



May 11, 2018

Toronto Local Appeal Body  
40 Orchard View Boulevard, Suite 211  
Toronto, Ontario, M4B 1R9  
Via email: [tlab@toronto.ca](mailto:tlab@toronto.ca)

**RE: Feedback on TLAB Rules and Procedures: Part 2**

Dear Chair and Members of TLAB,

The attached report (including executive summary) provides feedback on TLAB Rules and Procedures as invited by TLAB of the public. Several constituent associations within FoNTRA, principally the South Eglinton Ratepayers' and Residents' Association (SERRA), and the Leaside Property Owners' Association (LPOA) made submissions to TLAB in Part 1; this submission focuses on remedies to address the issues identified by them and others in the earlier submissions.

We thank the TLAB for establishing this public consultation process, thereby demonstrating accountability and responsiveness. We hope that the TLAB follows through with appropriate changes, and that this type of effort continues.

Thank you for the opportunity to present our recommendations to you in this forum.

Yours truly,

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**The Federation of North Toronto Residents' Associations (FoNTRA)** is a non-profit, volunteer organization comprised of over 30 member organizations. Its members, all residents' associations, include at least 170,000 Toronto residents within their boundaries. The residents' associations that make up FoNTRA believe that Ontario and Toronto can and should achieve better development. Its central issue is not whether Toronto will grow, but how. FoNTRA believes that sustainable urban regions are characterized by environmental balance, fiscal viability, infrastructure investment and social renewal.

**Feedback on TLAB Rules and Procedures**

**Federation of North Toronto Residents' Associations**

**May 11, 2018**

## **1. Executive Summary**

The FoNTRA submission builds on Part 1 submissions by SERRA, LPOA and other input from our member organizations. We have also referenced submissions of other organizations, and the recently published Rules and Procedures of the provincial Local Planning Appeal Tribunal (LPAT).

The TLAB is as an independent, quasi-judicial tribunal that hears appeals of Committee of Adjustment (COA) decisions. A quasi-judicial tribunal normally permits more flexibility to the Member in adjudicating the case, for example determining the facts of the case, as compared to a judicial (Court) hearing. As such, while TLAB Rules and Procedures are required, TLAB members should be allowed a degree of flexibility in managing their proceedings.

Our submission addresses two broad areas; substantive issues of “natural justice”, and procedural issues. Both ultimately relate to the Rules and Procedures.

The matter of greatest importance is whether the decision outcomes are fair, i.e; has natural justice been served? The analyses of the decision outcomes to date, as prepared by the Ontario Bar Association (OBA) Institute, and the South Eglinton Ratepayers and Residents Association (SERRA) each show that outcomes clearly favour the proponent.

SERRA’s submission identified the significant inconsistencies that exist between COA decisions and TLAB decisions. A majority of cases under appeal to TLAB have been ‘refused’ at the COA and subsequently ‘approved’ at the TLAB. The TLAB’s decisions ‘on appeal’ are not consistent with the decisions of the COA. It would appear surprising that the CofA decision to refuse is generally not upheld by the TLAB? The LPOA submission raised the same overall concern based on “lived experience” of the TLAB process and hearings.

Currently the outcomes are clearly unbalanced.towards resources and away form residents affected by applications. The TLAB needs to address these concerns to restore balance, and public confidence in o the process.

### **1.1 Need to reduce the disadvantages of unrepresented parties**

The proponent will almost always win the appeal when the proponents are represented by skilled professionals and highly paid experts, and opponents are self-represented, and without expert support.

To address this FoNTRA recommends:

That the TLAB members (adjudicators) should ensure that all witnesses are examined (i.e., by the member) and cross-examined (i.e. by the opponents). 'Active Adjudication' techniques should be used to ensure that these examinations take place in all cases.

## **1.2 Need to improve clarity on the application being heard by TLAB relative to the COA application**

If the application presented to the TLAB has been revised compared with the application presented to the COA, the material differences should be highlighted. If there are no material differences, the TLAB decision should describe why the COA decision was overturned.

