

# DECISION AND ORDER

**Decision Issue Date**      Friday, September 17, 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): ANDREY MATUSEVISH

Applicant(s): ANDREY MATUSEVICH

Property Address/Description: 313 BELSIZE DR.

Committee of Adjustment File

Number(s): 231266 000 00 MV

**TLAB Case File Number(s): 21 127759 S45 11 TLAB**

**Motion Hearing date: September 13, 2021**

**DECISION DELIVERED BY : DINO LOMBARDI, TLAB CHAIR**

## REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Andrey Matusevich	Applicant/Appellant	Zachary Fleisher
Gillian Harnick	Owner	
Martin Rendl	Expert Witness	
Eli Aaron	Expert Witness	
Al Kivi	Party	
Ray Edney	Party	

## **INTRODUCTION AND BACKGROUND**

This matter arises by way of a Written Motion submitted by Mr. Zachary Fleisher, solicitor, on behalf of his client, Andrey Matusevich (Applicant/Appellant), requesting a Written Hearing.

Mr. Matusevich applied to the Committee of Adjustment (COA) for three (3) variances to permit the construction of a rear, elevated deck at the rear of the existing detached dwelling at 313 Belsize Drive (subject property).

On August 4, 2021, the North York Panel of the Committee of Adjustment (COA) issued its decision approving Variances 1 and 3 as follows:

1. A deck area of 11.24 m<sup>2</sup> whereas 4.0 m<sup>2</sup> is permitted; and
2. A west side yard setback of 0.85 m whereas 1.8 m is permitted.

However, the COA refused Variance 2, which was a request for an east side yard setback of 1.56 m whereas the Zoning By-law permitted 1.8 m.

Mr. Matusevich appealed the Committee's decision to the Toronto Local Appeal Body (TLAB) and the Tribunal set a Hearing date to hear the matter for August 4, 2021.

The Hearing event on August 4<sup>th</sup> consumed the entire day but did not conclude the disposition of the matter and, therefore, a second Hearing Day was required. Following a canvassing of the Parties and after consultation with TLAB staff, the Parties were advised that September 13, 2021, had been tentatively held for the second Hearing Day.

As required by the TLAB's Rules of Practice and Procedure (Rules), the Appellant filed disclosure documents including what can be characterized as 'hand-drawn' plans for the proposed deck. At Hearing Day 1, I noted these 'hand-drawn' plans (Original Plans), marked as Exhibit 1, which had been before the COA, were in the Panel Member's opinion somewhat rudimentary in appearance and were difficult to read. They also lacked accuracy and dimensional details.

In response, Mr. Fleisher clarified that the plans in question had indeed been prepared by Mr. Matusevich and apologized for the quality of the drawings. To improve their quality, I suggested that professionally prepared drawings be submitted with identical and precise dimensions to confirm the information contained in the plans submitted by the Appellant.

Subsequently, the Appellant retained Robert Valente of Valente CAD Studios to prepare professional drawings in this regard. However, in the process of preparing these plans Mr. Valente identified a discrepancy with respect to the west side-yard setback of the existing house on the subject property. In fact, the west side yard setback which was thought to be 0.5 m was in reality 0.3 m. This resulted in an error in calculating the west side yard setback of the proposed deck and in the variance originally requested by the Appellant.

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As a result, and due to the physical constraints associated with the existing walk-out basement and Juliet balcony at the rear of the dwelling, the Appellant is asserting that Variance 3 now before the TLAB needs to be revised for the proposed deck to be constructed as proposed.

To rectify this situation, the Appellant has filed a Motion with the TLAB seeking the following relief:

1. An Order of the TLAB granting relief from Rules 17.1, 17.4, and 17.8 of the TLAB's Rules of Practice and Procedure (the "Rules") to allow for this Motion to be served prior to obtaining a Motion date and to allow for the late filing of this Motion;
2. An Order of the TLAB granting relief from Rules 11.2 and 16.2 of the TLAB's Rules to allow for the late filing of Form 3: Applicant's Disclosure;
3. An Order of the TLAB pursuant to s. 45(18.1.1) of the Planning Act deeming the amendment to the original application minor and dispensing with the requirement for written notice to be circulated as a result of an altered variance for a reduced west side-yard setback;
4. In the event the relief in paragraph 3 is not granted by the TLAB at the Motion, an Order of the TLAB pursuant to section 45(18.1) of the Planning Act amending the original application and issuing a Decision in respect of same but directing that the Applicant circulate written notice to the persons and agencies who received notice of the original application and to other public bodies and persons prescribed before issuing a Final Order; and
5. Such further and other relief as counsel may advise and the TLAB may permit.

