

INTERIM DECISION AND ORDER

Decision Issue Date Thursday, May 26, 2022

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): 1152030 ONTARIO INC

Applicant(s): NELSON ESPINOLA

Property Address/Description: 10 STAYNER AVE

Committee of Adjustment File Number(s): 21 201080 NNY 08 MV (A0581/21NY)

TLAB Case File Number(s): 21 231436 S45 08 TLAB

Hearing date: March 28, 2022

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY TLAB Panel Member S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANT

Applicant	NELSON ESPINOLA
Appellant	1152030 ONTARIO INC
Appellant's Legal Rep.	AMBER STEWART
Participant	MATTHEW SMITH
Participant	CLAUDIO SERA
Party (TLAB)	CITY OF TORONTO
Party's Legal Rep.	COLIN DOUGHERTY
Expert Witness	JASON XIE

INTRODUCTION AND BACKGROUND

Salvatore Vescio is the owner of 10 Stayner Avenue, located in Ward 08 (Eglinton-Lawrence) of the City of Toronto. In order to maintain a number of additions he had made to the existing house, including an accessory structure (pergola) in his rear yard, and a secondary suite in the basement, Mr. Vescio applied for the approval of various variances to the Committee of Adjustment (COA), which heard the Application on October 7, 2021, and refused the Application in its entirety.

On October 27, 2021, the Applicant appealed the COA's decision to the Toronto Local Appeal Body (TLAB). The Notice of Hearing issued by the TLAB, on December 20, 2021, stated that the Parties had to file their Witness Statements by February 18, 2022. The City of Toronto elected to be a Party on January 17, 2022, and filed its Expert Witness Statement on February 18, 2022. However, the Applicant did not file a Witness Statement, nor any other documentation, by the deadline. The TLAB scheduled a Hearing for March 28, 2022.

At the Hearing held by way of a videoconference at 9:30 AM on March 28, 2022, the Applicant was represented by Ms. Amber Stewart, a lawyer, and Mr. Jonathan Benczkowski, a land-use planner, while the City of Toronto was represented by Messrs. Colin Dougherty and Nathan Muscat, both of whom are lawyers, and Mr. Jason Xie, a land-use planner. Mr. Claudio Sera, who had elected for Participant status, was also present for the videoconference.

Ms. Stewart apologized for not submitting any documentation in support of the Application by the starws deadline, and attributed the lack of submissions to confusion caused by the lack of coordination between the planner, and the architect, regarding the submission of updated Plans and Elevations. Ms. Stewart stated that she and Mr. Benczkowski had explained to the Applicant, that they would represent him before the TLAB, if and only if he consented to "reducing the variances". She conceded that her client had built all the additions, before applying even to the COA. She requested for an adjournment, so that the planner and designer could have a discussion between themselves to see how quickly they submit the Plans and Elevations to the TLAB. Ms. Stewart also discussed how they (i.e. the Applicant's Representatives) planned to have a discussion with the City, regarding the Plans and Elevations, to see if their updated design could address the City's concerns. Mr. Benczkowski, the Applicant's planner spoke briefly, emphasizing how he would prefer for "the number of variances to be reduced", through discussions with the City of Toronto.

When expressing my agreement with the Applicant's request for an adjournment, I stated that "my hands were tied because the Applicants had not filed any documentation".

The City's lawyer, Mr. Dougherty, stated his disappointment with how the Applicant had not submitted their Witness Statement, and contrasted the Applicant's approach with

the City's completing submissions by the deadline. While Mr. Dougherty stated that he was not prepared to "file any Motion on behalf of the City (presumably to have the Appeal dismissed without a Hearing) he stated, repeated and reiterated how the TLAB had the power and the authority to take action against the Applicants. He assured me that my "hands were not tied" as I had stated earlier, and offered to draw my attention to specific Rules (The TLAB's Rules of Practice and Procedure), which when "interpreted strictly, could result in the TLAB's dismissal of the Appeal". Mr. Dougherty asserted that the Applicant had not demonstrated good faith in all his dealings with the City, and the TLAB.