## **1.3 The TLAB process should be accessible, affordable and understandable**

Having witness statements available through the TLAB on-line portal is an important first step in improving accessibility of information to all stake-holders. While there is a learning curve for first-time users, there is certainly more openness in the process than under the OMB.

The TLAB process is not accessible, affordable or understandable to many lay residents. The TLAB should create initiatives with appropriate funding to reduce these barriers.

## **1.4 Recognize the Local Knowledge Expert**

Several recent TLAB cases have demonstrated the valuable role of Local Knowledge Experts in the hearing process. FoNTRA believes that Local Knowledge Experts should be able to provide opinion evidence along with factual evidence in all cases.

The TLAB members should weigh the evidence of Local Knowledge Experts as they do with other experts.

## **1.5 City Support for an Intervenor Program**

The imbalance of resources on cases involving individual residents is matched with a similar imbalance on systemic issues and landmark cases. Intervenor funding would remove the funding imbalance for selected or landmark cases (e.g. as with the introduction of a new bylaw, or to address hyper-growth in selected communities). The program would not be designed to provide public funding for "regular" cases.

FoNTRA recommends the introduction of an Intervenor program that is specifically targeted to not-for-profit organizations with specific interest in important cases and that the City provide funding for the Intervenor program on an annual basis. An Intervenor funding program organization (similar to the Local Planning Support

Centre at the provincial level) would need to be established outside of the TLAB, perhaps from the COA Office in City Planning .

### **1.6 Settlement Process Must Be Fair**

Both the OBA and City Solicitor are on record as supporting changes to improve the efficiency of the settlement process. FoNTRA is concerned with the issue of procedural fairness with settlements arrived at during private negotiations.

FoNTRA recommends that the TLAB ensure that all Parties are allowed to be active in the settlements negotiations, and that all Participants have full visibility on settlement agreements.

FoNTRA further recommends that settlement agreements with material changes should be subject to mandatory notification to all Participants. All Participants should be allowed to review the changes in advance of a scheduled hearing where these changes have been filed.

### **1.7 TLAB Annual Report**

As noted above the current system is unbalanced in its decision making (reference the Ontario Bar Association, SERRA and LPOA submissions). More comprehensive annual reporting is required to allow for monitoring of hearing outcomes. and not just hearing time frames, i.e. efficiency, to establish baselines and measure trends. For example, TLAB should track and report on statistics related to legal representation and planning experts.

FoNTRA is pleased with the TLAB's outreach programs through the business meetings (e.g., education and training) and public consultations.

## **2. Feedback on TLAB Rules and Procedures**

This document proposes a number of changes to the TLAB Rules and Procedures. The intent of our recommendations is to ensure substantive and procedural fairness throughout the TLAB process.

### **2.1 Improving Fairness**

The assessment of outcomes was provided in the OBA Institute report, and was confirmed in SERRA's analysis, showing the TLAB decisions clearly favour the proponent. This is not surprising considering that the proponent has greater access to legal counsel and professional planners. Many professional planners choose to work exclusively for proponents of new development, and this creates a very small pool of available planning experts. This situation gives the proponents an obvious procedural advantage.

The energy boards in Canada (e.g., OEB, NEB, etc.) have been progressive in addressing sources of traditional and/or local knowledge and gathering relevant information. The Ontario Energy Board supports the concept of Intervenors to address some of the imbalances with under-represented parties.

### **2.2 Role of Local Knowledge Expert**

The need for better local information arises from the large number of established neighbourhoods in the City, and the diversity that exists across these neighbourhoods. The OBA submission has identified the difficulty in retaining witnesses who are qualified to assess the planning issues within local neighbourhoods.

FoNTRA is proposing recognition by TLAB of the role of the Local Knowledge Expert in the TLAB proceedings. These experts would bring information relevant to the specific neighbourhoods that surround the subject property(ies). The Local Knowledge Expert would also have a good understanding of zoning matters, and TLAB rules and procedures.

