



Toronto Local Appeal Body

40 Orchard View Blvd, Suite
253
Toronto, Ontario M4R 1B9

MOTION DECISION AND ORDER

Issuance Date: August 3, 2023

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

Appellant(s): A. RAHAMAN
Applicant(s): ARC DESIGN GROUP
Property Address: 37 ALLISTER AVE
COA File No.: 21 122226 ESC 20 MV (A0195/21SC)
21 122234 ESC 20 MV (A0196/21SC)
TLAB Case File No.: 21 251857 S45 20 TLAB
21 251858 S45 20 TLAB

Hearing Date(s): April 20, 2023
Deadline Date for Closing July 6, 2022
Submissions/Undertakings:
Decision Delivered By: TLAB Panel Member C. Wong

REGISTERED PARTIES AND PARTICIPANTS:

| <i>People Type</i> | <i>First Initial. Last Name</i> | <i>Representative</i> |
|--------------------|---------------------------------|---------------------------------|
| <i>Appellant</i> | A. Rahaman | A. Stewart |
| <i>Applicant</i> | Arc Design Group | |
| <i>Owner</i> | 10901148 Canada Inc | |
| <i>Owner</i> | A. Rahaman | |
| <i>Party</i> | City of Toronto | M. Hardiejowski C. Dougherty |
| <i>Party</i> | P. Thachuk | |
| <i>Party</i> | J. May | |

INTRODUCTION AND CONTEXT

[1] The Owner of the property of 37 Allister Avenue (subject property) wishes to construct two new 2-storey detached dwellings on the existing property (proposal).

- [2] NOTE: 37 Allister Avenue is comprised of two whole lots (Lots 159 and 160) on Registered Plan 2541. The proposed/existing lot frontages and proposed/existing lot areas for both Lots 159 and 160 were established through the registration of the plan of subdivision. There is no requirement for a consent to sever application.
- [3] This proposed development requires variances to the Zoning By-law for lot area and lot frontage.
- [4] The subject property is located in the Cliffside neighborhood of the District of Scarborough in the City of Toronto. The subject property is designated *Neighbourhoods* in the City's *Official Plan* (OP) and is zoned RD (f12.0; a464) (x193).
- [5] On December 2, 2021, the Owner/Applicant appeared before the East District panel of the City of Toronto's Committee of Adjustment (COA) requesting the following variances to By-law No. 569-2013:
1. CHAPTER 10.20.30.10 Lot Area
 - (1) Minimum Lot Area In the RD zone:
MINIMUM REQUIRED LOT AREA IS 464M2
PROPOSED/EXISTING LOT AREA IS 318.14M2.
 2. CHAPTER 10.20.30.20 Lot Frontage
 - (1) Minimum Lot Frontage In the RD zone:
MINIMUM REQUIRED LOT FRONTAGE IS 12M.
PROPOSED/EXISTING LOT FRONTAGE IS 7.61M.
- [6] The COA refused to grant the variances.
- [7] On December 28, 2021, the Owner/Applicant appealed the COA's decision to the Toronto Local Appeal Body (TLAB), and a Hearing date was scheduled for July 19, 2022.
- [8] According to TLAB Rules of Practice and Procedure, by May 12, 2022, the City of Toronto (represented by Mr. Dougherty), Mr. Thachuk (Member of the Cliffcrest Scarborough Village Southwest Residents Association Planning and Development Committee) and Ms. May (Neighbour) elected Party status.
- [9] Further, in accordance with TLAB's Rules of Practice and Procedure, by June 13, 2022, Mr. Dougherty, Mr. Thachuk, and Ms. May submitted their respective Document Disclosure and/or a Witness statement in opposition to the Applicant's appeal.
- [10] The Applicant, however, did not submit Document Disclosure or a Witness Statement to support its appeal, by the June 13, 2022 deadline, for the Hearing scheduled on July 19, 2022.

