

DECISION AND ORDER

Decision Issue Date Tuesday, May 22, 2018

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) Legal Representative: Barnet Kussner

Applicant: Homeland

Property Address/Description: 19 Talwood Ave

Committee of Adjustment Case File Number: 18 101584 NNY 25 MV (A0009/18NY)

TLAB Case File Number: 18 141303 S45 25 TLAB

Screening date: Tuesday, May 01, 2018

DECISION DELIVERED BY Ian James LORD

INTRODUCTION

This matter comes forward for an Adjudicative Screening under Rule 9.1 j) of the Rules of Practice and Procedure of the Toronto Local Appeal Body ('the TLAB').

I accepted the assignment, after consultation with the TLAB's external counsel, as the Appellants' legal representative is a former partner with the Firm I retired from, in January, 2014. The matter is principally administrative not involving or addressing matters in dispute as between any of the parties.

The TLAB Staff had declined to process the appeal for the multiple clients of Mr. Kussner for failure of each, individually, to complete Form 4 (the election for Party status) and pay the requisite individual appeal filing fee.

The effect of the refusal is to stay the issuance of a Notice of Hearing or, potentially, dismiss the appeal. Neither circumstance advances in a positive manner the dispute resolution process.

BACKGROUND

Form 4 of the TLAB provides that an individual declare their intention to be a Party (or Participant) to an appeal file, as well as their desire to appoint a Representative, where circumstances warrant. No provision is made on the Form (or its electronic counterpart, for expansion purposes), to allow for multiple persons seeking Party status to complete a single form, or for them to appoint a common representative.

Form 4 provides that: “Questions about this form can be directed to the Manager, Planning & Liaison, Court Services ... (address)”. This invitation was not pursued.

The TLAB Staff issued on May 1, 2018, a Notice of Non-compliance in respect of multiple persons filing a single Form (and Representative appointment) premised on one filing fee for the appeal noting that: ‘only one appellant may file an appeal’ at a time.

By correspondence dated May 2, 2018, Mr. Kussner responded to this ‘Notice’, with lengthy submissions.

MATTERS IN ISSUE

The question for resolution is whether Form 1, the Notice of Appeal, permits more than one person to group together or to shelter under a common Representative, on the payment of one appeal fee.

JURISDICTION

As a matter of administrative procedure, the TLAB is obliged to make Rules pursuant to the Statutory Powers Procedure Act within the context of OReg. 552/06.

The TLAB Rules, adopted May 3, 2017, provide for the Forms and for interpretive guidance and relief in circumstances that warrant such relief.

The Rules provide as follows (excerpted):

1. GENERAL

Definitions

1.2 In these Rules the following words or phrases have the following meaning:

“Appellant” means a Person who brings an Appeal;

“Form” means a Document required by the Local Appeal Body for the filing of certain Documents and available on the Local Appeal Body’s website;

“Party” means a Person who is a party under Rule 12;

“Person” includes a corporation, and the entities included within the meaning of a person in the Statutory Powers Procedure Act;

“Representative” means a Person who acts for a Party or Participant in a Proceeding and is authorized under the Law Society Act, or is otherwise authorized by law to represent a Party or Participant in a Proceeding;

2. APPLICATION OF THE RULES

Interpretation of these Rules

2.1 The Local Appeal Body is committed to fixed and definite Hearing dates. These Rules shall be interpreted in a manner which facilitates that objective.

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

2.3 The Local Appeal Body may exercise any of its powers under these Rules or applicable law, on its own initiative or at the request of any Person.

Matters Not Dealt With by the Rules

2.5 Where procedures are not provided for in these Rules the Local Appeal Body may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner.

2.6 The Local Appeal Body may issue Practice Directions from time to time which are posted on the Local Appeal Body’s Website.

2.7 These Rules shall be interpreted in a manner which facilitates the introduction and use of electronic filing and the use of digital communication and storage media.

2.8 Any amendment to these Rules comes into force upon its publication on the Local Appeal Body’s Website, unless the Local Appeal Body directs otherwise.

Compliance with the Rules

2.9 Substantial compliance with the requirements of these Rules is sufficient.

Relief and Exceptions to the Rules

2.10 The Local Appeal Body may grant all necessary exceptions to these Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost effective manner.

Failure to Comply With the Rules or Procedural Order

2.11 Where a Party or Participant to a Proceeding has not complied with a requirement of these Rules or a procedural order, the Local Appeal Body may:

a) grant all necessary relief, including amending or granting relief from any procedural order on such conditions as the Local Appeal Body considers appropriate;

d) refuse to grant the relief in part or whole.

