

MOTION DECISION AND ORDER

Decision Issue Date Monday, October 17, 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): LENNY KURUP

Applicant: BARRETT MUNICIPAL CONSULTING

Property Address/Description: 20 LONG CRES

Committee of Adjustment Case File Number: 21 230974 STE 19 MV

TLAB Case File Number: 22 118391 S45 19 TLAB

Hearing date: Wednesday, August 03, 2022

DECISION DELIVERED BY D. Lombardi

REGISTERED PARTIES AND PARTICIPANTS

Owner/Appellant	LENNY KURUP
Applicant	BARRETT MUNICIPAL CONSULTING
Appellant's Legal Rep.	MICHAEL CARA
Party	JULIE WATSON
Party	MICHAEL MALLINSON
Party's Legal Rep.	DAVID BRONSKILL
Expert Witness	FRANCO ROMANO
Expert Witness	DAVID IGELMAN

INTRODUCTION

This matter involves Notices of Motion filed by Mr. Michael Mallinson and Ms. Julie Watson (Moving Parties) of 18 Long Crescent and 22 Long Crescent, respectively, on July 19, 2022, prior to obtaining a Motion date from the Toronto Local Appeal Body (TLAB). Each is an interested neighbour to this Appeal and to the application before the TLAB regarding the proposal for variances at 20 Long Crescent (subject property) that was refused (as amended) by the City of Toronto (City) Committee of Adjustment on February 9, 2022.

Neither Mr. Mallinson nor Ms. Watson elected Party or Participant status in this matter within the deadline set out in the Notice of Motion.

As both Mr. Mallinson and Ms. Watson have retained the same legal firm, Goodmans LLP, and both are seeking the same relief, I will consolidate their Motions and address the matter as one (Motion).

Each Motion (Form 7) was filed with the TLAB, along with an accompanying Affidavit (Form 10) from David Igelman, on July 19, 2022.

The interlocutory relief being sought in the Motion is as follows:

1. An Order of the TLAB granting relief from Rules 17.1 and 17.4 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;
2. An Order of the TLAB granting relief from Rules 12.2, 16.2, and 16.8 of the TLAB's Rules to allow for the late filing of Form 4: Notice of Intention to be a Party, Form 14: Expert Witness Statement, and the Moving Parties Document Disclosure;
3. An Order of the TLAB pursuant to Rule 4.4 granting an extension to the time limit to submit a Notice of Intention to be a Party, Expert Witness Statement, and Document Disclosure; and
4. Such further and other relief as counsel may advise and the TLAB may permit.

The City of Toronto also filed a Notice of Motion (Form 7) and requisite Affidavit (Form 10) with the TLAB on July 27, 2022, regarding the same matter and requested the same interlocutory relief as the Moving Parties' Motion, as follows:

1. An Order of the TLAB granting relief from Rules 17.1 and 17.4 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;
2. An Order of the TLAB granting relief from Rules 12.2 of the TLAB's Rules to allow for the late filing of Form 4: Notice of Intention to be a Party;

3. An Order of the TLAB pursuant to Rule 4.4 granting an extension to the time limit to submit a Notice of Intention to be a Party;
4. Such further and other relief as counsel may advise and the TLAB may permit.

Given that the above-cited, separately filed Motions are interrelated in this Appeal matter, they have therefore been consolidated (Combined Motions) and this decision and order will address both the Motion from the City of Toronto and the Motion of Mallinson-Watson.

The Notices of Motion were responded to by a Notice of Response to Motion (Form 8) by Michael Cara (Overland LLP), the legal Representative of Lenny Kurup, Applicant/Appellant (Applicant) in this appeal matter, along with an accompanying Affidavit (Form 10) and was served on July 26, 2022.

The above constitutes the filings in respect of the Motion issues.

The Moving Parties requested a Motion Hearing date from the TLAB to hear the Motion orally. Given that the TLAB could not provide a date for the hearing of the Motions prior to the scheduled Hearing date of this matter, the Moving Parties instead advised that an adjournment was not being requested and, instead, requested that the Motion be heard at the commencement of the hearing of the Appeal scheduled for August 3, 2022.

BACKGROUND

This matter involves an appeal by the Applicant of the Committee of Adjustment (COA) refusal, as amended, on February 9, 2022, for variances sought to permit the construction of a new three-storey detached dwelling with an integral garage, a front porch, rear deck, a front basement walkout, and third-storey front and rear balconies on the subject property (Application).

