

MOTION DECISION AND ORDER

Decision Issue Date Monday, September 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): MARY ANN YEWEN

Applicant: OU DESIGN INC.

Property Address/Description: 16 KESTELL LANE

Committee of Adjustment Case File Number: 22 107378 NNY 16 MV (A0068/22NY)

TLAB Case File Number: 22 139977 S45 16 TLAB

Hearing date: Monday, November 14, 2022

DECISION DELIVERED BY T. Yao

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Mary Ann Yewen
Applicant	Ou Design Inc.
Party	Shenwei Bai
Party's Legal Rep.	Martin Mazierski
Participant	Deborah Mackenzie
Participant	Gary Peterson
Participant	Julia Sweeney
Participant	Jane Tucker
Participant	George Tucker
Participant	Zlatko Tausan

Participant	Mark Hanna
Participant	Gary Sweeney
Participant	Amir Aghaei
Participant	Shafiq Vallani

Introduction and Context

This is a written motion by the lawyer for Ms. Bei (owner of 16 Kestell Lane) to dismiss Ms. Yewen's appeal without a hearing. Ms. Yewen is the next-door neighbour, and she objects to the decision of the Committee of Adjustment to grant variances to Ms. Bei. The appeal states in part:

We do not understand the lack of concern regarding the trees when the various City of Toronto by-laws mandate the protection of trees. On the neighbouring property (14 Kestell Lane) [this is Ms. Yewen's property] the front yard tree is about 70 years-old and its drip line indicates it has and will be affected by construction as stated in the letter received from the Toronto Urban Forestry & Natural Feature Protection (signed by Bonnie Williams, planner, urban forestry, RNFP, and dated February 23, 2022). The letter also states that two other trees in the back yard (including a historic elm) will be affected. The permit was granted allowing the damage the tree roots of these three trees "to accommodate the construction of the replacement interlock patio at 16 Kestell Lane." the letter also states, "the injury cannot reasonably be avoided, and that **tree will withstand the injury and continue to survive well**". The interlocking patio can certainly be avoided but more importantly, **how can the survival of the trees be guaranteed?** We would like to note that the mature elm in the backyard of 16 Kestell Lane is currently still suffering from root compaction due to bricks piled up against it, as well as the root damage from the interlocking patio and steps that were put in before any permits were acquired

Ms. Yewen continued, expressing concerns about soil stability and risk of lack of care by contractors (they might accidentally cut natural gas lines). The Affidavit of Maggie Ou, Ms. Bai's architect, states that these are matters of construction and not proper planning considerations. I make no conclusion on Ms. Ou's contention, but do not feel that the relief requested is warranted at this early stage, in the absence of an opportunity to present expert evidence and cross examination.

Summary of Evidence

Ms. Bei owns a bungalow at 16 Kestell Lane, in the northeast corner of Don Mills, south and west of the York Mills/ Don Valley Parkway intersection. Her rear yard backs on the Donalda Golf course, which contains part of the Don River and is a heavily treed ravine backing onto the Kestell Lane properties

In early 2022, she applied to the Buildings Department for a second floor “bump-up” (Figure 1), which needed four variances from the zoning by-law. One of the plans is shown in Figure 1, and the numerical variances in Table 2. It is likely that the setback variances (variances 1, 3, and 4) relate to an pre-existing condition, as I understand that the present foundations will be retained.

Figure 1. South elevation with existing house shown in dotted lines.