Mr. Claudio Sera, the Participant in attendance, spoke about how the Applicant was trying to "trick" the other participants, and interpreted the lack of submissions regarding Plans and Elevations, to construe proof of the Applicant's lack of good intentions.

I stated that I would adjourn the Hearing, and would subsequently issue an Interim Decision to identify deadlines for the submission of a Witness Statement by the Applicants, provide the City an opportunity to submit a Response to the Applicant's Witness Statement, as well as allow the Applicants to submit a Reply, where necessary. Mr. Muscat, one of the City's lawyers, added that "timelines must be added for Response, and Reply", to which I provided reassurance by stating that it was my practice to ensure that Parties had the ability to provide Responses, and Replies to new submissions by the other Party.

There were discussions between the Parties, about how soon would the Plans be circulated, and how quickly could the Parties meet to discuss the plans, and what implications would this have for the deadlines I was going to propose in the Interim Decision to be sent out. I emphasized that from my perspective, more time should be spent in completing the Submissions, because all dates following after the submissions, including the Hearing date(s), would be peremptory.

The details of these discussions about scheduling, are not listed here, for reasons discussed in the Analysis, Reasons and Findings Section. It would be sufficient to note that when the Hearing was adjourned, the Parties agreed that we would meet in early May 2022, to continue with the Hearing, based on the deadlines to be listed by way of the Interim Order to be issued within a few weeks after the Hearing.

After the Hearing, I instructed the TLAB Staff to contact the Parties in order to identify dates in May 2022, to continue with the Proceeding, as per the discussions at the Hearing. I understand that notwithstanding two different emails that were sent out by the TLAB Staff between April 4, 2022, and April 11, 2022 to identify Hearing dates in May 2022, no response was received from the Applicants. I am aware that the second of the two emails stated that in "the absence of a response, the TLAB would fix a Hearing date. Concerned by the lack of a response from the Parties, I instructed the TLAB staff to schedule a videoconference with the Parties on June 2, 2022, and asked them to send out an email that an Interim Decision would follow "within two weeks", in which I would explain the reasoning behind my asking to meet with the Parties.

On 10 May, 2022, Mr. Colin Dougherty, one of the City's lawyers sent out an email, , stating that no Decision had been issued, and that "Said timelines ought to be reflected within a decision/order."

MATTERS IN ISSUE

The main question before me is how to complete the Hearing in the most efficient way possible, taking into account the lack of submissions by the Applications.

JURISDICTION

The TLAB relies on its Rules of Practice and Procedure (the "Rules") to make decisions on administrative issues, including the scheduling of Hearings.

ANALYSIS, FINDINGS, REASONS

I begin by noting that there were allegations of the Applicant's lack of good faith from the Opposition at the very onset of the Hearing. Given that the Proceeding started out on the sour note, because of allegations of the Appellants' lack of good faith by the Opposition, I find that at the very least, the Applicants could have endeavoured to demonstrate their sincerity, by being proactive with submissions, and cooperating with the TLAB to identify dates for the Hearings.

I am concerned by the Applicants' lack of response to not one, but two different emails sent by the TLAB to identify Hearing dates- while the cause behind the lack of a response is unknown, I find that such behaviour does not bode well in terms of establishing the Applicant's intentions to be respectful of other Parties, or the TLAB, as well as ability to adhere to timelines. It is difficult to understand how the Party intends to complete the more complex task of negotiating with the Opposition, making changes to the Plans and Elevations, as necessary, and complying with the deadlines, when they cannot complete the significantly easier task of responding to a simple scheduling query from the TLAB. I find that a Party's follow up actions are a better predictor of their behavior than promises, and am not consequently convinced that there is any merit to setting up deadlines at this point in time. I believe that I have to be convinced of the Party's ability to meet the said deadline, as opposed to a pattern of missing, or messing with deadlines.

Under the circumstances, I ask the Applicants to utilize the Hearing scheduled for June 2, 2022 , to demonstrate that they have the capacity to adhere to prescribed deadlines.

