Toronto Local Appeal Body

40 Orchard View Blvd, Suite 211
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

DECISION AND ORDER

Decision Issue Date Monday, March 12, 2018

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

Appellant(s): DEJAN BOJIC

Applicant: TACCON INC

Property Address/Description: 82 GOVERNMENT RD

Committee of Adjustment Case File Number: 17 196228 WET 05 MV

TLAB Case File Number: 17 248317 S45 05 TLAB

Hearing date: Monday, March 05, 2018

DECISION DELIVERED BY G. Burton

APPEARANCES

Parties	Representative
Taccon Inc.	M. Tiberia
	G. Abousawan
	Pavel Zbyagin
Dejan Bojic	Douglas Allen
Veronika Bojic	
Svetlana Bojic	

Participants

Jo-Anne Kupiek

Paul Doughty

INTRODUCTION

This was an appeal to the Toronto Local Appeal Body (TLAB) from a decision of the Committee of Adjustment (COA) dated September 28, 2017 that approved variances for 82 Government Road, located at the northeast corner of Government and Prince Edward Drive in Etobicoke. The neighbours to the east at 80 Government Road have objected to the variances granted. There had been an earlier COA decision on June 29, 2017 which had rejected virtually the same variances, in the appellants' view. At the commencement of the hearing, Mr. Allen, representing the objectors, made a motion for adjournment of the hearing.

BACKGROUND, ANALYSIS, FINDINGS, REASONS

I will deal with all of these headings in this summation, as in the end, very little evidence was heard that remained free of objections or interjections. The evidence may have to be repeated or summarized on resumption of the hearing.

I reference and summarize the objections and my rulings here, with further elaboration as determined appropriate.

There were many instances and alleged grounds on which Mr. Allen objected to proceeding with the hearing. He repeated the same objections several times throughout, on occasion impliedly refusing to accept earlier rulings on the same points.

OBJECTION ONE: Lack of reasons in the COA decision.

This was contrary to the rules of natural justice, he argued. By subsection 5.4(1) of the *Statutory Powers and Procedure Act* the appellants should have the right to particulars, i.e., reasons for the COA decision, and to examine the City planners to assess their views on the application. If they failed to respond, he would make a Freedom of Information request, or seek to examine the staff for discovery. There had been an earlier COA decision on June 29th, 2017 that had rejected what he claimed were the same variances. He stated that this constituted a multiplicity of proceedings, also proscribed.

HELD: 1) The COA never or rarely gives detailed reasons for its decision, so there was no breach of the usual procedure or substance here, and no reason to

adjourn on this ground. I am not aware of any recourse to compel the COA to provide reasons. Objection to a decision of the COA is to the Toronto Local Appeal Body (TLAB), or to the courts by way of judicial review.

2) If the City Planning Staff have concerns about an application, it is almost invariable that they write a report to the COA. Since there was no such report here, it is logical to assume that they had no concerns with the revised variances. Any party to a TLAB appeal is entitled, pursuant to the Rules, to request a summons to compel the attendance of a witness. This right was not pursued. The TLAB holds no responsibility for the case conducted by a party or a participant regarding evidence gathering, beyond assuring compliance with its Rules, statutory rights and principles of administrative law.

3) There is no multiplicity of proceedings here. Anyone is entitled to make application under section 45 of the Planning Act for variances and have them dealt with by the COA. They do not appear on a cursory review to be the same variances in the second application. There were some reductions, and thus the COA approved them, in its wisdom, rather than rejecting them. This is entirely within its jurisdiction.

4) As to the need for particulars, this hearing is a hearing *de novo* where I must assess all of the requested variances individually and collectively on the evidence presented in the TLAB hearing. No additional reasons from the level below, the COA, would necessarily be of assistance in this hearing *de novo*. If any party or participant wishes to elicit evidence relevant to the appeal, the onus is upon them to meet that obligation.

5) It is unfair to the owners to adjourn the proceeding convened on this day on another ground. The appellants have just recently hired this representative. This could have been done at the time of required filings in January, as there was more than enough time provided in the Notice of Hearing. The Hearing obligation remains (in the absence of a motion to dismiss the appeal) until the TLAB finds it appropriate to finalize the matter. The parties and participants are under the obligation to meet their responsibilities in accordance with the dates set out in the Notice of Hearing.

OBJECTION TWO: asserted bias.

Because of my ruling not to adjourn, Mr. Allen objected that I demonstrated bias. He asserted that I must have made up my mind about the position the City had taken. He objected that my “position” closes the door to further investigation, and that this indicates prejudgement. I also had interrupted him (he made this claim repeatedly, and usually without justification.)