The owner of the subject property appealed the COA decision and the TLAB set a Hearing date for August 3, 2022, to hear the Application.

The subject property is located on the north side of Long Crescent, south of Kingston Road and east of Woodbine Avenue.

The site is designated *Neighbourhoods* in the City Official Plan (OP) and is zoned RD (f10.0; d0.35) (x1392) in the City-wide Zoning By-law 569-2013 and R1 Z0.35 in the former City of Toronto Zoning By-law 438-86.

The subject property currently contains a 1.5-storey detached dwelling with a front integral garage.

As originally submitted to the COA, the proposed development required a total of seven (7) variances from the above-cited Zoning By-laws. In response to feedback received from City Planning staff and neighbouring residents, the Applicant revised the proposal by reducing the number of storeys from 4 to 3, reducing the overall height of the proposed structure (to 11.3 m under By-law 569-2013 or 11.27 m under By-law 438-86), eliminating any variances for the height of the main entrance, increasing the amount of front landscaping, and reducing the Floor Space Index (FSI) (Revised Application).

These modifications to the original Application eliminated one (1) variance and reduced the scale of the remaining variances. Nevertheless, the COA refused the Revised Application as amended on February 9th.

The Moving Parties (Mallinson and Watson) are neighbours immediately adjacent to the subject property. They ask that the TLAB allow the Motion to be served prior to obtaining a Motion date, and that they be granted late filing of the Notice of Intention to be a Party, along with Expert Witness Statements and document disclosure. They submit that their intent is not to engage in “trial by ambush” and that the Applicant was provided with notice by the Moving Parties at their earliest convenience, of their intention to be Parties and, likewise, filed disclosure as soon as reasonably possible.

Furthermore, they assert that they have a genuine and valid interest in participating in the Appeal and are not requesting that the scheduled Hearing be adjourned unless so requested by the Applicant/Appellant.

Similarly, the City seeks relief from the TLAB and requests that it be allowed to join the proceeding as a Party. The City submits that it received direction from City Council to oppose the Application late in the appeal process, after all of the relevant procedural deadline dates had passed and concedes that it would have been too late in this instance to attempt to file disclosure and evidence without an adjournment, which it also is not requesting.

In the Notice of Response to the initial Motion by the Moving Parties submitted by the Appellant’s legal Representative, Michael Cara, the Applicant asks that the TLAB either dismiss the Motion or, alternatively, grant the Moving Parties Participant status. As to the urgent Motion brought by the City, Mr. Cara expressed a similar position on behalf of his client, noting that mediation discussions with the City led to the Revised Application that now satisfies City Planning staff.

MATTERS IN ISSUE

The issue to be determined is whether granting Party or Participant status to the Moving Parties and the City is unduly prejudicial to the Appellant’s presentation of their case and, if not granted, would the TLAB be forgoing a relevant contribution to its understanding of the issues in the Hearing that may be provided by those individuals?

If the answer is that granting Party or Participant status is not prejudicial and that this may provide the decision-maker with a further understanding of the planning concerns regarding the Application, then Mr. Mallinson, Ms. Watson, and the City should be granted Party or Participant status thereby allowing them to present their concerns at the Hearing.

At the same time, the Applicant must also be given the opportunity and time to review and reply to any document disclosure allowed to be filed and served.

Furthermore, the TLAB must consider whether granting Party or Participant status assists in avoiding the submission deadline requirements as outlined in the TLAB's *Rules of Practice and Procedure (Rules)* and potentially creates a precedent for similar future Motions.

JURISDICTION

The Moving Parties in this matter refer to the TLAB's Rules, specifically Rules:

- 4.4 – Extension or Reduction of Time
- 12.2 – Party Election
- 16.2 & 16.8 – Disclosure of Documents & Expert Witness Statement
- 17.1 and 17.4. – Date by which a Motion will be Heard & Date for Motion

The TLAB, as per Rule 2.11 (Relief and Exceptions to the Rules), is free to grant relief from the Rules *“as it considers appropriate, to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner.”*

Additionally, Rules 4.4 and 4.5 permit the TLAB to extend the time limit provided by its Rules, and Rules 12.3 and 13.3 allow the TLAB to name persons to be a Party or Participant, respectively, for part or all of a Proceeding.

