

DECISION AND ORDER

Decision Issue Date Friday, October 28, 2022

PROCEEDING COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13

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 (Note: No hearing has been held and these persons are merely listed in roles as shown on the TLAB web site.)

Applicant Ou Design Inc.

Party Shenwei Bai

Ms. Bai's Legal Rep. Martin Mazierski

Participant Deborah Mackenzie

Participant Gary Peterson

Participant Julia Sweeney

Participant Jane Tucker

Participant George Tucker

Participant Zlatko Tausan

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

On April 14, 2022 Ms. Bai, owner of 16 Kestell Lane, was successful in obtaining variances from the Committee of Adjustment, as set out on page 6 of this decision. Her neighbour, Ms. Yewan appealed. On September 9, 2022, Ms. Bai's lawyer (Mr. Mazierski) brought a motion to dismiss the appeal without holding a hearing. The timing of the motion was a day after persons listed above had elected to be participants and before the exchange of witness statements. I denied Mr. Mazierski's motion by a written Order of September 26, 2022, saying:

[Ms. Yewen's appeal letter expressed] 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.

Mr. Mazierski proceeded by written motion so that if successful, Ms. Yewan's appeal rights would have been extinguished without her even being able to make oral submissions as to whether her appeal letter was sufficient. I also noted in that decision a software glitch in the City of Toronto server, (which has now been corrected) which made it hard for anyone but an experienced insider to access the TLAB website for 16 Kestell Lane. Thus, it was possible that Ms. Yewan, who did not appear to have filed anything in response, had tried to do so. However, subsequent events show that she did not file any material.

I concluded:

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.

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

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I now turn to the correspondence after my decision. On October 11, 2022, Ms. Yewen wrote to the TLAB to advise that neither she nor any of the other participants intend to appear at the hearing; still scheduled for November 14, 2022.

From: Mary Ann Yewen <maryannyewen@gmail.com>
Date: Tuesday, October 11, 2022 at 1:06 PM
To: Amir Aghaei <amir.a@timesgroupcorp.com>, Deborah Mackenzie <dmackenz@me.com>, Gary Peterson <Garyp1116@gmail.com>, Gary Sweeney <gsweeney@ctm-ac.com>, George Tucker <gtucker@rogers.com>, Jane Burnside Hillfield Park <jane@hillfieldpark.ca>, Julia Sweeney <jsweeney@coolingtowerinc.com>, Mark Hanna <hannalaw@rogers.com>, Toronto Local Appeal Body <TLAB@toronto.ca>, Zintis <zintis@gmail.com>, maggie.ou@oudesign.ca <maggie.ou@oudesign.ca>, Martin Mazierski <martin@mazlaw.ca>, shafiq.vallani@gmail.com <shafiq.vallani@gmail.com>, wawacanada@gmail.com <wawacanada@gmail.com>, ztausan@yahoo.com <ztausan@yahoo.com>
Subject: File # 22 139977 S45 16 TLAB

Good afternoon, to all.

This is our written notice that we, residents of Kestell Lane, are not in a position at this time to appear at the hearing on November 14th, as set out in the September 26th Motion Decision order.

At this time though we would like to reiterate a couple of points laid out in our original note.

We are still of the belief that the removal of the trees in the ravine affected the stability of the hillside as well as the foundations of the neighbouring homes which is relevant to the granting of the construction permit.

The Urban Forestry Department (Ravine Natural Protection) issued a Tree Protection Plan that was subject to a deposit. We are hoping that this plan will be adhered to as laid out and that the RNFP will continue to inspect #16 Kestell Lane to ensure the plan is being adhered to and no more trees will be injured or damaged.

We also hope that the building of the new home will be monitored by City Inspectors to ensure all construction adheres to the terms of the permit(s) granted.