- [11] Upon inquiry from TLAB, the Applicant's legal representative, Ms. Stewart, cited delay in receiving a Zoning Notice and requested an adjournment *sine die* (without an appointed future Hearing date) with the promise that information for scheduling a Hearing would be forthcoming.
- [12] With no objections to this adjournment from the other Parties, on July 18, 2022, the TLAB granted this adjournment.
- [13] Then, over the next five months, despite numerous requests from TLAB and the City of Toronto's legal representative for updates on the status of the Applicant's appeal, the Applicant continued to request that no Hearing date be scheduled.
- [14] On December 5, 2022, Toronto Buildings issued Zoning Notices which continued to identify variances for lot frontage and lot area in the Applicant's proposal.
- [15] Having received the clarifying Zoning Review on December 15, 2022, however, Ms. Stewart did not request a Hearing date.
- [16] Then, on January 13, 2023, Ms. Stewart indicated that the Applicant continued to seek clarification from the Zoning examiner on other matters but requested to schedule two TLAB Hearing dates.
- [17] On January 19, 2023, TLAB issued a Notice of Hearing and scheduled two Hearing dates, one on April 20, 2023 and one on May 2, 2023.
- [18] The Applicant still did not file Document Disclosure (by February 8, 2023) or a Witness Statement (by March 20, 2023), according to TLAB's Rules of Practice and Procedure, for the Hearing scheduled on April 20, 2023.
- [19] Then, at 9:45 p.m. on the day before the scheduled Hearing, Ms. Stewart emailed the Applicant's Document Book and Expert Witness Statement to TLAB staff and the Parties.
- [20] Due to the late filing, on the morning of the Hearing, the Applicant's materials were not available to the public, on the Applicant Information Centre, or to the presiding TLAB Member (me).
- [21] In attendance at the April 20, 2023 TLAB Hearing were:
- Ms. Amber Stewart, Legal representative for the Applicant, ARC Design Group and Owner/Appellant Arifur Rahaman
 - Mr. Jonathan Benczkowski, Planning expert witness for the Applicant
 - Mr. Colin Dougherty, Legal representative for the City of Toronto
 - Mr. Marc Hardiejowski, Legal representative for the City of Toronto
 - Party Mr. Peter Thachuk, Member of the Cliffcrest Scarborough Village Southwest Residents Association (CSVSWRA) Planning and Development Committee
 - Party Ms. Janet May, Neighbour

[22] At the Hearing, Ms. Stewart requested that the Applicant's late filed materials be admitted and that a Hearing proceed on the merits or be adjourned.

[23] Mr. Dougherty and Mr. Hardiejowski for the City of Toronto sought to have the appeal dismissed.

[24] Parties Thachuk and May both verbally supported the City's request that the appeal be dismissed.

[25] At the Hearing, I requested that Ms. Stewart submit a written motion requesting that the Applicant's late filed materials be admitted. As well, I asked Mr. Dougherty and Mr. Hardiejowski to submit a written motion to dismiss the appeal. TLAB staff provided deadlines for these motions and their responses.

[26] Ms. Stewart and the City's Legal representatives submitted their motion materials and respective responses according to TLAB's specified timeline.

[27] This is a decision on the motion to admit late filed materials and on the motion to dismiss the appeal.

THE LEGISLATIVE AND POLICY FRAMEWORK

Provincial Policy – *Planning Act*, S. 3

[28] A decision of the Toronto Local Appeal Body ('TLAB') must be consistent with the 2020 Provincial Policy Statement ('PPS') and conform to the Growth Plan for the Greater Golden Horseshoe for the subject area ('Growth Plan').

Variance – *Planning Act*, S. 45(1)

[29] In considering the applications for variances from the Zoning By-laws, the TLAB Panel must be satisfied that the applications meet all of the four tests under s. 45(1) of the Act. The tests are whether the variances:

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

ISSUES

[30] 1. Are the late filed materials admissible?

[31] 2. Should the appeal be dismissed?

SUMMARY OF EVIDENCE

- [32] Filed or Submitted by Ms. Stewart
Notice of Motion for Late Filings (Form 7)
Motion for Late Filings Affidavit, Jonathan Benczkowski (Form 10)
Response to Motion (Form 8)
Response to Motion (Supporting Documentation)
CONFIDENTIAL Letter (Sealed from the public)
- [33] Filed by Mr. Dougherty
Notice of Motion to Dismiss (Form 7)
Motion to Dismiss Affidavit (Form 10)
Affidavit of Mario Cifuentes Gramajo
Motion of the City of Toronto to Dismiss
Notice of Response to Motion (Form 8)
Notice of Response to Motion (Supporting Documentation)

ANALYSIS, FINDINGS AND REASONS

I. Admission of Late Filings

- [34] TLAB's Practice Direction 7 deals with Late Filings and is available on the website: <https://www.toronto.ca/city-government/planning-development/committee-of-adjustment/appeals/toronto-local-appeal-body-practice-directions/>.

- [35] It states that when materials are filed after the deadline set in the Notice of Hearing, and before the start of the Hearing (as is the case here), without the consent of all Parties, the late filed Applicant must request that the Applicant's Disclosure be admitted to the record.

- [36] Practice Direction 7 continues that "In general, save for extenuating circumstances, minimal non-prejudicial delay or where consented to by other Parties, the late filed Applicant's Disclosure will not be admitted into the record."

Consent

- [37] In this case, no Parties consented to the admission of the Applicant's late-filed materials.