EVIDENCE

The following individuals attended the Hearing on August 3rd:

- Michael Cara, the Appellant's legal representative, along with Franco Romano, the Appellant's expert planning witness, and Justine Hospitalis (an observer).
- The City of Toronto was represented by Colin Dougherty, legal counsel.
- Michael Mallinson and Julie Watson attended as did their legal representative Zachary Fleisher and David Igelman, their expert planning witness. Mr. Igelman was supported by Addison Milne-Price from his office (Design Plan Inc.).
- Keri Wynn, a resident, also attended as an observer.

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At the commencement of the Hearing, but prior to dealing with the Combined Motions before the TLAB, I offered two options as to how to deal with the matter. The first option involved converting the Hearing to an Oral Motion Hearing to hear the issues and then adjourn the matter and issue a written Motion decision at a later date.

The second option included adjourning the matter so that a different Panel Member with greater availability could be assigned to hear the Motions and issue a written Motion decision expeditiously. I explained that due to an upcoming medical procedure I would be unable to issue a Motion decision in a timely manner.

Following a short recess to allow each group to discuss these options, I was advised that there was consensus to continue the proceedings and hear the Motions with the seized Member, as the Moving Parties and the City had proposed.

The following documents were identified and entered into the record as Exhibits:

- Exhibit 1 – Motion Record of the Moving Parties (July 19, 2022);
- Exhibit 2 – City of Toronto Notice of Motion: Reasons for Request; and
- Exhibit 3 – Notice of Response to Motion on behalf of the Applicant (July 26, 2022).

I heard first from Mr. Fleisher who submitted that the relief sought in the Motions should be granted because the prejudice caused to the Moving parties by excluding their evidence outweighs the prejudice to the Applicant resulting from any late disclosure. He argued that the TLAB is meant to properly and fairly adjudicate land use planning disputes in an accessible and just manner, and the TLAB's Rules are meant to facilitate the just determination of every proceeding on its own merits.

Furthermore, he asserted that “slavish adherence” (his terms) to the Rules to exclude two neighbours from participating in the proceeding and filing relevant land use planning evidence “would be prejudicial and unjust and will prevent the TLAB from hearing evidence relevant to whether the proposal meets the four tests and is good planning.” (Ex. 1, para. 15)

He cited case law in the form of two TLAB decisions: *Marcovici, Re*, and *Aird and Berlis LLP, Re*. In the former case, the TLAB permitted a late Notice of Intention to be a Party and late disclosure and expert witness statements three weeks before the scheduled Hearing. In the latter case, the TLAB likewise permitted late disclosure one week prior to the Hearing although the TLAB rescheduled that Hearing to three months later.

Mr. Fleisher asserted that the Moving Parties have a ‘genuine and valid interest in participating in the Appeal’ (Ex. 1, para. 16), and further submitted that the evidence prepared by Mr. Igelman would make a relevant contribution to the TLAB’s understanding of the issues in this proceeding.

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He also reconfirmed that the Moving Parties were not requesting an adjournment unless so requested by the Applicant and would consent to any reasonable adjustment in disclosure deadlines. However, while an adjournment might not have been requested, any relief granted in favour of the Motions would necessarily precipitate delay and a rescheduling of the Hearing date for this matter.

Finally, Mr. Fleisher noted that the TLAB's *Rules* allow its rules to be liberally interpreted, that substantial compliance with the Rules is sufficient, and that the TLAB can grant all necessary exceptions or relief it considers appropriate to enable it to effectively and completely adjudicate matters before it. He asserted that while the Moving Parties acknowledge that the late disclosure of documents 'inconveniences' (his term) the Applicant/Appellant, the prejudice caused does not outweigh the TLAB's mandate to secure the just, most expeditious and cost-effective determination of the proceeding on its merits.

Mr. Dougherty, the City solicitor, highlighted the chronology of events that delayed the City's involvement in this matter and that, as a result, all the relevant procedural deadlines had passed. However, he nevertheless asserted that the City should have an opportunity to join the proceeding as a Party to allow a meaningful contribution through the cross-examination of witnesses and submissions.

Mr. Dougherty submitted that through its participation, the City would ensure public interest concerns concerning planning in the City would be advanced and supported and that the harm to the City, if prohibited from participating in the Hearing, far outweighs the inconvenience to the Applicant resulting from the City's belated entry to the proceeding as a Party. He also confirmed that City would be in attendance to confirm the revised plans that resulted from discussions that occurred with the Applicant/Appellant.

