

INTERIM DECISION AND ORDER

Decision Issue Date Tuesday, November 30, 2021

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): 1941120 ONTARIO LTD

Applicant(s): 1941120 ONTARIO LTD

Property Address/Description: 57 MAJOR ST

Committee of Adjustment File

Number(s): 20 138367 STE 11 MV (A0395/20TEY)

TLAB Case File Number(s): 20 209020 S45 11 TLAB

Hearing date: July 2, 2021 and September 1, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY S. GOPIKRISHNA

REGISTERED PARTIES AND PARTICIPANTS

| Name | Role | Representative |
|---------------------|---------------------------|------------------|
| 1941120 Ontario Ltd | Applicant/Owner/Appellant | Martin Mazierski |
| Maria Perin | Party | |
| Jenny Sit | Party | |
| Robert Brown | Expert Witness | |
| Meg Luxton | Participant | |
| Harriet Friedmann | Participant | |
| Yael Karshon | Participant | |
| Cameron Carvalho | Participant | |

**Decision of Toronto Local Appeal Body Panel Member: S. GOPIKRISHNA
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| Name | Role | Representative |
|---------------------|-------------|----------------|
| Colin Ing | Participant | |
| Sarah Hastie | Participant | |
| Derek Penslar | Participant | |
| Robin Penslar | Participant | |
| Jeannie Hastie | Participant | |
| Sachin Aggarwal | Participant | |
| Tim Grant | Participant | |
| Susan McDonald | Participant | |
| Tea Cheney | Participant | |
| Sue Shen | Participant | |
| Dan Sood | Participant | |
| Maxanne Ezer | Participant | |
| Trevor Mchaney | Participant | |
| Wendy Wu | Participant | |
| Adrian Sakamoto | Participant | |
| Ana De Sousa | Participant | |
| Bernice Hune | Participant | |
| Bettina Von Lieres | Participant | |
| Carla Giuliani | Participant | |
| Dan Thompson | Participant | |
| Erin Bearrs | Participant | |
| Merrick Zwarenstein | Participant | |

INTRODUCTION AND BACKGROUND

The purpose of this Interim Order and Decision is to provide direction to the Parties involved with 57 Major Street about what needs to be done before the next

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Hearing is convened, as well as who needs to take responsibility for contacting Witnesses.

It is important to briefly discuss how this proceeding has unfolded to understand the challenges faced in terms of commencing the Hearing.

The purpose of this Appeal is to legalize and maintain the basement secondary suite in the existing three storey, two-unit townhouse at 57 Major Street- the COA heard this application of October 2, 2020, and refused it in its entirety.

A few weeks before the beginning of the Proceeding, the Opposition brought forward a Motion to dismiss the Appeal without a Hearing, since the Appellant had not filed any documents. The Appellant then retained a lawyer, and filed material in support of the Appeal. I therefore allowed the Hearing to proceed forward at the beginning of the Hearing held on June 2, 2021.

At this Proceeding, the Appellant was represented by Counsel, but no planning witness, while the two Parties in opposition to the proposal had no counsel but had a witness to testify with respect to planning matters. The Appellants asked for an adjournment, because they wanted to summons the City planner who had worked on the file, before the application was heard by the Committee of Adjustment (COA). When asked why they needed to summons the City planner, the Appellant made it very clear that they did not want to spend money to retain the planner, and that summoning the City planner was a cost-effective strategy to get a planning witness to support their proposal.

While the Appellants had submitted a Witness Statement in the name of Xinde Xia, the owner of the property at 57 Major Street, there was no explanation in the Statement to explain how the proposal corresponded to By-laws 810-2018, and 1210-2019, which permit laneway suites, and amend By-Law 569-2013 respectively, to provide for laneway suites, notwithstanding references to laneway suites in their Statement. I learnt that the owner of the Property, who wanted to give evidence, is not a planner by training. While the opposition's indignation at the Proposal was palpable, I found that no planning rationale had been provided in their submissions, and concluded that that they should be given an opportunity to explain their planning rationale behind their opposition, by way of written submissions. Given that both the Appellants and Opposition had to make submissions, before evidence could be collected, I granted the adjournment. I also asked the opposition to designate spokespersons, who could submit updated witness statements, where appropriate.

At the next Hearing held on September 1, 2021, the opposition requested for an adjournment, because their witness had to attend a funeral. The Parties in opposition to the Appeal explained that they were not familiar with the topic of planning, and were consequently dependent on their witness, Mr. Brown, to understand the evidence from the Appellant, interpret it for them, and rebut the same. I was also informed that the TLAB had approved the request for summoning Ms. May Wang, the City planner who had worked on the file, and that she was present to give evidence.

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It also emerged that the Counsel for the Applicant, Mr. Martin Mazierski, had had a conversation on the phone with Ms. Wang, before summoning her. Members of the opposition objected vigorously, and voiced strong concerns about Mr. Mazierski contacting the Witness before summoning her.