Best regards,

Mary Ann Yewen

One day later, Mr. Mazierski wrote as follows:

From: Martin Mazierski <martin@mazlaw.ca>
Sent: October 12, 2022 12:48 AM
To: Toronto Local Appeal Body
Subject: FW: File # 22 139977 S45 16 TLAB - 16 Kestell Lane

On behalf of the applicant, I would appreciate it if staff could please make sure to forward the appellant's below 2022-11-10 email (sent to/filed with the TLAB) to Member Yao, and to let the Member know that I respectfully request that he please consider the

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appellant's email, wherein the appellant (Mary Ann Yewen) has notified the TLAB that she does not intend to attend the 2022-11-14 TLAB hearing (scheduled as per the original Notice of Hearing), without providing the TLAB with any specific reasons for why she will not attend, **in the context of the wording in the 2022-09-26 Motion Decision, within which Member Yao stated (on page 6 of 7) that:**

"I intend to deny the motion but will reconsider this if Ms. Yewen fails to appear at the hearing without good reason." [bold in the original]

I would also like to respectfully bring attention to the fact that Ms. Yewen's 2022-10-11 email, like the original Notice of Appeal, showed that the appellant's concerns are related to forestry issues, which, as explained in the motion materials, do not relate directly to the minor variances being requested. Ms. Yewen's failure to provide any planning grounds up to this point (within the Notice of Appeal or in the unfiled Response to the Notice of Motion) and her (unexplained) 2022-10-11 email declaration that she will not be appearing at the hearing to provide oral evidence, essentially mean that the applicant will be required to prepare a complete set of filings (graciously deferred by the Member Yao until 2022-11-07, as per the 2022-09-26 motion decision) and to present a case on 2022-11-14, without the appellant presenting any filings or oral arguments relating to the planning merits of the application. I believe, based on my interpretation of the 2022-09-28 motion decision, that this scenario, forcing the applicant to make a case even though the appellant fails to provide any oral planning grounds to remedy the original deficiency in the Notice of Appeal (the 2022-11-14 hearing having been meant to provide the appellant with the opportunity to provide oral evidence that they were not afforded because of the written format of the motion to dismiss without a hearing, which was noted as problematic on page 6 of 7 of the 2022-09-26 motion decision), is the scenario that Member Yao meant to give himself the discretion to avoid by reserving the right to grant the motion at the hearing.

I would appreciate it if TLAB staff could please confirm the receipt of this email and to forward it to Member Yao.

Thank you in advance,

Martin Mazierski, JD, MBA

Since this email was not forwarded to Ms. Yewen¹, I sent a memo on October 17, 2022 to all parties and participants, advising that it was my intention to dismiss the appeal without costs.

. . . it is my (the TLAB's) intention to dismiss the appeal without costs. This means Ms. Bai will not be put to the expense of preparation for a hearing at which Ms. Yewen will not attend.

¹ TLAB Rules provide that all documents "required to be filed", must be served on all parties. Rule 3.3 states "Where any Document **is required to be Served, Filed** or Exchanged with or on the TLAB or any another Party, Participant or other Person, it shall be Served, Filed or Exchanged by Email, . . . and shall be sent: a) to the Representative of the intended Party or Participant, if any; . . ."

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I received the following email from Ms. Yewan, which appears to be only sent to a partial list of persons on the mailing list, notably excluding Mr. Mazierski.

Mary Ann Yewen and neighbours on Kestell Lane
From: Mary Ann Yewen [mailto:maryannyewen@gmail.com]
Sent: October 17, 2022 10:44 AM
To: Amir Aghaei <amir.a@timesgroupcorp.com>; Deborah Mackenzie <dmackenz@me.com>; Gary Peterson <Garyp1116@gmail.com>; George Tucker <gtucker@rogers.com>; Jane Burnside Hillfield Park <jane@hillfieldpark.ca>; Julia Sweeney <jsweeney@coolingtowerinc.com>; Mark Hanna <hannalaw@rogers.com>; Toronto Local Appeal Body <TLAB@toronto.ca>; shafiq.vallani@gmail.com; ztausan@yahoo.com
Subject: # 16 Kestell Lane

Good morning,

It is our understanding that Mediation requires that the Participants after talking to each other and agree to mediation, advise the TLAB of this decision and that a Member will be present up to seven days before the hearing date (November 17th) to participate in the meeting. Is that correct? We would like to have a Member present.