The witness testimony of the Local Knowledge Expert would provide additional information to assist the TLAB in its decision making.

The qualifications and experience of the Local Knowledge Expert would be reviewed in a manner similar to other experts. The TLAB member would determine how to weigh the evidence provided by the Local Knowledge Expert in a manner similar to other experts. The Local Knowledge Expert will be allowed to provide opinion evidence on selected matters, and will be allowed to provide an opinion with respect to the four planning tests.

Proposed definition of 'Local Knowledge Expert' is:

"A Local Knowledge Expert has a deep understanding of the local neighbourhood, and its planning, and their input will be helpful in providing relevant information and opinions to the TLAB proceedings".

### **2.3 Granting of Intervenor Status**

Residents' Associations (RAs) often seek to have standing to recognize the local knowledge that they can bring to the TLAB hearing. While RAs are normally treated in a civil and courteous manner, their testimony in support of public interest are not always fully considered.

FoNTRA proposes that the TLAB should introduce and recognize the role of Intervenor. The participation of an Intervenor is critically important in those cases where the City does not appear at the hearing. Intervenor status at TLAB should be similar that allowed currently at the Ontario Energy Board.

The Intervenor will normally choose to act as a Party, and there will be few required changes to the Rules documents.

Proposed definition of 'Intervenor' is:

Intervenors are interested groups or individuals who participate actively in the proceeding either by submitting evidence, arguments or interrogatories (written questions) or by cross-examining a witness or witnesses at an oral hearing.  
*(Definition from Ontario Energy Board)*

### **2.4 Special Assistance to Intervenors**

Residents' Associations and other organizations would seek Intervenor status for selected cases concerning matters of public interest. Possible case examples include applications under new bylaw regulations, applications for multiple-unit dwellings, applications in areas of the city that are experiencing hyper-growth.

The special assistance to Intervenors should include legal and planning advice in a manner similar to that considered in the LPAT Rules and Procedures.

In certain cases, Intervenor funding would be provided in a manner similar to the Ontario Energy Board. The City would provide an annual budget (say \$250,000) to support the Intervenor program. This funding would be similar to the funding made available to support the COA Mediation program pilot.



### **3. Disclosure Requirements**

#### **3.1 Clarification of Disclosure Rules**

We understand that the City Solicitor:

“will be seeking clarification on document disclosure rules and will be requesting that document disclosure and witness/participant statement filing be combined into one step.”

FoNTRA endorses the first part of this item related to the need for clarification on document disclosure rules, particularly as it relates to Participants.

However we disagree that document disclosure and witness/participant statement filing be combined into one step. The current process allows for a review period between the document disclosure and the participant/witness statement filing (a.k.a. the issues list). The separation is needed in order to allow all parties/participants to prepare their witness statement based on the applicant’s disclosure.

We have observed that the TLAB disclosure may be significantly different from the COA application. The intent of the disclosure, and its constituent plans, elevations and variances is to ensure certainty regarding the application. This creates a level playing field (“no surprises”) for all players.

#### **3.2 Additional disclosure further to official disclosure (outside of settlement process)**

As above it is highly desirable to have certainty regarding the application.

At the same time it may be reasonable to allow introduction of additional evidence, such as allowing Participants to introduce photographs and other objects on the day of the hearing.

If the applicant desires to make changes outside of the Settlement process, these changes should not be filed (and accepted) without proper notifications. It appears that the Notice of Motion process is intended for this purpose. Generally the TLAB should determine whether the proposed changes are material, and whether re-notification is required. Introduction of material changes on the day of the hearing should not be permitted.

This is an issue of procedural fairness, and respect for the process, as much as a matter of substantive fairness.