I then heard from Mr. Cara, the Applicant's solicitor. He reminded the TLAB of its *Rules* as they relate to "*fixed*" Hearing dates, and disclosure due dates, noting that the Rules are clear that "*hearing dates are firm*" and that adjournments will not be granted except in accordance with the TLAB's *Rules*. He submitted that his rebuttal to the Motions had three themes: 1) procedural deficiencies; written evidence contained in the affidavit of Daniel Artenosi; and undue prejudice to the Applicant because of the late filings.

Mr. Cara asserted that the Moving Parties (Mallinson/Watson) were aware of the existence and importance of the TLAB's deadlines, that owing properties adjacent to the subject property is not in and of itself sufficient grounds to justify relief from the Rules, and highlighted that the Applicant has fulfilled his obligations and complied with all deadlines imposed by the TLAB in the Notice of Hearing.

He submitted that the Moving Parties have caused the Applicant "irreparable harm" (his term) because of their disregard for the TLAB *Rules*. By doing so, they chose to wait until nearly a month after the Applicant filed their Expert Witness Statement and Document Disclosure as required in the Notice of Hearing and over a week after the

deadline for Responses to Witness Statements to prepare or file any substantive evidence.

He argued that granting the relief requested in the Combined Motion before the TLAB would establish that “*the Notice of Hearing dates are optional for those that live in the immediate vicinity of a site and have little to no bearing on their ability to seek late status and file late disclosure.*” (Ex. 3, para14)

To support his client’s position that relief should not be granted, Mr. Cara cited two cases where the TLAB granted relief for parties that failed to meet procedural deadlines. In highlighting *Aird & Berliss LLP, Re and Marcovici, Re*, he distinguished each from the current appeal given that in both cases, relief was granted because the properties were subject to parallel processes under the *Ontario Heritage Act* and City Council was deciding on the cultural heritage value or interest.

He confirmed that the Motion filed by the Moving Parties acknowledges that the Applicant would be prejudiced by the requested relief and suggested that the question that remains for the TLAB to determine is the magnitude of the prejudice and how it can be effectively mitigated. And, while the Applicant maintains that the Motion should be refused, Mr. Cara did acknowledge that should the TLAB wish to strike a balance between the notion of prejudice and the interest in hearing from Moving Parties, it could make an Order granting Participant status, an alternative option to the relief sought.

In this regard, Mr. Cara highlighted a third TLAB decision, 54 Westhampton Dr. (Case No. 19 125032 S45 01 TLAB) issued in August 2019, where the TLAB did exercise its authority for interlocutory relief. However, he submitted that in that matter the TLAB refused to grant Party status but did allow Participant status so that the requested Party could contribute to the Member’s understanding of the issues in dispute.

He submitted that the Moving Parties, along with the City, could be granted Participant status which would allow them to make relevant contributions to the matter while at the same time appropriately mitigating the prejudice to the Applicant/Appellant.

Mr. Cara argued that allowing the Moving Parties to be recognized as Participants would permit statements to be submitted that detail the outstanding concerns with the proposal and the revised plans while also allowing the TLAB to undertake an efficient Hearing at the next available Hearing date.

ANALYSIS, FINDINGS, REASONS

The principal argument in favour of granting the Moving Parties, Michael Mallinson and Julie Watson, and the City of Toronto particular status in the appeal matter before the TLAB is not complicated. In my determination, I find that doing so results in a fair compromise that does not summarily prejudice the Applicant’s ability to proceed with their appeal while also ensuring the TLAB’s ability to conduct a just and

timely proceeding while allowing statements to the TLAB that detail outstanding concerns with the revised proposal.

I note that this was, in fact, an option to be considered by the TLAB offered by the Applicant's solicitor in his Response to Motion (Ex. 3, para. 16).

I concur with the Moving Parties that they have a genuine and valid interest in participating in the appeal process and their testimony will make a relevant contribution to the TLAB's understanding of the issues in the proceeding. I acknowledge that they actively participated in the COA hearing process and that not permitting their concerns to be expressed regarding this Appeal would appear unfair since their objections to the variances had been expressed previously.