Minimal non-prejudicial delay

- [38] The Applicant initiated the appeal on December 28, 2021, and by December 5, 2022, had full information to continue with a TLAB Hearing on the merits. Despite this, the Applicant did not file materials for the April 20, 2023 Hearing, until the night before. Over ten months expired between the time in which the three other Parties submitted their required materials (June 13, 2022) and when Applicant submitted its materials (April 19, 2023).

[39] Although Ms. Stewart requested that the April 20, 2023 Hearing be adjourned with a new date, to cure the defect of the late filings, and to give the Parties more time to prepare their submissions in response, I agree with Mr. Dougherty that this would cause asymmetrical disclosure since the three other Parties submitted their materials ten months prior to Ms. Stewart, by the June 13, 2022 deadline for the first Hearing date. Admitting Ms. Stewart's late filed materials on April 19, 2023, would allow her the advantage of reviewing materials that were submitted ten months in advance. This is not consistent with the principles of procedural fairness and causes prejudice to the other Parties.

[40] In addition, admitting the late filed materials for a Hearing that was adjourned for the third time would require the three other Parties to potentially resubmit materials and refresh themselves on a matter that is over a year old. This duplicated effort for the other Parties in preparation for the Applicant's appeal is also prejudicial against them.

Extenuating circumstances

[41] From December 5, 2022, to April 19, 2023, the Applicant took nearly four and half months to file its Document Disclosure and Witness Statement, when the TLAB Notice of Hearing for the April 20, 2023, gave 20 days for Document Disclosure and 32 days for Witness Statement.

[42] Vice-Chair Bassios states in her decision for 83 Glenvale Boulevard, "TLAB is committed to sustaining an accessible forum for the resolution of land use disputes within its mandate. On occasion, this means that latitude will be granted to those who are self-represented and those who are not familiar with the TLAB Appeal process. This does not mean, however, that a Party involved in a Hearing before the TLAB is excused the basic responsibilities and respect that must be accorded to the TLAB process and to the other Parties and Participants engaged in the matter."

[43] In this case, the Applicant is not self-represented, but had legal counsel through the entire process.

[44] Ms. Stewart submitted a sealed affidavit outlining serious personal circumstances she faced during the period from February 2022 through to February 2023 and beyond, which coincide with the delays seen at the TLAB.

[45] I have a great deal of sympathy for Ms. Stewart's grave personal circumstances. If the Applicant wished to continue its retainer with Ms. Stewart, and she continued to find herself fit to act in the matter, however, there were other paths to secure consideration from both the TLAB and the other Parties ahead of an 'eleventh hour' submission of all the Applicant's case materials.

[46] Vice-Chair Bassios continues in her 83 Glenvale Boulevard decision, "While the principles of administrative law, or those of good land use planning, might be

mysterious to lay persons, even the most cursory of research would identify that the basis for granting of variances to a Zoning By-law in Ontario, whether at a committee of adjustment or via appeal at a tribunal, rest on the four tests outlined in the Act s. 45(1): Do the variances maintain the general intent and purpose of the Official Plan; do they maintain the general intent and purpose of the Zoning By-laws; are they desirable for the appropriate development or use of the land; and are they minor?”

[47] In this case, the Applicant, with or without legal counsel, has the “responsibility to put before the Tribunal the evidence necessary to enable the Tribunal to make findings required by the Act.”

[48] An appeal of the Committee of Adjustment’s decision is a privilege. If one appeals a Committee of Adjustment decision, one has a duty to fulfill and comply with the requirements of the Toronto Local Appeal Body in a manner that is efficient and respectful of City resources. One need not be a legal or planning expert, but one must avail oneself of the support one needs and communicate one’s needs with the TLAB in a timely manner.

[49] Late filing and continued Adjournments consume TLAB resources and contribute to a backlog in the system, which reduces the accessibility of justice. If one accepts a scheduled Hearing date (for example, April 20, 2023) and does not use it, by not filing materials in a timely manner, this deprives other members of the public of the opportunity to have their matter heard and decided.

[50] As TLAB strives to be highly transparent, accessible to all people, and to serve the broad public interest. Thus, in its Notice of Hearing it provides an overview of the steps and dates that are required under the *Planning Act*, as well as clear email and phone information for those who have accessibility or other concerns. TLAB has also issued Practice Directions, linked to our main webpage: <https://www.toronto.ca/city-government/planning-development/committee-of-adjustment/appeals/>.

[51] It is not fair to those who do comply with these Rules, which are legally required under the *Planning Act* to ensure a smooth and efficient planning process if unjustified exception is made for those who do not comply.