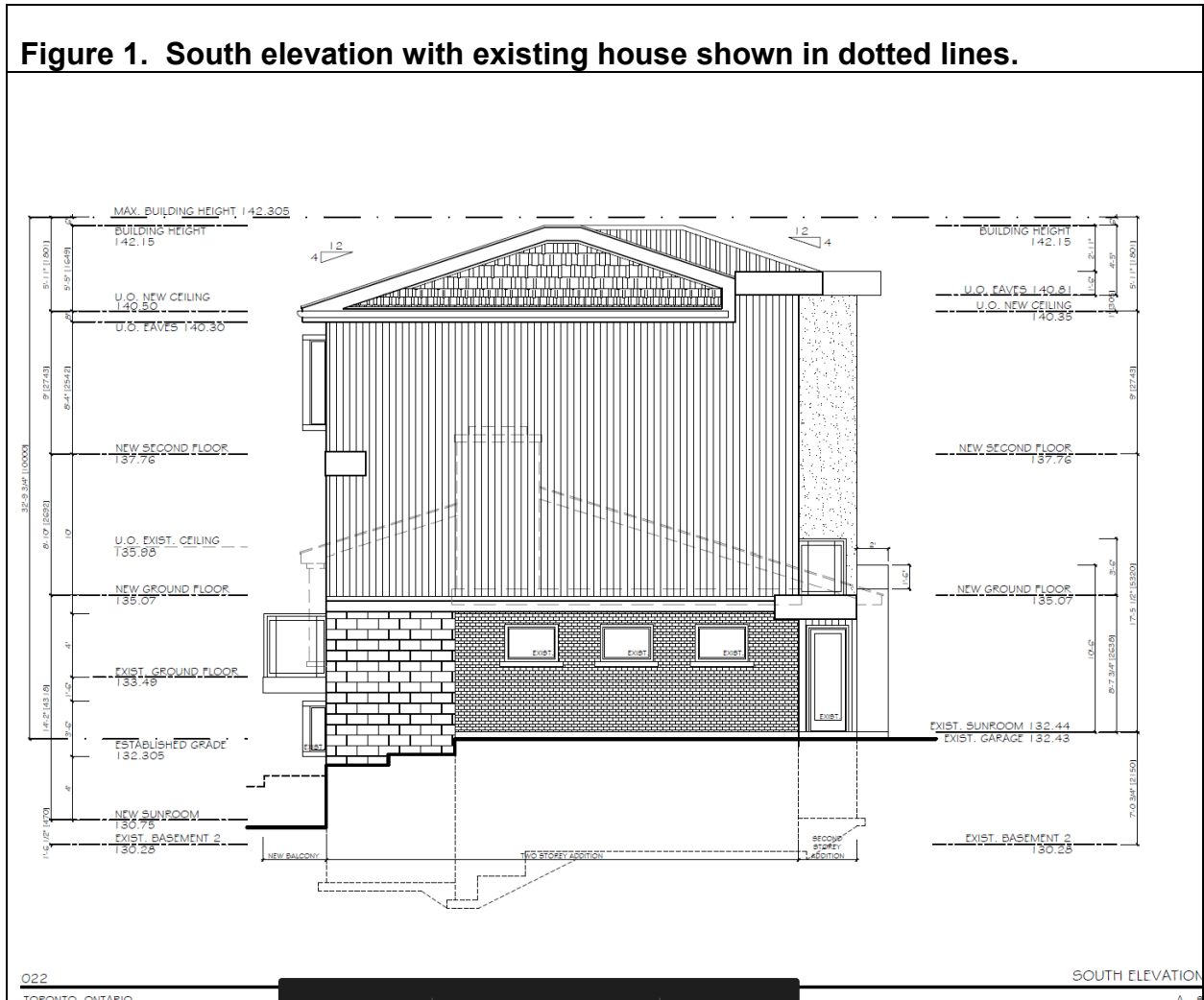


Table 2. Variances sought for 16 Kestell Lane

	Required	Proposed
Variances from Zoning By-law 569-2013		

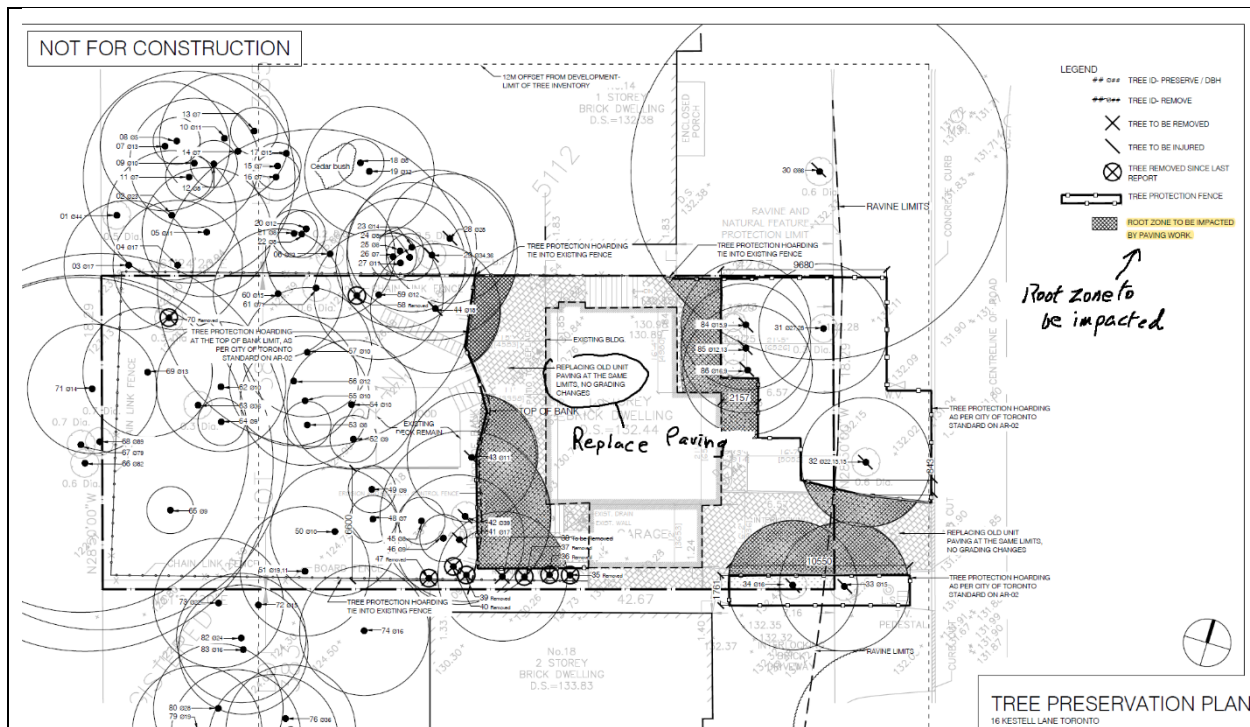
Table 2. Variances sought for 16 Kestell Lane			
1	Setback from Toronto and Region Conservation Authority top of bank	10 m	0.3 m
2	Side main walls	7.5 m	8.5 m
3	Front yard setback	8.13 m	6.57 m
4	South side yard setback	1.8 m	1.24 m

On April 14, 2022, The Committee of Adjustment granted Ms. Bei the variances. A neighbour, Ms. Yewen, appealed, and on August 9, 2022, the TLAB sent out a Notice of Hearing with an election deadline (to participate) of September 8, 2022. The above listed persons elected to be participants. On September 9, 2022, Mr. Mazierski (Ms. Bei's lawyer) filed his motion to dismiss. The materials indicate the motion package was served on the "mailing list" although I do not see in the TLAB website any affidavit of service. The notice of motion was supported by the affidavit of Ms. Ou, Ms. Bei's architect. Nothing has been filed in response.¹ Document disclosure is due by October 11, 2022, and nothing has been filed in that regard by either party.

This decision is a response to Mr. Mazierski's written motion package where the only documents before me are the Notice of Motion, Affidavit and "Book of Authorities"; with no documents submitted by Ms. Yewen.

Figure 3. Ms. Bei's arborist's tree protection plan

¹ To find "Kestell Lane" on the TLAB website; one must press the "AIC" button, instead of typing in an address in the box in "Scheduled Hearings". This is not the usual procedure and may have proved an obstacle for Ms. Yewen in responding to Mr. Mazierski.