We have experienced a situation where the TLAB disclosure was identical to the application refused by the COA, yet several months later, the day before the hearing,

the applicant submitted revised plans. The current Rule is fair and appropriate. The situation with settlement resulting in a revised plan is appropriately handled through the settlement procedures (see discussion in Section 5)

## **4. Timelines**

### **4.1 Participant registration and submission of statements**

The current timeline requirements are especially onerous for a Participant when compared to the previous OMB requirements.

The City Solicitor's report on TLAB put forward the following suggestion to the Planning & Growth Management Committee on April 4<sup>th</sup>, 2018.

Eliminate its current stand-alone requirement for participants to file their intention to be a participant within 20 days of a Notice of Public Hearing and instead make the only pre-hearing obligation for a Participant to serve a Participant Statement.

We endorse this recommendation as it reduces one of the steps for participants.

### **4.2 Setting of Filing Dates**

Many stakeholders have expressed concerns about the "front end loading" of the steps in the TLAB process.

We recommend that the dates for filing of all documents should be based on the Hearing Date rather than the Notice of Public Hearing, i.e. the interim dates would be calculated backwards from the Hearing Date.

This approach would also be simple to implement.

## **5. Settlement Procedures**

### **5.1 Participation in settlement discussions**

The Rules and Procedures document states that "the Local Appeal Body is committed to encouraging Parties to settle some or all of the issues by informal discussion, exchange and mediation." FoNTRA endorses the goal of 'settlements' particularly if all Parties and Participants are included in this process.

Both the OBA written submission and the staff report as provided by the City Solicitor have recommended that the process for settlement be streamlined.

The OBA's position is that:

- The Rules should be expanded to more comprehensively deal with the process for settlements and amended as required to reduce barriers to settlement.

The position of the City Solicitor is:

- The City Solicitor will be requesting various timing and procedural changes to better encourage settlement.

It appears that the regular representatives in these matters (i.e., City lawyers and private practice lawyers) are concerned with efficiency at the expense of planning principles and adverse impacts.

The current TLAB procedures are largely inherited from the OMB procedures and favour the represented parties. The persons that are most adversely impacted by the settlement (i.e., as with an abutting neighbour in the shadow of a large development) are often excluded from two-party discussions that are handled in private under confidentiality restrictions. The principles of natural justice are bypassed in this two-party settlement process.

It is recommended that

- (1) All Parties should have input into the revisions, and have visibility on the revised proposals in advance of the TLAB hearing.
- (2) Participants who are adversely impacted by the development should be upgraded to Party-status during the Settlement negotiations.

## **5.2 Procedures for handling Revised Plans**

While one party may arrive at a settlement agreement with a proponent, the TLAB should ensure procedural fairness in the hearing process. These agreements are often negotiated at the eleventh hour and this leaves outside parties blindsided in the process. There is insufficient time to consider the impact of these changes and prepare new statements.

The TLAB should ensure that adequate notice is provided to any material changes to the proposed application (see Section 3 above)

## **6. Matters Requiring Clarification**

The following items require clarification:

### **6.1 Ability for a single person to provide Testimony and to Cross-Examine**

The previous OMB hearings would not allow one person (appearing as a Party or as a Participant) to provide evidence and also act as an advocate.

The Rules should clarify whether one person, appearing either as a Party or as a Participant, can offer witness testimony, and cross-examine other witnesses.

### **6.2 Document Disclosure for a single person**

The Rules should clarify how a Person (Participant or Party) can submit a Witness statement including photos and other materials that can be referenced during the person's oral statement.

### **6.3 Unacceptability of Waivered Applications**

The applicant may choose to use the Waiver process to bypass a zoning examination in advance of a Committee of Adjustment hearing. This process is widely used throughout the city but the applicant-submitted variance lists are often prepared incorrectly.

In most cases, if the application is refused at the COA and proceeds on appeal, a zoning examination is completed in advance of the TLAB hearing. In some cases, the waived application proceeds directly to the TLAB.

Waivered applications should not be permitted at the TLAB because there is no available process to address missed or inaccurate variances.