In support of this Motion, the Appellant's solicitor submitted the following Motion materials to the TLAB on September 2, 2021, contained within a Motion Record of Andrey Matusevich (Motion) including 9 Exhibits and case law :

- Notice of Motion (Form 7);
- Affidavit (Form 10) of Martin Rendl, sworn on September 2, 2021;
- Exhibit A – Original Drawings;
- Exhibit B – 313 Belsize Dr. Property Survey (dated April 8, 2015);
- Exhibit C – Original Drawings (Toronto Building Notes);
- Exhibit D – Zoning Certificate (dated October 21, 2021);
- Exhibit E – Enlarged Version of Exhibit B;
- Exhibit F –
  - Form 3 – Applicant's Disclosure (dated September 2, 2021)
  - Revised Plans with Privacy Screen (dated August 19, 2021)
  - Revised Plans without Privacy Screen (dated August 19, 2021)
- Exhibit G – Revised List of Variances;
- Exhibit H – Letter of Support from D. Harding (dated August 29, 2021);
- Exhibit I – Email to R. Edney and A. Kivi (dated August 20, 2021);
- Case Law – *Fearn, Re, 39 Bastedo Ave.*, 2019 CarswellOnt 4899 (TLAB)

No materials or documents were submitted by the other Parties in response, following service of the Motion filing.

## **MATTERS IN ISSUE**

This Motion seeks an Order of the TLAB granting relief from Rules 17.1, 17.4, and 17.8 of the TLAB's *Rules* to allow the Motion to be served prior to obtaining a Motion date and to allow for the late filing of the Motion. It also seeks relief from Rules 11.2 and 16.2 of the Rules to allow the late filing of the Applicant's Document Disclosure (Form 3).

Additionally, the Motion request an Order of the TLAB pursuant to s. 45(18.1.1) of the *Planning Act (Act)* deeming the amendment to the original application 'minor' and dispensing with the requirement for written notice to be circulated because of an altered variance for a reduced west side yard setback.

Conversely, if the TLAB fails to deem the amendment to the original application minor, the Appellant seeks an order pursuant to s. 45(18.1) of the *Act* amending the original application and issuing a Decision in respect of same but directing that the Applicant circulate written notice to persons and agencies who received notice of the original application

## **JURISDICTION**

TLAB Rules 17.1, 17.4, and 17.8 govern the filing of Notices of Motion, how and when they are heard by the Tribunal and the service of Notices by the Moving Party on Parties and Participants. Rules 11.2 and 16.2, respectively, deal with the filing of applicant's disclosure and the types of documents to be served.

TLAB Rules 2.1, 2.2, and 2.10, respectively, address the Tribunal's application and interpretation of its *Rules* and direct that substantial compliance with the Rules is sufficient.

Subsections 45(18.1) and (18.1.1), respectively, address the Tribunal's ability to make decisions on an application if it has been amended from the original application with or without written notice based on a determination as to whether the amendment to the original application is deemed by the Tribunal to be minor.

## **EVIDENCE**

The Notice of Motion (form 7) filed with the TLAB on September 2, 2021, is accompanied by an Affidavit (Form 10) sworn by Martin Rendl, the Appellant's expert land use planner, which sets out the facts upon which the Moving Party relies.

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In summary, the drawings which were identified as Exhibit 1 at Hearing Day 1, were prepared by Mr. Matusevich using a survey dated April 8, 2015, a hard copy of which the Appellant received when he purchased the subject property. Those drawings were accepted by the City of Toronto (City) Building Department and reviewed by the Zoning Examiner (Exhibit D) to issue a Zoning Certificate.

The presiding Panel Member, on Hearing Day 1, suggested that it would assist the TLAB and the other Parties if professionally prepared and more legible plans with identical dimensions were obtained. Valente CAD Studios was retained to produce these drawings. During this preparation, Mr. Valente noticed a discrepancy – the west side yard setback of the existing dwelling is actually 0.3 m and not 0.5 m, as shown on the original plans. This error was attributed to difficulty in reading the west side yard dimension on the survey (Exhibit B).