3. FORMS, FORMAT, FILING, SERVICE AND DOCUMENTS

Forms

3.1 All Persons shall use and complete Local Appeal Body Forms, unless the Local Appeal Body directs otherwise. Where no Form is available or applicable for any contemplated communication, service, filing or other such action, the following must be included in the Document:

a) the name of all known Parties and Participants in the Proceeding;

b) the name of the Person filing the Document and if applicable, that Person's Representative;

c) the Email address, mailing address and telephone number of the Person filing the Document, and if applicable, the same information for the Person's Representative; and

d) the Case File number, if available.

Format of Documents

3.2 Every Document in a Proceeding, including visual evidence, shall be in electronic format, unless the Local Appeal Body directs otherwise. Acceptable electronic format includes Documents in PDF, unless the Local Appeal Body directs otherwise. Documents shall be in typed format, or, if hand-written, shall be legible.

9. ADJUDICATIVE SCREENING

Adjudicative Screening by Member

9.1 In the case of an Appeal under subsection 45(12) of the Planning Act the Local Appeal Body may propose to, or upon Motion, dismiss all or part of a Proceeding without a Hearing on the grounds that:

- 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;
- 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.

9.3 Where the Local Appeal Body proposes to dismiss all or part of an Appeal under Rule 9.1 or 9.2 it shall give Notice of Proposed Dismissal, using Form 16, in accordance with the Statutory Powers Procedure Act, and to such other Persons as the Local Appeal Body may direct.

9.4 A Person wishing to make written submissions on a proposed dismissal shall do so within 10 Days of receiving the Local Appeal Body's notice given under Rule 9.3.

9.5 Upon receiving written submissions, or, if no written submissions are received in accordance with Rule 9.4, the Local Appeal Body may dismiss the Appeal or make any other order.

9.6 Where the Local Appeal Body dismisses all or part of an Appeal, or is advised that an Appeal is withdrawn, any fee paid shall not be refunded.

EVIDENCE

In his correspondence, Mr. Kussner makes several assertions:

1. Adhering to the TLAB Staff direction: “Please name only one appellant and their email on form.”, requires ‘separate appeals and (to) pay separate appeal fees, or else name one specific individual to act as appellant on their behalf’;
2. There is no prior Ontario Municipal Board practice, statutory or regulatory support, ‘nor in the basic principles of procedural or substantive fairness at common law, which provides support for (the) TLAB’s administrative policy’;
3. As counsel, the retainer is for a number of individual persons who reside at multiple addresses. “They are not acting collectively as a group- rather, they are all acting as individual persons...They do not wish to have one named person acting for all of them...”.
4. The position of the TLAB ‘encourages a multiplicity of proceedings and amounts to the imposition of an unjustified financial burden ...(and) puts them to the unfair and unnecessary risk that if they select only one individual to be named as the appellant, (and) that person later decides to withdraw or settle his/her appeal contrary to the wishes of others of the group – thereby pulling the rug out from under their statutory rights of appeal.’
5. The appellants are distinct individuals: “All of whom wish to be named as an appellant and have the rights of an appellant.”
6. There is a “lack of any legitimate reason for the position which has been taken by (the) TLAB Staff.”

The request is made to reconsider the policy or for the right to appear before an adjudicator.

ANALYSIS, FINDINGS, REASONS

The appellants, at this early stage of the appeal proceeding, wish to appoint a common counsel to represent their interests. The right to the counsel of one’s choice is a fundamental and protected right.

**Decision of Toronto Local Appeal Body Panel Member: I. Lord
TLAB Case File Number: 18 141303 S45 25 TLAB**

I agree with Mr. Kussner that Form 1 has been set up to accommodate only one named appellant but I do not agree that this is simply a 'matter of convenience for the TLAB itself'. The TLAB Rules and associated Forms went through an extensive period of formulation, public exposure, deputations and revisions prior to their adoption and promulgation on May 3, 2017. Indeed, the TLAB has instituted and is in the midst of a comprehensive operational review of the Rules, Forms and Public Guide in an ongoing series of meetings posted on the TLAB website: www.toronto.ca/tlab.

The purpose of the Rules and the attendant Forms is to establish, under mandatory regulatory direction, appropriate processes for conducting administrative justice within the limited jurisdiction afforded the TLAB. This includes the protection of elective positions of persons wishing to contribute: that they may do so with equivalent status and with rights and privileges commensurate with their individual election of responsibilities.

In this case, the group Representative clearly asserts that desired status: "All of whom wish to be named as an appellant and have the rights of an appellant."

The conundrum is that the drafting of Form 1 and its literal application would require individual Forms and attendant filing fees from multiple persons all of whom wish to be represented by the same, in this case, counsel.

As drafted, the Form intends the extension to each person the right to appellant status and to independently pursue that status without compromise to or consistency with the decisions of others of like interest.