Contemporaneously with her “bump-up” addition, Ms. Bei wished to rebuild her rear patio. This project does not require Committee of Adjustment variances, but rather permission from the City’s Urban Forestry Department (Ravine and Natural Feature Protection). This is Mr. Mazierski’s key argument: that no attempt should be made to tie the two projects together since one needs variances under s. 45 of the Planning Act and the other is regulated by the City of Toronto under By-law 813 (relating to trees), albeit I note that the map for the trees deserving of Ravine and Natural Feature protection are set out in the City’s Official Plan,² which is a planning document.

Since the parties wish some input from an outside source on tree regulation for the hearing, I will briefly summarize how the City regulates trees. All trees in the City require a permit for their “injury” or “destruction”, which are specialized words in By-law 813. The by-law can be found at

https://www.toronto.ca/legdocs/municode/1184_813.pdf.

It divides trees into “city” trees, (those in the front yard on the street right of way) and “private” trees on private landowners’ lands; the former being more protected than the latter. Ravine trees fall in a third category, and the City’s concern for their protection may be seen in the \$6996 deposit Ms. Bai has paid. This money is to ensure that she follows the tree protection plan set out in Figure 3, above.

² For example, 2.3.2 Toronto’s Green Space System and 3.1.2 Public Realm

Issues and Analysis

The Planning Act permits a motion if the appellant's (Ms. Yewen's) appeal letter "does not disclose any apparent land use planning ground."³ There are similar provisions for appeals from adoption of Official Plan amendments, zoning by-laws, plan of subdivision approvals and consents. The reason for this provision is that those types of hearings may take days, and parties are given a mechanism not to be forced into a hearing if they can bring a motion establishing that a ground exists under s. 45(17) of the Planning Act, showing that appeals that are vexatious or not in good faith. The "time wasted" vs "denial of a right to a hearing" calculus is different for a TLAB variance hearing; (only one day has been allotted). In *East Beach*⁴, (a matter involving a racetrack telethon, and an Official Plan Amendment), the motion to dismiss without a hearing took four days to argue. Here, there is no savings in time for the TLAB or the parties; in effect, Ms. Yewen's appeal may require two hearing days—one for the motion and one for the hearing itself.

To forestall that expenditure of hearing time, Mr. Mazierski has brought a written motion, but this makes it only the more imperative that the findings should be clearly demonstrated. If successful, there would be no oral evidence. None of the precedents cited by Mr. Mazierski were by written motion and there is clear dialogue between the responding party and the decision maker that has not occurred here.

I am uncomfortable accepting the architect's sworn but untested assertion that there is no apparent land use planning ground. As a tribunal member I frequently note that early filings differ substantially from the evidence that is finally tendered at the hearing and stopping the process even before witness statements are exchanged, risks unfairness.

DECISION AND ORDER

I intend to deny the motion but will reconsider this if Ms. Yewen fails to appear at the hearing without good reason.

I am cancelling the deadlines set out in the Notice of Hearing of August 9, 2022, and all documentation, witness statements etc., must be exchanged by November 7,

³ S. 45(17) (17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if,

- (a) it is of the opinion that,
 - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,
 - (ii) the appeal is not made in good faith or is frivolous or vexatious, . . .

⁴ *Toronto (City) v. East Beach Community Assn.*, 1996 CarswellOnt 5740, 1996 CarswellOnt 5740, [1996] O.M.B.D. No. 1890, 42 O.M.B.R. 505

Decision of Toronto Local Appeal Body Panel Member: T. Yao
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2022. The hearing date of November 14, 2022, still stands and I ask the case manager to send a fresh notice for November 14, 2022, for the convenience of persons who have lost track of the August Notice of Hearing.

I would request the parties to have discussions with the hope of reaching a settlement and I draw attention to the TLAB Notice of Hearing paragraph regarding mediation.⁵



T. Yao
Panel Chair, Toronto Local Appeal Body

⁵ The TLAB encourages Parties to conduct mediation if the TLAB is satisfied there is good reason to believe one or more of the issues in dispute may be resolved through Mediation. Mediation is a more effective and less costly approach than the hearing process, and allows parties to address issues in a collaborative manner and in a less formal environment. Mediation conducted by the TLAB shall be held no later than 15 Days before the Hearing. See Rule 20.