I am also sympathetic to the fact that the Moving Parties were dealing with personal matters that took precedence over the subject Appeal which delayed the retention of counsel and a land use planner to oppose the application. However, I do not accept the explanation in the Motion Record that "*Regrettably, they (the Moving Parties) were unaware of the level of preparation required for a TLAB Hearing....*" (Ex. 1, para. 6)

Unfamiliarity or inexperience with the TLAB process or its *Rules* is not an excuse for flouting or circumventing those Rules. The Applicant asserts this is demonstrated in an email Ms. Watson sent to the TLAB and the Applicant's solicitor on June 30, 2022 (Ex. 3, Arsenosi Affidavit), where she asks her local Councillor's office "*How does the city (sic) of Toronto go about getting around the deadline that we have missed.*"

Although on the surface this may appear somewhat portentous, I do not consider this a deliberate attempt by Ms. Watson or Mr. Mallinson to 'circumvent' the Rules in any pejorative sense. Rather, I believe that the overriding issue may have been a delay in meeting with and then retaining legal counsel, as suggested in a second email from Mr. Mallinson dated June 26, 2022, contained in the Arsenosi Affidavit,

Turning to the Notice of Response to Motion filed by the Applicant's Representative, there is a request to dismiss the Motion for Party status and to refuse the granting of an Order to allow the late filing of an Expert Witness Statement and Document Disclosure. Although the Response maintains that the Combined Motion and the relief sought should be refused, the Appellant suggests that the TLAB could issue an Order under Rule 13.3 to grant the Moving Parties Participant status. This is seen by Mr. Cara as an option that "strikes a balance between the prejudice to the Appellant and the interest in hearing from the Moving Parties."

I have considered the request to dismiss the Motion as requested and as recited above. Based on *Rules* 4.4 and 4.5 regarding extending time limits and the fact that the request has been made by neighbours to the immediate east and west of the subject property and who have previously expressed interest in this matter, I find dismissing the request for status at the Hearing would be unfair and not in the public interest. I make this same finding regarding the late Motion filed by the City. However, I concur with the

alternative option that the Moving Parties and the City be allowed to elect Participant status.

Additionally, Rule 13.4 of the TLAB's Rules directs that when deciding whether Participant status should be denied, the TLAB should also consider the criteria outlined in Rule 12.4. More specifically, Rule 12.4 c) states that consideration should be made as to "whether the Person is likely to make a relevant contribution to the TLAB's understanding of the issues in the Proceeding." In this regard, I find that allowing Ms. Watson, Mr. Mallinson, and the City to participate in the Hearing will provide relevant contributions to my understanding of the issues in dispute in this matter.

I have considered the Motions and the Notice of Response to Motion, and I find that granting the Moving Parties and the City involvement in this matter as Participants will further the TLAB's mandate to "secure the just, most expeditious and cost-effective" determination of this proceeding on its merits.

In this regard, and in making my finding in this matter, I am reminded of my colleague's (Member Yao) apposite statement in his TLAB decision for 90 Ash Cres., where he wrote:

*"...I have allowed filings that are late (65 Tilson Rd.), possibly over-broad, and possibly too voluminous, to allow leeway for a full hearing process. **Flexibility is needed to prevent process from displacing fairness, although process is important (my emphasis).**"*

For the reasons recited above, Ms. Watson, Mr. Mallinson and the City will only be granted Participant status at the Hearing, as generally outlined in Rule 13. Therefore, each is advised to inform themselves of the rights and responsibilities of a Participant and Representative, if that role is presumed.

As a Participant, the individuals cited above will be allowed to submit a Participant Witness Statement (Form 13) with a written outline of their intended evidence (Rule 16.7) and any documents to be relied upon at the Hearing on all Parties and file same with the TLAB 30 days after a Notice of Hearing is issued.

DECISION AND ORDER

The Combined Motions are granted, in part; Ms. Watson, Mr. Mallinson and the City of Toronto shall be permitted to elect Participant status at the Hearing in this matter.

They shall serve on the Parties and the TLAB a Participant Witness Statement (Form 13) with a written outline of their intended evidence and any documents to be relied upon no later than 20 days after the new Notice of Hearing is issued.

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TLAB staff shall canvas the Parties and Participants for a new Hearing date and issue a new Notice of Hearing to reflect that date. The deadline dates will remain the same as those in the August 3, 2022, Notice of Hearing (issued on April 28, 2022) except for a Participant Witness Statement as noted above.

X



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