adjudicate whether the Variances are correctly described. Thus, correctness or accuracy of the Zoning Notice is not a matter that will be adjudicated, and the time requested to resolve Mr. Van-Lane's concern is not, in my opinion, grounds for adjournment of the Appeal Hearing.

Relatedly, one of the sources of Mr. Van-Lane's frustration with the inconsistencies that he identifies is that the requested variances differ from the as-built structure, and possibly the building plans. Again, as above, the mandate of the TLAB is to adjudicate the requested Variances only, not the building plans or the compliance of the as-built structure. Following the TLAB Decision regarding the Variances, building permits can only be issued in conformity with the Variances granted. If the as-built structure is not sanctioned by the Variances or building permits, enforcement is mandated through the Building Code and is not within the jurisdiction of the TLAB. Thus, the inconsistencies that concern Mr. Van-Lane are relevant after the TLAB has rendered its Decision.

Mr. Van-Lane asserts that he has not received the information he requires to properly assess the shadow impact of the proposal. Ms. Stewart correctly responds that the TLAB Motion Decision and Order of January 27, 2021, did not require floorplans of the interior of the building, instead stipulating that exterior elevations be provided for the purposes of a shadow impact study. Exterior elevations were provided by the Applicant in the February 1, 2021 Applicant Disclosure, as required. The floorplans for the interior of the building are not pertinent for the purposes of a shadow study. Other concerns that drive Mr. Van-Lane's desire to view the interior floor plans are germane for the purposes of building permit application scrutiny and not for the purposes of the TLAB Appeal Hearing. I note that the Applicant has agreed to provide the floorplans to Mr. Van-Lane under separate cover.

With regard to the insufficiency of the time Mr. Van-Lane has left before the Hearing to commission a shadow study, Ms. Stewart asserts that the length, height and setbacks have not changed since the first Applicant Disclosure. I acknowledge that the key parameters of the proposal pertinent to a shadow study have not changed from the first Disclosure to the second, but Ms. Stewart has included the following language in both the Applicant Disclosure documents, with which Mr. Van-Lane takes issue:

“Through the course of the application processing, the Applicant has sought to obtain amended building permits in order to address an Order to Comply. The Applicant intends on making revisions to the proposed plans in an effort to (1) reduce or eliminate those unanticipated variances, and (2) reduce or eliminate the variances that were before the Committee of Adjustment to mitigate concerns raised by the owner of 195 Winnett Avenue”.

It is not clear to me from the above extract whether the intent to make revisions to “the proposed plans” applies only to the building permit application or to the plans that are included in the Disclosure. In the Response to Motion, Ms. Stewart refers to the Zoning Notice of February 11, 2021 as confirming the correctness of the Applicant’s Disclosure. In actuality, the fsi number that the Zoning Notice confirms is 1.19 fsi whereas the Applicant’s Disclosure rounded the number to 1.2 fsi. Was the correctness of the fsi number, or number and type of variances, still an open question, then, in the Applicant’s Disclosure of February 1, 2021? Mr. Van-Lane could legitimately expect to have firm plans to rely on prior to commissioning and paying for a shadow study. (I make no finding at this time regarding the weight or importance a shadow study might carry in the Appeal Hearing). Likewise, Mr. Van-Lane could legitimately expect to have a firm list and magnitude of variances, which are not subject to revision, to work from in preparing his Disclosure and Witness Statement.

Under the TLAB Rules, a specific period of time is allotted following the date for Applicant Disclosure for other Parties to prepare Disclosure and Witness Statements. Parties to the Hearing can expect to be able to rely on the Disclosure for certainty in understanding what the application before the TLAB entails. In this matter, the periods between Applicant’s Disclosure and due dates for other Parties were shortened by the TLAB’s previous Order in an effort to move the matter forward and meet the set Hearing Date. It appears, though, that the Application Disclosure of February 1, 2021 could still have been construed to be a conditional statement pending finalization. The Response to this Motion, on February 18, 2021 was the first unambiguously definite statement of the Variance request. This left Mr. Van-Lane an unrealistically short time to respond before the deadline of March 1, 2021 which the TLAB had previously set for Disclosure and Witness Statements.

Ms. Stewart has suggested an amended timeline for submissions in an effort to protect the Appeal Hearing date which has been set for April 1, 2021. Mr. Van-Lane has not responded to the suggestion in his Reply.

While I recognize the Applicant’s urgency and desire to finalize the Appeal and so therefore resolve the Building Code enforcement process and resume construction, Mr. Van-Lane is reasonably entitled to sufficient time to prepare his materials and prepare for the Appeal Hearing. In order to achieve this outcome, the Hearing date will be revised.

Mr. Van-Lane has had since February 18, 2021 a clear and definite statement of what Variance is being requested. Forty days following this date is the customary time period between when Applicant’s Disclosure and due dates for Disclosure and Witness Statements. He also has the benefit of a complete Expert Witness Statement filed on

behalf of the Applicant. I therefore find that the second part of the requested relief, to hold a prehearing conference to assess the adequacy of the disclosure and the overall status of the Appeal is not warranted.

DECISION AND ORDER

The relief requested in the *Notice of Motion* is granted in part.

TLAB staff are directed to:

1. Issue revised submission dates to all Parties:
 - Due **March 30**; Document Disclosure, Witness Statements and Expert Witness Statements.
 - Due **April 14**; Response to Witness Statements, Response to Expert Witness Statements
 - Due **April 24**; Reply to Response to Witness Statements, Reply to Response to Expert Witness Statements
2. Issue a revised *Notice of Hearing* for the earliest date available in the TLAB's schedule after April 27. The Hearing is to be held electronically and the Parties are to be canvassed regarding the Hearing date.

The return Hearing date of April 1, 2021 is cancelled, and no attendance is required on that date.



Ana Bassios
Panel Chair, Toronto Local Appeal Body