HELD: I ruled against my alleged apprehension of bias and against an adjournment. I reiterated that if there had been a concern or objection by the City, the Planning Staff would most likely have written a report, and/or a City lawyer could have been present at this TLAB hearing to oppose the application. There is no indication in the filings of any City interests in the appeal. It was my interpretation based on long experience with the COA that nothing further was owed or due from the City, of course

without prejudice to any pursuit that may be advanced by a party or participant pursuant to the Rules.

THREE

Mr. M. Tiberia then began to outline the proposal leading to the requested variances, including the reductions. A moment later, Mr. Allen objected that he was reading from notes that he had not disclosed in advance filings. He repeated this objection later, even following a ruling on it.

HELD: A witness can use speaking notes as an aid to the presentation of evidence in TLAB hearings. Advance disclosure of such 'notes' is not a prerequisite, provided the substance is adequately disclosed in accordance with the Rules.

FOUR

Mr. Allen pointed out that the representative acting on behalf of the owner could not also give testimony in the hearing – the election to take on one role precluded the dual role.

HELD: I agreed with Mr. Allen, put the witness to his election and so Mr. G. Abousawan became a witness and continued to outline the proposal.

FIVE

Mr. Allen then claimed that I failed to canvas the other parties on his submission that I had demonstrated bias. He stated his understanding of the test for bias. He asserted that the fact that I assumed that planning staff had no issue, demonstrated bias. There should be a mistrial. He also said that I had denied the Charter right to representation.

HELD: The self-represented litigants neither asked for nor had submissions on the issue of alleged bias, and I repeated my ruling. I was prepared to hear the evidence and to make a decision on it, as is the TLAB's duty. I did not understand his point about failure to allow representation and no elaboration was provided.

SIX

Mr. Allen objected to the witness referring to an aerial photo of the subject site, on two grounds: 1) It had not been filed in advance, and 2) It had notations visible on it. He raised the same objection later to a municipal document that had been highlighted by a "curlicue" design. 'Calculations' made on a document might influence the tribunal member, he argued.

HELD: The witness could refer to a document filed on the date of the hearing, as determined appropriate by the TLAB. Reference to a location map or aerial photograph is a frequent occurrence at TLAB, even given the rules for prefiling of evidence. It is up to the member to determine relevance. If it is, it may be accepted. Notations on evidence, official documents or not, are a frequent occurrence at TLAB, and members are able to consider and reject notations if not based on the evidentiary

conclusions. Tampering with exhibits is a different matter, but this was not the substance of the objection as articulated. There was a brief adjournment to allow the appellants to examine the photo.

SEVEN

There was next an objection that one of the other owners was 'coaching' the witness.

HELD: The speaker was not being coached, but was merely clarifying what documents had been filed before the hearing, and where. TLAB hearings are audio digitally recorded, and interjections can be examined. I am content that efforts for clarification, accurate reference and non–consequential events occur, and that these are not the subject for reprimand let alone censure, except in extreme circumstances. The documents had been prefiled, but then consolidated into a new grouping for the hearing. This is a frequent occurrence, and I found it acceptable.

EIGHT

Mr. Abousawan principally provided only the factual background to the application. At one point he stated that the size of the present house structure on the lot did not allow for a current lifestyle. Mr. Allen objected as this was opinion evidence, not within the knowledge of this non-planner witness. Many similar issues arose shortly thereafter. Examples were: the witness pointed out that one variance (related to a preexisting condition) "had no negative effect on the neighbours". A variance for a roof overhang "made it less perceptible…" A mudroom at the rear was "reasonable, to provide an entrance from the street…" He also disputed a factual conclusion in the planner Ms. Barbir's report. Her conclusion that the height and depth did not meet the by-law requirements was in error, as both did comply with zoning requirements. Mr. Allen objected again that as a non-expert, he could not provide any of these conclusions in his testimony.

HELD: I cautioned the witness to stick to factual evidence only. However, a lay witness is entitled to draw conclusions based on common experiences, interpretations and application of facts. Lay citizens are not precluded from providing opinion evidence. A distinction between lay citizen evidence and expert testimony from a qualified professional is a prerogative of the tribunal. It is a matter going to weight, not necessarily acceptance. Mr. Allen said again that even this demonstrated bias on my part and that 'that would not play well' on an appeal. I told the parties that I wished to hear of the owners' intent behind the variances. They were also entitled to explain the factual and procedural background, without being subject to objections on their lack of expertise or manner of expression of opinion.

NINE

At this point one of the appellants requested to ask a question of the witness.