As a result, the Mr. Rendl submits that the west side yard setback shown on the original drawings is 0.66 m despite being shown as 0.85 m (I note that in Mr. Rendl's Affidavit, at paragraph 8, he mistakenly identifies the setback as 0.65 m which I believe is a typographical error).

He asserts that if the correct side yard setback variance of 0.65 m were maintained, the result would be the construction of a deck with a larger area than proposed – 13.63 m<sup>2</sup> instead of 11.24 m<sup>2</sup>.

Mr. Rendl further attests that the dimensions of the proposed rear deck are constrained on the west side by the location of basement walk-out and on the east side by the Juliet balcony. There, the Variance 3 needs to be revised accordingly, to construct the size of the deck as contemplated.

A west side yard setback of 0.66 m is now required as that dimension is the largest setback possible given the location of the basement walkout and stairs. Additionally, to maintain an identical deck area variance of 11.24 m<sup>2</sup>, as previously sought, the Appellant is proposing to reduce the depth of proposed deck by 0.1 m. Mr. Rendl confirms in his affidavit that this reduction does not trigger changes to any of the other variances sought.

The Motion includes professional drawings prepared by Mr. Valente (Exhibit F) that show a deck that is numerically identical in area and east side yard setback as was shown in the original plans. However, the west side yard setback to the deck is now proposed as 0.66 m and the depth of the deck has been reduced by 0.1 m.

The Motion includes two sets of drawings (Exhibit F), dated August 19, 2021, reflecting the amendments made – one with a privacy screen and one without a privacy screen.

In his affidavit, Mr. Rendl attests that the Appellant provided the revised drawings (Exhibit F) to his westerly neighbour, Ms. Harding, and his southerly neighbour, Ms. Reynolds, to advise of the revisions. Attached to the Motion as Exhibit H is a letter of support from Ms. Harding of the revised proposal.

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Mr. Rendl also attests that Mr. Matusevich provided the revised drawings (Exhibit F) to the other two Parties in the proceeding, Messrs. Edney and Kivi, who represents the South Eglinton Ratepayers and Residents' Association (SERRA), via email on August 20, 2021 (Exhibit I).

Finally, Mr. Rendl submits in his affidavit that the amendment to the west side yard setback variance is minor and does not require further notice. He asserts that in any event, the adjacent neighbour to the west, who this change impacts the most, was not only notified, but is supportive of the revised proposal.

He also submits that the proposed revision does not change his planning opinion that he gave in testimony during Hearing Day 1 that the revised proposal continues to satisfy the statutory tests as outlined in the *Planning Act*.

## **ANALYSIS, FINDINGS, REASONS**

The Moving Party, Mr. Matusevich, has requested that TLAB deal with the subject Motion in writing or, conversely, at the commencement of the second Hearing Day which was tentatively scheduled for September 13, 2021. That date is referenced at various points in the Motion documentation filed with the TLAB by the Moving Party.

September 13, 2021 was a date that was canvassed at the conclusion of Hearing Day 1, after consultation with TLAB staff, and upon agreement of the Parties in attendance. The presiding Member acknowledged to those in attendance that September 13<sup>th</sup> was available on the TLAB's meeting calendar and confirmed that Tribunal staff would issue a Notice of Hearing Day 2 to corroborate this date.

Unfortunately, due to a misunderstanding with TLAB staff, the September 13<sup>th</sup> date was never set aside by staff and no Notice of Hearing Day 2 was issued by the Tribunal. As a result, the seized Panel Member who presided at Hearing Day 1 and who was scheduled to sit the second scheduled Hearing day was unavailable.

This is regrettable and the TLAB has apologized to the Parties in this matter. Once the Tribunal became aware of this situation, staff were immediately directed to contact the other Parties to advise that no Hearing Day 2 would occur on that day and to canvas for a date for Hearing Day 2.

Following this canvassing and on the consent of all the Parties, Hearing Day 2 has now been confirmed for October 4, 2021, and a new Notice of Hearing (Day 2) has now been issued.

The presiding Panel Member also directed staff to advise the Parties that September 13, 2021, would be held as the Motion Hearing date for the Motion in question, which is addressed, herein, in this decision and order.

