

DECISION AND ORDER

Decision Issue Date Monday, February 05, 2018

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

Appellant(s): HELEN GIONTSIS

Applicant: BRANDON KASHIN

Counsel or Agent: AMBER STEWART

Property Address/Description: 5 PINE CRES

Committee of Adjustment Case File Number: 17 107743 STE 32 MV

TLAB Case File Number: 17 183067 S45 32 TLAB

Hearing date: Thursday, January 25, 2018

DECISION DELIVERED BY T. Yao

INTRODUCTION

This decision deals with a motion brought at the commencement of the hearing on January 25, 2018 and is also a memorandum of mediation, also occurring on that day.

APPEARANCES

Ms. Giontsis (5 Pine Cres) was represented by Ms. Stewart, and Ms. and Mr. Aziz (7 Pine Cres) were represented by Mr. Lapointe. Also attending were Mr. Bundock, party, (18 Pine Cres); and Mr. Williams, participant, (3 Pine Cres). Professional witnesses were: Ms. Giontsis's planner, Mr. Cieciora, and the Azizes' geotechnical engineer, Mr. Fisher.

BACKGROUND

The Committee of Adjustment refused to grant Ms. Giontsis 20 minor variances for 5 Pine Cres. She appealed to the TLAB.

The property at 5 Pine Crescent is a ravine lot, wherein the lands below top-of-bank at the rear of the premises are subject to Toronto and Region Conservation Authority comment. The top-of-bank is used to measure lot area, and it and the floor space index (FSI) depend on the demarcation of the top-of-bank line.

There are three procedural orders leading up to today's events.

1. My order of September 20, 2017 required all persons to file documents by October, 2017 and that the hearing should proceed on November 7, 2017.
2. Member McPherson's first Order of October 20, 2017 acknowledged Ms. Stewart's request to hold November 7 for a hearing "while her client undertook the necessary actions to confirm the top-of-bank" with the TRCA. A telephone teleconference would be held October 31, 2017 to ascertain if this top-of-bank study was forthcoming in time for the parties to proceed on November 7, 2017.
3. On November 7, 2017, Ms. Stewart advised Member McPherson that because of further TRCA correspondence, "additional review was required" and she expected that the top-of-bank confirmation be completed in December, 2017. Member McPherson, with the consent of all parties, set January 25, 2018 for the hearing and ordered Ms. Giontsis to serve and file this study by December 29, 2017.

On Dec 19, 2017, McIntosh Perry produced the geotechnical report, "*Desktop Assessment for Existing Slope*" for Ms. Giontsis. Ms. Stewart served and filed it by December 29, 2017. As soon as she received the report, Ms. Stewart requested TRCA to comment. They did so, but not until January 18, 2018. Ms. Stewart requested that the City zoning plan examiner revise the City's zoning notice in accordance with the McIntosh Perry top-of-bank line and the City did so, but not until January 24, 2018. Both documents were immediately served and filed on opposing parties.

Mr. Lapointe's submissions

Mr. Lapointe received the zoning notice at 4:15 pm on January 24, 2018 (yesterday) while he was teaching architecture at Centennial College. After his class he went home, when he received a further email from Ms. Stewart at 8:15.

I then went to my office downtown spent the time to write this notice [of motion], tried to figure out what was different in the drawings, had no clue, once again we were provided with 12 hours overnight to review a new submission. The appellant says it hasn't changed. That is their word. Not our review. Sir if I may quote you? In your September 18 decision, you wrote:

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“Although the applicants/owners may be confident that the annotated list is an adequate substitute, the official zoning notice is a critical document for the person adjudicating the hearing, and it would be unproductive if this hearing were to go forward today, when one document has not been disclosed in a timely way.”

Sir, we are in the exact same position as at that previous hearing. We have been given information at the last second, and sir, the appellant just told us on September 18 at the first hearing, that they got information at the last second and gave it to us. I will show through cross examination they had a lot of time to provide information to the City for the initial PPR, sorry the zoning plan examination, as it is known now, and they delayed by ten days in the initial application.

We know that on October 15, or 25th, the TRCA magically appeared with a letter, at the last minute they received this letter, we, as applicants were ready to defend this, again we had to hold. On November 7, we were told again, “Oh no”; we had to wait. Here we are, one more time, and for the fourth time the applicant is providing information at the last minute. Sir, I suggest that the applicant is not ready to fight this case, they should prepare this information and when they’re ready they should apply to the TLAB and present their evidence.

Sir, I have further information. I have here the questions I am going to ask for one defendant. There is (sic) forty pages.

Mr. Lapointe went on to say that he was concerned that Ms. Stewart’s consolidation of documents would upset his numbering system. He went on to say:

Sir, the whole area is covered with man-made features. How has this line been established? We have our soils engineer here to provide evidence on this. The motion is that the evidence that has been provided, the soils report, the TRCA comments, they’re completely bogus.

Mr. Bundock’s submissions

Mr. Bundock supplemented Mr. Lapointe’s submissions; he said we should establish whether the soils report was done correctly before moving to the zoning plan examiner’s notice. “If incorrect, the hearing should be put on hold.” He also stated that he was honestly in doubt as to whether the plans would change because of the late examiner’ notice.

Ms. Stewart’s submissions

Ms. Stewart explained that TRCA’s position had been “no comment” during the course of this TLAB appeal but that on October 19, 2017, the day before the first McPherson motion, TRCA “were no longer satisfied, and they may want to have a second look”. TRCA now required confirmation of top-of-bank.

Ms. Stewart sent the McIntosh Perry study to the TRCA “right away” but TRCA did not comment by Dec 29, 2017 and in fact the comment was not sent out until January 17, 2018.