[52] I do not accept the Applicant/Appellant’s late filings.

II. Motion to Dismiss

[53] Appeals to TLAB that are frivolous, vexatious, or not in good faith, are not tolerated. Under Rule 9.1 of its Rules of Practice and Procedure, TLAB has the

authority of its own proposal or on a motion, to dismiss all or part of a proceeding without a Hearing on the grounds that:

- “a) the reasons set out in Form 1 do not disclose any apparent land use planning ground upon which the TLAB could allow all or part of the Appeal;
- b) the Proceeding is frivolous, vexatious, or not commenced in good faith;
- c) the Appeal is made only for the purpose of delay;
- d) the Appellant has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;
- e) the Appellant has not provided written reasons and grounds for the Appeal;
- f) the Appellant has not paid the required fee;
- g) the Appellant has not complied with the requirements provided pursuant to Rule 8.2 within the time period specified by Rule 8.3;
- h) the Proceeding relates to matters which are outside the jurisdiction of the TLAB;
- i) some aspect of the statutory requirements for bringing the Appeal has not been met; or
- j) the submitted Form 1 could not be processed and the matter was referred, pursuant to Rule 8.4, for adjudicative screening.”

[54] On December 5, 2022, Toronto Buildings issued Zoning Notices which continued to identify variances for lot frontage and lot area. The Zoning Notices required the Applicant to correct or clarify deficiencies with respect to “several built form items ... such as coverage, and discrepancies related to established grade and height measurements” (Motion for Late Filings Affidavit, Paragraph 17).

[55] Having received the clarifying Zoning Review on December 5, 2022, however, Ms. Stewart did not request a Hearing date. Instead, in his Motion for Late Filings Affidavit, the Applicant’s land use planning expert, Mr. Benczkowski, states that he and Ms. Stewart “agreed that that [sic] an opinion regarding the lot frontage and lot area variances should be after the built form deficiencies were resolved because Toronto Buildings could not issue building permits while the built form questions were outstanding” (Motion for Late Filings Affidavit, Paragraph 18).

[56] This acknowledges that the Applicant intended to delay the TLAB process until after it had complete resolution of its building design issues with Toronto Buildings.

- [57] The intent to delay scheduling a Hearing, once an appeal has been commenced, is not approaching the other Parties, TLAB staff, TLAB Members, and public resources in good faith.
- [58] In addition, once the Hearing on April 20, 2023 had been scheduled, the Applicant's inaction until all the Notice of Hearing deadlines had passed and its submission of full materials the night before the Hearing does not respect the other Parties' rights and is not in good faith.
- [59] Vice-Chair Bassios states in her decision for 429 Montrose Avenue, "The Appellant initiated the Appeal. ...The inaction of the Appellant to prepare for the Hearing of his own Appeal is not a justifiable reason for the processes of the TLAB to be discarded and the rights of the Parties and Participants to fair notice to be ignored."
- [60] Further, the Applicant's reasoning to delay the TLAB process until "after the built form deficiencies were resolved *because Toronto Buildings could not issue building permits while the built form questions were outstanding*" (emphasis added) does not justify the delay to TLAB. Yes, built form questions must be addressed before building permits are issued, but building permits are not needed prior to the TLAB process. Indeed, the TLAB process comes before the issuance of building permits where variances have been denied at the COA.
- [61] The Applicant's "delay" in obtaining a Zoning Notice, was, in my opinion, a delay caused by a disagreement with Toronto Building and the Applicant's related desire for a different Zoning Notice that would make the TLAB appeal unnecessary. In this case, when an Owner is aggrieved by a Zoning Examiner's interpretation and a decision of the Chief Building Official, the Owner has the right to appeal under the *Building Code Act*, subsection 25(1).¹ The Applicant could have followed this course of action, rather than pursuing an appeal at TLAB.
- [62] If the Applicant intended to appeal at TLAB and not withdraw its appeal, it needed to prepare for it.
- [63] In contrast, the Applicant seemed more pre-occupied with the possibility that it may not have to proceed with the Hearing than in conducting its appeal.
- [64] I find that the Applicant did not act in good faith in preparing for the Hearing of April 20, 2023, and further in delaying its appeal for over a year and a quarter.
- [65] I also find that it is an unreasonable abuse of the process to expect that the other Parties and TLAB accommodate further delays on this matter.

¹ Ontario Building Code Act, 1992, S.O. 1992, c. 23, Online: <https://www.ontario.ca/laws/statute/92b23>

CONCLUSION

[66] I do not admit the late filed materials. I grant the motion to dismiss the appeal.

DECISION AND ORDER

[67] The appeal is dismissed. The decision of the COA stands.

C. Wong
Panel Member