By completing Form 1 as a group of consensual appellants under one Representative, in this case counsel, I agree with Mr. Kussner on the one hand that independence of status is maintained; however, I disagree that the purpose of that independent status cannot be compromised by one or more individuals in the group doing the very type of things labeled as unfair and unnecessary by a requirement for individual appeals.

Namely, as a group, consensual representation can be compromised down the line by any one of a number of elections from members within the group. Some recognized by the correspondence filed include: an individuals' withdrawal or settlement; others include: the change or relinquishment of status under Rules 12.5 and 13.6; implications for Motions to challenge status; contrary positions on issues within the group; and the preparation and posting of disclosure and Witness Statements (and Participants Statements) under the Rules, for those persons intending to give evidence before the TLAB.

The drafting of the Rules and Forms, read as a whole, intends the protection of individual rights. The manner by which this is accomplished, in respect of Form 1, is challenged as being, at the outset, overly pedantic, prescriptive and unnecessarily constraining where individuals wish to pursue their individuality through common representation.

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I find that there is a service to the administration of the appeal proceeding whereby persons of common interest are prepared to agree on common representation. Not only does this Representative serve as the communication point for the appellant group within the context of service obligations (Parties or Participants) but also the conduct of a proceeding in terms of orchestrating filings, sequence and timing of witness efficiencies; these all benefit from the singularity of a Representative.

Indeed, the Rules etc., promote this efficiency in the administration of justice.

I find also that the matters, above listed, concerning consequences of changed positions within a group, if any, are matters for the Representative to address, in accordance with the Rules. In assuming responsibility for a group of persons wishing to retain independent appellant Party status, counsel or the Representative becomes the 'shepherd responsible for the flock', to apply an analogy.

Namely, that if matters of discord, settlement, status changes arise within the group, the counsel or Representative has the responsibility to address those matters in compliance with the Rules for so long as and until a member of the group is properly disassociated from the expressed position of individuals within the group. Where a member of the group holds a position contrary to another member, it becomes the responsibility of the counsel or the Representative to resolve the discrepancy in accord with the TLAB Rules and applicable rules of professional conduct.

As a necessary consequence, Form 1 should not act as an impediment to representative groupings or the ability of the TLAB to advance an appeal to resolution.

I agree with Mr. Kussner that Form 1 should be interpreted under application of Rules 2.5 and 2.10, to allow a series of persons to be identified as appellant Parties wherein the counsel or named Representative acts on their behalf as individuals.

I find that such representation role warrants an acknowledgement of the additional obligations of the counsel or Representative, being the additional burdens assumed, professional and administrative, in representing multiple Parties.

As so completed, substantive compliance under Rule 2.9 can be acknowledged.

It follows that appropriate revisions are required to Form 1 to permit its expansion to include particulars of a requested list of represented persons as appellants, and an acknowledgement by the Representative of the responsibility of that role as the remainder application of the Rules, Forms and Practice Directions envisage.

I can make these terms by invoking Rule 2.11 a).

As described, the Rules, Forms and Practice Directions are under review in an active program of meetings initiated by the TLAB. As well, in allowing time for that process to unfold, including delays in the technical coding revisions necessitated by changing a Form, adoption and promulgation of changes and associated delays, this

decision can serve as the vehicle to institute interim direction, change and revision, subject to the ultimate decision of the TLAB.

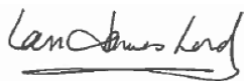
It is anticipated that the TLAB will be making formal changes to its processes and forms in order to accommodate multiple Party-appellants with a common Representative submitting one form and paying one fee.

In the circumstances, no dismissal is warranted under Rule 9.3 and the appeal can proceed.

DECISION AND ORDER

1. The Notice of Appeal, Form 1, Part 3 Page 2 filed by Weir Foulds, LLP is allowed, with multiple appellants.
2. The TLAB Staff shall process TLAB Case File 18 141303 S45 25 TLAB without the necessity of additional Forms or fee payment.
3. The Appellants' Legal Representative, Mr. Barnet Kussner, shall remain responsible for ensuring individual compliance with the Rules of the TLAB in respect of filings, changes to Party status and any other requirements of the Rules relevant to a client party.
4. The TLAB Staff shall prepare any requisite revisions to any Rule, Form Practice Direction and the Public Guide necessary to accommodate the relief granted herein for consideration in conjunction with the determination of the current Review of the Rules, Forms, Practice Directions and Public Guide.
5. The TLAB Staff shall post a Notice on the TLAB website that a Notice of Appeal may be made on behalf of one or more appellants where such Notice appoints a common Representative or counsel under one filing fee provided that the Representative or counsel is advised that he/she shall remain responsible for ensuring individual compliance with the Rules of the TLAB in respect of filings, changes to Party status and any other requirements of the Rules relevant to a client party.

X



Ian Lord
Panel Chair, Toronto Local Appeal Body
Signed by: Ian Lord