Given that this Proceeding needs to be completed in a timely fashion, I would like the Parties to come prepared to answer the following question, at the Hearing:

Is there merit to the Interim Order and Decision's stating that the existing Plans and Elevations before the TLAB, become the basis for proceeding forward?

The consequence of this approach is that any Party, and Participant in opposition to the Appeal, will not have to file further Witness Statements; there is some level of predictability about what preparation needs to be undertaken by the Parties and Participants to present evidence at the Hearing. Depending on the circumstances, the Applicant may need to submit a Motion to update and make changes to the Plans and Elevations, whether it be by way of a Settlement, or a Contested Proceeding. Where the dates are peremptory, and the Plans/Elevations are firmly in place, the Proceeding becomes more efficient, and predictable in how the Hearing will unfold.

The second issue I need to discuss is my lack of comprehension of the City's position, as stated at the Hearing held on March 28, 2022, where they were not prepared to bring forward a Motion to dismiss the Appeal, but appeared eager to remind the TLAB of how, and why it should dismiss the Appeal.

Prima facie, it is true that a Tribunal can dismiss an Appeal without a Hearing, on its own cognition; however, the threshold to trigger such an action is really significant, where the behavior of the Party is not merely out of the ordinary, but rises to the level of being odious, and overwhelms the Tribunal from carrying out its duties, with respect to the Appeal. I find that in this Appeal, the lack of the submission of Witness Statements, by the Applicants has not resulted in the best of beginnings, their actions are nowhere near the threshold of being offensive to the Tribunal.

The primary impact of postponements of the part of a Party is the possibility of prejudice to other Parties- what I infer from the City's lack of interest in a Motion to dismiss this Appeal, is that the Applicant's actions have fallen short of being prejudicial to the City's interests. Given that the City did not object to overtures from the Applicant to negotiate the design of the house at the centre of this Appeal, I find that there is no reason for the TLAB to consider dismissing the Appeal at this state in the Proceeding, especially on its own cognition.

It is also important to note that the TLAB provides a specific "Intention to Dismiss" an Appeal to the Party, and hears submissions on the same, before making a Decision on whether the dismissal is warranted- the Dismissal of an Appeal represents the culmination of a process to address progressively unreasonable behavior on the part of the Appellant, rather than a knee jerk reaction of one's umbrage in response to the less-than-perfect actions of an Appellant.

By way of information, the TLAB's own Rules advise that the Rules be interpreted liberally as opposed to a "strict interpretation" approach discussed at the Hearing, as can be seen in Rules 2.13 and 2.2, both of which are recited below, in that order:

Failure to Comply with the Rules or Procedural Order

2.13 Where a Party or Participant to a Proceeding has not complied with a requirement of these Rules or a procedural order, the TLAB may:

- a) grant all necessary relief, including amending or granting relief from any procedural order on such conditions as the TLAB considers appropriate;*
- b) adjourn the Proceeding until the TLAB is satisfied that there is compliance;*
- c) order the payment of costs; or d) refuse to grant the relief in part or whole*
- d) refuse to grant the relief in part or whole*

AND

Interpretation of these Rules

2.2 These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits

Consequently, on a go forward basis, I instruct the City to consider submitting a Motion to have the Appeal dismissed without a Hearing, if it is not satisfied by how the Applicant prosecutes his Appeal. The TLAB will intervene to dismiss the Appeal on its own initiative, if and only if it determines that the circumstances call for such an extreme measure- the Tribunal asks that it not be prompted, nor prodded to resort to such a harsh, and extreme measure.

INTERIM DECISION AND ORDER

- 1) At the Hearing to be held on June 2, 2022, the Applicant needs to demonstrate their ability, and intention to cooperate with direction provided by the TLAB for the completion of this Appeal.
- 2) The Parties are asked to discuss the impact of possible direction from the TLAB that the Hearing proceed forward on the basis of existing Plans and Elevations for 10 Stayner Avenue, submitted to the Committee of Adjustment, as part of the Application heard on October 7, 2021.

So orders the Toronto Local Appeal Body

X



S. Gopikrishna
Panel Chair, Toronto Local Appeal Body