HELD: This was not the moment to question the witness, although they could make an objection if necessary. There would be an opportunity to ask questions on the

content of the testimony in cross examination. The witness should not be interrupted in the midst of his testimony.

TEN

Respecting the examples of COA decisions for other corner lots, the witness provided the example of 546 Prince Edward Drive across the street, as a recent construction with a greater Floor Space Index (FSI) than the requested. Mr. Allen asked if there was a finding in the decision that this was the same as the proposed, or if this was another exaggerated opinion that the tribunal should not be hearing. I requested that the witness provide only the lot coverage and FSI from his other examples, and where they were located, but Mr. Allen said that this was asking a prohibited leading question. He pointed out that the Supreme Court had prohibited such questions.

HELD: A Hearing Officer is entitled to engage a witness with questions of clarification or understanding. This was not asking leading questions but rather was a direction to limit his evidence. Such examples are common in TLAB hearings.

ELEVEN

Later the witness mentioned the survey provided in prefiling, and the drawings for the new proposal. Mr. Allen objected to the fact that the drawings were not 'stamped' by an architect, and might therefore contain inaccurate measurements. This was important as they were relied on by the City Zoning Examiner to determine the variances requested. He suggested such uncertified plans were not even admissible as proper evidence before the tribunal. He would have no opportunity to cross examine the maker. They should all be struck, the hearing was invalid, and the owners must make a new application based on stamped drawings. The owners countered that the Zoning Examiner accepted and relied on them for review and to determine the variances. They would be verified at the building permit stage.

HELD: While technically correct that there can be a benefit to plans certified as accurate, this evidentiary rule is not upheld as strictly in applications and administrative hearings. These hearings are not identical to those of a court. I held that I do not rely on the drawings, only on the requested variances. I agreed that evidence could illustrate how the Zoning Examiner determined the calculations of the variances. If strictly from the drawings, they may not be completely accurate. However, the risk in reliance upon incomplete or inaccurate drawings lies with the applicant, as a permit will not issue nor construction be permitted in such circumstances. If drawings are challenged, there is an onus on the accuser to demonstrate the inaccuracies.

TWELVE

Mr. Allen noticed during a break that the witness, still under cross examination, was texting. Communication such as this, he claimed, is a criminal offence. He asserted that he could bring a private criminal charge against the witness. This showed, he stated, a callous disregard for the court rules.

HELD: I cautioned the witness on any exchanges related to the matters on appeal during cross examination, but did not strike his factual testimony concerning prior COA decisions.

THIRTEEN

Mr. Allen then said that he would make a motion to the Superior Court to make the Zoning Examiner available for discovery and production. He suggested that there should be an adjournment for this, or for written discoveries. In the alternative, the parties could agree to mediation. The owners then refused to mediate, as prior discussions with the appellants had proven to be fruitless. They would proceed with the present application, and not make a new one.

HELD: It was agreed that the parties would jointly speak to the Examiner, with prior written questions. If the Examiner explains to my satisfaction how the variances were arrived at and computed, I will resume the hearing. Any party is, of course, at liberty to request a summons to compel the attendance of a witness believed to be necessary for the matter.

ADDITIONAL FINDINGS, REASONS

It was agreed at the time that there would be a teleconference on April 3, 2018 to update the parties and determine when and if the hearing would be resumed. Mr. Allen will not be available on that day but would arrange for a colleague to attend.

I have since reviewed and satisfied myself that the drawings challenged here appear in fact to be very commonly accepted in TLAB hearings. They usually form the basis for computation of the variances requested. I look forward to hearing of the results of the parties' discussions, and will hear further submissions on rejecting the drawings as evidence.

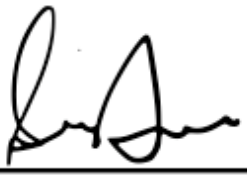
DECISION AND ORDER

1. This hearing will reconvene on **April 27, 2018**. The date of April 3 is vacated. If the TLAB finds that the drawings submitted to the Zoning Examiner do form a sufficient evidentiary basis for the requested variances, the hearing on the merits will continue on April 27.

2. If any party wishes to file new documents that they will rely on, they must be filed with TLAB **by Friday, April 20, 2018.** If any motions are requested, they must be

filed by **Friday, March 30, 2018** and will be determined in a written hearing form, following TLAB Rule 17.4 and Practice Direction 2.

However, no further adjournment of the hearing will be granted unless it is on the consent of all parties, or otherwise in accordance with the Rules.

X 

G. Burton

Panel Chair, Toronto Local Appeal Body