FoNTRA proposes that all applications that proceed to the TLAB should go through a zoning examination and receive a Zoning Notice statement. This measure will reduce the opportunity for errors resulting in better planning decisions that can be properly enforced. It is very difficult to enforce a missed variance that is not identified in the written decision.

### **6.4 Handling Modifications from a Settlement Process**

The current TLAB Rules and Procedures provide tight control on essential documents including the Public Notice list of variances and site plans. This control is valuable as all Parties, Participants and other stakeholders have a common understanding of the proposal.

Today, a typical settlement involves only two parties (e.g., the applicant and City) who arrive at a new proposal with revised list of variances and site plans.

FoNTRA's proposal (see Section 5 above) is for all Parties to be involved in the Settlement. Participants should receive copies of the revised list of variance and site

plans as soon as they are available. The applicant should be responsible for this circulation.

## **7. Opportunities to Improve Accessibility**

The TLAB should work to ensure that all its processes (e.g., Settlements, Hearings) are accessible, affordable, understandable and proportionate to the abilities and sensibilities of users.

### **7.1 Special Assistance to First-Time Users**

The barriers for first-time users of the TLAB systems are quite high, especially for those users who are self-represented. The TLAB should continuously strive to make the processes more accessible, affordable and understandable.

FoNTRA asks that the TLAB consider the many recommendations on this matter contained in the written submissions from residents and Residents' Associations.

Our residents have noted the Digital Forms handling and the technical expertise for Digital Signatures are especially difficult. The TLAB should pay special attention to helping first-time users navigate through this technology.

### **7.2 Order of Witness Testimony**

The TLAB Member should ask at the start of the hearing if any parties or participants require accommodation with respect to the order of Witness testimony. Typically lay persons may request a specific time slot to accommodate their working scheduled.

The TLAB members seem to be ready to make these accommodations, if requested at the start of the hearing.

### **7.3 Complete Hearings in a Single Day**

Multi-day hearings increase the burden on lay persons to participate in the process. The TLAB should consider methods to streamline the procedures to compress the proceedings into a single day.

The TLAB should consider set time limits for Witness Statements, which are already adopted by LPAT Rules and Procedures. Reading of standard provisions of pre-filed planning policy documents should normally be discouraged. The TLAB member is encouraged to be resourceful in working to achieve this goal.

### **7.4 Availability**

The OBA proposes the following rule change:

The Appellant and the City should be consulted regarding their availability for a hearing before a hearing date is set. Such parties should also be canvassed regarding the number of witnesses and anticipated hearing duration to facilitate the scheduling of hearings for more than one day where appropriate.

FoNTRA requests that all Parties in the case should be canvassed. The TLAB should not provide special privileges to selected parties.

### **7.5 Restrictions on Residency**

The OBA proposes the following rule change:

Persons residing at the same residence should be treated as one appellant, party and/or participant for the purposes of the proceeding unless they indicate otherwise.

FoNTRA does not believe that this rule change is required. Procedural fairness requires that all persons should be allowed to participate.

### **7.6 Restrictions on who can be an Authorized Representative**

The TLAB Public Guide includes the following restriction:

If your authorized representative is not a lawyer or paralegal, he or she cannot take a fee from you for this service and must not be in the business of acting for persons at hearings, defined as no more than three times a year.

FoNTRA does not understand the rationale behind this restriction, as it is necessary to appear at a number of hearings to gain experience. FoNTRA recommends that this restriction should be dropped, or if applied it should include all lawyers and paralegals as a matter of procedural fairness.

### **7.7 Request for Civility Rule**

The City Solicitor proposes the following:

To encourage civility, courtesy and respect in all TLAB proceedings, the City Solicitor is requesting a new rule requiring all persons involved in a TLAB matter to act in good faith and in a manner that is civil, courteous and respectful.

A common complaint from participants and witnesses relates to aggressive cross-examination by the appellant's legal counsel. In some cases, the cross-examination methods come across as bullying tactics. Legal counsel should be cautioned by the TLAB member to be respectful during cross-examination.