When asked for the reasons behind such an unusual step, Mr. Mazierski said that he wanted to make sure that Ms. Wang would feel “comfortable” giving evidence. It also emerged that Mr. Mazierski sent her questions about what would be asked of her at the Hearing, without any intimation to the TLAB, and more importantly, the other Parties in opposition. Mr. Mazierski opposed the Motion for adjournment, because “Ms. Wang was in the process of transferring from one department to another”, and may have challenges in appearing before the TLAB, after resuming her new position.

I informed the Parties that I would adjourn the Hearing, to address the unexpected difficulties caused as a result of the Appellant’s lawyer contacting the summonsed witness. I instructed Ms. Wang to come prepared to discuss By-Laws 810-2018 and 1210-2019, if she were summonsed again. I also advised the other Parties that they had the ability to draw up a list of questions for the summonsed witness, to be answered at the Hearing if she were summonsed again. I advised the Parties that a summonsed Witness could not be expected to testify in favour of a given Party, or against a different Party. The duty of summonsed Witnesses is to answer very specific questions about the proposal, on the basis of their specialized knowledge. Lastly, I asked the Appellant to reflect on, and make a thoughtful decision on summoning Ms. Wang again, and inform the TLAB about their intentions.

On October 28, 2021, Mr. Mazierski sent an email to the TLAB, asking them to confirm that I had been made aware of his intention to summons the Witness by way of an earlier email, with an enquiry about the scheduling of the Hearing. I replied to this email asking Mr. Mazierski if he had completed the work for summoning the Witness. The reply from Mr. Mazierski stated that he “will not be able to fill out a Form 11 (Request to Summons) until a new hearing date has been set, and the Tribunal won’t be able to issue the summons (in response to the Form 11) until the hearing date has been identified “. He also asked the TLAB staff to include Ms. Wang in the list of individuals to be emailed, when scheduling the Hearing.

MATTERS IN ISSUE

The question before me is to provide instructions to the Parties, and the TLAB staff about what steps before the Hearing commences.

JURISDICTION

The TLAB follows its own Rules of Procedure and Process (“the Rules”) in jurisdictional matters.

ANALYSIS, FINDINGS, REASONS

It is important for me to put on record my profound disappointment, if not dismay, after learning that there had been conversations between Mr. Mazierski and Ms. Wang, to the exclusion of other Parties, prior to the summons request being made. The inappropriateness of this move is underlined by the fact that Ms. Wang was asked if she was “comfortable” with being summonsed, and was made aware about questions she may be asked, when on the witness stand.

Such a process is flawed for the following reasons:

- It is common knowledge that a person’s consent, or ascertaining their “comfort level” with being summonsed, is irrelevant to the summons. Once summonsed, the witness in question has the option of rearranging their schedule to make themselves available on the day of the Hearing, bringing a Motion to have the Summons quashed, or face the consequences of absenting themselves from the Hearing, which range from being fined to incarceration.
- It is highly improper to provide summonsed witnesses, a list of questions that they could be asked at the Hearing. The impact of such an impropriety is exacerbated, when both the Opposition, and the TLAB are not made informed about such conversations. Since nobody is privy to the discussion between the Party and the summonsed witness, there is a serious concern that the evidence to be given, would be coloured to favour the Applicant- this is evident from the Applicant’s position, because they seem very confident that Ms. Wang would speak favourably about the proposal. *Prima facie*, there is a strong perception of prejudice to other Parties, because of their exclusion from the original discussion. While I have attempted to make the best of a bad situation by asking the opposition to submit questions to the Witness if she were summonsed again, I have a genuine concern about the possible tainting of the evidence if she were to take the stand again.

The fact that such an egregious error was made by a sophisticated Party, with access to ostensibly sound legal advice is troubling- I find the Applicant’s approach to contacting the witness before summonsing them, and sharing questions with them, to be unacceptable, when not offensive.

I am not convinced by the Appellant’s argument about linking the Summons Request to a specific date, and asking that the Witness to be consulted as part of the scheduling process. Nothing prevents the Appellant from requesting to summons the Witness **after** (my emphasis) the dates for the Hearing have been established.

The TLAB needs to protect the public interest by not including individuals whose participation is a matter of conjecture- at this point in time, there is no legal requirement for Ms. Wang to participate in the Hearing. The process suggested by the Appellant rests on the questionable premise that they will be successful in having the Witness summonsed a second time- the TLAB cannot dance to the Appellant's tune, or seen to be colluding with them to create circumstances, that favour a given result.

Consequently, I find that the Witness to be summonsed, does not have to be included in discussions to schedule the Hearing. Given the complexity of the matter, two days of Hearing time may be sufficient to complete this Proceeding.

I herewith instruct the TLAB Staff to contact the Parties (but not the witness who may be summonsed) to identify Hearing dates in February, 2022 Once the dates have been identified, the Parties can then make whatever arrangements they need to ensure that witnesses of their choice, can be present to give evidence at the Hearing, and undertake appropriate paperwork.

INTERIM DECISION AND ORDER

1) The TLAB staff shall contact the Parties involved with 57 Major Street, to identify two
(2) Hearing dates in the months of January and February, 2022, or later. The Parties are responsible for the participation of their preferred witnesses. Specifically, the TLAB will not contact any witnesses, whose participation has not been confirmed, for any purpose, including scheduling Hearings.

So orders the Toronto Local Appeal Body



X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body