Ms. Stewart went on to say that the McIntosh Perry report substantially confirmed the line that had been used all along, but the table land was increased by 1.5 sq. m; in her words “essentially the same but a little bit better.” The TRCA comment of January 17, 2018, together with a new site plan containing a redrawn top-of-bank line as found by McIntosh Perry, was then submitted to the City for a fresh zoning plan review. The City depends on TRCA for informed comment and so the two steps had to be performed in sequence; in effect the process created a bottleneck at TRCA, which delayed comments from the zone examiner.

The previous zoning plan examiner, Greg Whitfield, was away on vacation. Ms. Stewart explained the urgency of the request, and the City assigned a second plan examiner, Tina Pusateri, to review the file. Ms. Stewart submits that the FSI has only decreased from .93 to .92.

MATTERS IN ISSUE

Should this hearing commence on January 25, 2018? If so, are there matters involving the management of the hearing that should be addressed?

ANALYSIS, FINDINGS, REASONS

This request boils down to this. In September, 2017, the plan examiner’s notice arrived a few days before the hearing. Mr. Bundock made a motion to adjourn because he had not had time to review it. It was granted. In January 2018, the City’s zoning notice arrived the day before the hearing. Mr. Lapointe brings a motion, and since I do not have a written copy, I characterize the relief as being for an order that Ms. Giontsis to go back to square one, on the grounds of late filing of documents. What is different?

The situation is not the same as in September. In September, I accepted Mr. Bundock’s submission that he needed time to prepare. I appreciate that he still says he needs time to prepare but this is Mr. Lapointe’s motion and plainly Mr. Lapointe is prepared and wishes to defend his position. So really, both sides wish to proceed.

I find that Ms. Stewart could not be responsible for an apparent change of position on the part of the TRCA and similarly for the necessity to send the proposal to a second zoning examination. Similarly, she could not be responsible for the lateness of Ms. Pusateri’s examination, which for obvious reasons was only finalized by heroic measures. I find Ms. Giontsis has obeyed the filing requirements of paragraph 2 of Member McPherson’s decision of November 7, 2017.

Mr. Lapointe’s request that Ms. Giontsis “come back when she is ready” is not tenable.

Accordingly, I decided the hearing should commence, as ordered by Member McPherson, and we turned to planning for the likelihood of a two or three-day hearing, as no one wished to commence on January 25, 2018 with the certainty of a long wait to the next hearing day. The parties asked me to ascertain the possibility of a three-day block of time. I found that May 22-24, 2018 period had no hearings assigned and there were members available and so reported to the parties.

The direction to attend a mediation session

I offered to conduct a mediation session using the remaining time that day and the parties agreed. The Rules state:

20.2 Where the Local Appeal Body is satisfied there is good reason to believe one or more of the issues in dispute may be resolved through Mediation the Local Appeal Body may direct the Parties, and such other Persons as the Local Appeal Body may direct, using Form 17, to attend non-binding Mediation. Mediation shall be confidential.

20.3 The Local Appeal Body shall set the location, date and time of any Mediation to be conducted and direct how notice of the Mediation will be given to the Parties.

I felt there was good reason to believe one or more issues could be resolved through mediation. Since I had the parties in front of me I did not send them a Form 17 but simply continued in the same room. I made it clear that once mediation commenced, that Rule 20.5 would prevent me from presiding over any hearing relating to those unresolved issues “unless all of the Parties consent and the Member agrees”.

We then considered the issue of a participant Brock Grant, (253 Glen Manor Rd East), who had elected participant status but was unable to attend because he was away on business. Through discussion amongst the parties, we decided that as a practical matter, important people not present had to be consulted before parties will assent to a settlement; for example, Ms. Giontsis had to consult Mr. Cormier; Mr. Williams had to consult his wife and so on.

Accordingly, a mediation was held pursuant to Rule 20.2. After the mediation, it appears one of three results is possible;

1. full settlement of the issues;
2. partial settlement; or
3. no settlement.

I decided that the next step should be a conference call to see which of the three results has occurred. The date of 12:00 noon, Friday, February 16, 2018 was chosen for this. If there is full settlement, the call will be converted to an electronic hearing and assuming there is sufficient evidence and I am satisfied that the settlement is in the public interest, an order will issue. If there is partial settlement and if it is reasonable to attempt to deal with the remaining unresolved issues in a one-day hearing, a date will be set before another member of the TLAB. There is available time on Friday, February 23. A fresh notice of hearing will be sent in that event. Finally, if there is no settlement,

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or if it looks like the scoped hearing will not be finished in a day then the hearing will take place sometime in the range of May 22-24 or later, again before another member.

In the interests of transparency, I wish to advise the parties that these dates, except for Feb 16, 2018 are not guaranteed. For Feb 23 and May 22-24, 2018, the TLAB has rooms available and there are members who are not conducting hearings those days. However, since this is a part time tribunal, it is not known whether any member is available until approached. This I am reluctant to ask staff to do, because both possible hearing dates are contingent. Furthermore, the May 22, 23, 24 dates have room availability, but are being held for possible motions and it may be necessary to find alternate days less convenient than a dedicated block of time. The TLAB will make its best efforts to accommodate any hearing day(s) in the spirit of Rule 2.2:

These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.”

DECISION AND ORDER

Mr. Lapointe’s motion is dismissed without prejudice to his raising concerns or disagreement with the demarcation of top-of-bank. The hearing of January 25, 2018 is adjourned sine die, to be spoken to at a conference call at 12:00 noon, Friday, February 16, 2018. A notice of this conference call will be sent to all parties.

X

Ted Yao

T. Yao
Chair, Toronto Local Appeal Body
Signed by: Ted Yao