Additionally, it is also our understanding the entire property is subject to the Ravine and Natural Feature Protection by law (MC 658) so planning is part of this. Is this also correct?

Best regards,

Mary Ann Yewen and neighbours on Kestell Lane

Contemporaneously, I received an email from Mr. Mazierski in response to my memo, advising of a minor error in the variances to be authorized. That email was cc'd to Ms. Yewan.² Mr. Mazierski did not comment on Ms. Yewan's email as he was unaware of it.

² The email begins:

From: Martin Mazierski [mailto:martin@mazlaw.ca]
Sent: October 17, 2022 10:31 PM
To: Toronto Local Appeal Body <TLAB@toronto.ca>
Cc: maryannyewen@gmail.com; Planning Law TLAB <planninglawTLAB@toronto.ca>; zintis@gmail.com; niloo_b5@yahoo.com; ztausan@yahoo.com; shafiq.vallani@gmail.com; garyp1116@gmail.com; DMACKENZ@me.com; jsweeney@coolingtowerinc.com; jane@hillfieldpark.ca; gtucker@rogers.com; hannalaw@rogers.com; gsweeney@ctm-ac.com; amir.a@timesgroupcorp.com; Maggie Ou - Ou Design <maggie.ou@oudesign.ca>; Shenwei Bai - owner of 16 Kestell Lane <WAWACANADA@GMAIL.COM>
Subject: 22 139977 S45 16 TLAB - 16 Kestell Lane - Shenwei Bai (applicant) comment on Member Yao memo sent out on 2022-10-17

I do not understand Ms. Yewan's request for mediation and in any case the Rule on mediation require that I be satisfied that mediation may accomplish something, which I do not find to be the case. I also do not understand the request to "have a member present" when there is not going to be a hearing.

At the end of the day, Ms. Yewan appealed to the TLAB and when a hearing date was set, she advised she would not attend. Speaking for her neighbours, she also advised that they too would not attend. Moreover she has been given numerous chances to clarify her position.

I will now complete the dismissal motion.

Facts on which the dismissal is based

Section 45(1) of the Planning Act requires me to find the four tests are met, that the variances must cumulatively and individually:

- maintain the general intent and purpose of the Official Plan;
- maintain the general intent and purpose of the Zoning By-laws;
- be desirable for the appropriate development or use of the land; and
- be minor.

For me to make findings, I am not obligated to hold a hearing, indeed I may dispense with a hearing if I consider it "appropriate", which I do in this case:

Dismissal

45(17.2) The Tribunal may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (17) [Mr. Mazierski's motion] , as it considers appropriate. [Planning Act]

In my earlier decision I noted that, because of the nature of the "bump-up" to be constructed by Ms. Bai, there was likely only one variance at issue, namely side wall height, because the other variances, including setback to top of bank, reflect as-built conditions. Ms. Bai does not request an overall building height or density variance. Ms. Yewan has invited the City to intervene; the time for the City to elect to do so has elapsed. Furthermore, Toronto Region and Conservation Authority has commented on the top of slope variance and is satisfied. Ms. Bai has made a substantial financial deposit to ensure her obligations with respect to Ravine trees are secured. I find that the intent of the official Plan and zoning by-law are maintained and that the requested variances are minor, and desirable for the appropriate development of the land.

I previously set out the variances as follows:

Table 2. Variances sought for 16 Kestell Lane			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Setback from Toronto and Region Conservation Authority top of bank	10 m	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

DECISION AND ORDER

The hearing of November 14, 2022 is cancelled. The appeal of Ms. Yewan is dismissed without costs.

The variances in Table 2 are authorized on condition that the construction is in substantial compliance with the site plan and elevation drawing submitted to Richard McMann of the Toronto Buildings Department, being dated 2022-01-03.

X



T. Yao
Panel Chair, Toronto Local Appeal Body