Given the evidence filed, I am prepared to allow the Moving Party's request to allow this Motion to be served prior to actually having obtained a Motion date from the TLAB and to allow for the late filing of this Motion. I am also prepared to allow relief from

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the TLAB's Rules, specifically Rules 11.2 and 16.2, to allow for the late filing of Form 3: Applicant's Disclosure.

I accept Mr. Matusevich's genuine regret for the inconvenience this may have caused the other Parties and concern for potential prejudice resulting from the late disclosure of the revised plans agree with the Moving Party and I agree that the error in the original drawings were not deliberate.

Furthermore, given that the revised plans were provided to the Parties and the abutting neighbours at the earliest opportunity and shortly after being completed, on August 20, 2021, I agree with the Moving Party and find no evidence to suggest that the Appellant's intention is to obfuscate or to engage in "trial by ambush."

I am also prepared to grant the Appellant's request for relief from Rule 17.4 requiring the Moving Party to obtain a Motion date prior to service of the Notice of Motion in order to provide the other Parties with an adequate opportunity to respond. The TLAB was unable to provide the Moving Party with a Motion date in a swift fashion and that, coupled with required rescheduling of the September 13<sup>th</sup> date, supports the granting of relief from Rule 17.4.

As to the matter of s. 45 (18.1.1) of the *Planning Act*, I agree with the Moving Party that the 19 cm revision to the west side yard setback variance is a 'technical' revision and does not result in a markedly different proposal. It also does not, in my opinion, alter any of the issues raised by the Parties to date, in their submissions filed with the TLAB.

Therefore, I find that the change to the original plans, a west side setback of 0.66 m for the proposed rear deck instead of 0.85 m as previously sought, to be minor. I do not find that the revision warrants additional notice, and I am prepared to grant exemption from any such requirement under s. 45(18.1.1) of the *Act*.

The Moving Party has offered case law to support the relief sought in the Motion in the form of a 2019 TLAB decision, *Fearn, Re, 39 Bastedo Ave*, issued by former Member Burton which addressed the matter of the filing of revised plans in a compressed timeframe before a hearing.

In the decision in the case, above cited, Member Burton wrote the following:

*"There are frequent changes to plans and variances even at the Hearing itself. These are usually accepted by the TLAB under Rule 2.10, where there had been no prejudice. I find none here, where [the other Party] had several weeks to be acquainted with the revised proposals."*

In the current matter before the TLAB, I note that the revised plans were served on the other Parties by the Appellant shortly after they were completed, more than five (5) weeks) prior to the rescheduled date for Hearing Day 2 which is now September 29, 2021. I find this to be a reasonable time period that provides the other Parties adequate time to review the plans and to respond appropriately. I also agree that permitting the Moving Party to file the revised plans and revised Variance 3 does not prejudice the other Parties.

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I agree with the Moving Party that the revision to the west side yard setback variance is technical, minor, and does not alter or significantly increase the alleged impacts to Mr. Edney's property, which appears to be the primary issue in this Hearing.

This timeframe will also allow SERRA's expert land use planning witness, Mr. Aaron, to appropriately review the revised plans and prepare his oral evidence accordingly in advance of Hearing Day 2 at which he is expected to be called to provide testimony on behalf of SERRA.

Furthermore, Mr. Rendl affirms in his Affidavit that the revised plans do not alter his planning opinion, which remains that the variances sought for the proposed deck maintain the general intent and purpose of the Official Plan and Zoning By-law, is desirable for the appropriate development of the site, and is minor.

Therefore, I am prepared to grant the relief sought by the Appellant, bullet points 1 to 3, in the filed September 2, 2021 Notice of Motion. I find that permitting the revised plans and variance will not result in prejudice to the other Parties and I agree that no new notice is required pursuant to s. 45(18.1.1) of the *Planning Act*. Additionally, granting the relief requested by the Moving Party will allow the Tribunal to effectively and completely adjudicate this matter in a just, expeditious, and cost-effective manner in accordance with Rule 2.11 of the TLAB's Rules.

## **DECISION AND ORDER**

The requested relief in the Notice of Motion dated September 2, 2021, is granted.

TLAB staff is directed to issue a Notice of Hearing Day 2 for October 4, 2021, for this matter.

If problems arise in the implementation of this decision and order, the TLAB may be spoken to.

X 

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Dino Lombardi  
Panel Chair, Toronto Local Appeal Body  
Signed by: dlombar