TORONTO

Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Thursday, July 12, 2018

PROCEEDING COMMENCED UNDER section 53, subsection 53(19), section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): CHARLOTTE SHEASBY-COLEMAN

Applicant: VICTOR HIPOLITO, EKP DESIGNS INC

Property Address/Description: 11 & 15 STANLEY AVE

Committee of Adjustment Case File Number: 17 267606 WET 06 CO, 17 267617 WET 06 MV, 17 267618 WET 06 MV, 17 251936 WET 06 CO, 17 251938 WET 06 MV, 17 251943 WET 06 MV

TLAB Case File Number: **18 135459 S53 06 TLAB, 18 135460 S45 06 TLAB, 18 135463 S45 06 TLAB, 18 126898 S53 06 TLAB**

Motion Hearing date: Friday, June 29, 2018

DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

Name	Role	Representative
Charlotte Sheasby-Coleman	Appellant	
Sara Beato and Jose Goncalves	Party	Russell Cheeseman
Giuseppina Deo	Party	Russell Cheeseman

INTRODUCTION AND BACKGROUND

Giueseppina Deo is the owner of 11 Stanley Avenue, while Sara Beato and Jose Goncalves are the owners of the 15 Stanley Avenue, both of which are adjacent properties in Ward 6 of the City of Toronto. Both the owners applied to the Committee of Adjustment (COA) to sever their respective properties into two lots and build houses on the created plots requiring multiple variances; in other words, there would be four

houses on four independent lots after the severnace instead of the existing two houses on two independent lots. The applications were both heard by the COA on 8 February, 2018. While the owners of 15 Stanley were represented by EKP Designs and the owners of 11 Stanley were represented by Victor Hippolitto. The COA approved the severance of both properties, as well as variances for the proposed houses to be built on the resulting severed lots.

On 6 March, 2018, Ms. Charlotte Sheasby-Coleman, resident of 9 Stanley Ave, appealed both decisions to the Toronto Local Appeal Body (TLAB). However, it is important to note that the appeal respecting 11 Stanley was restricted to the severance while the appeal respecting 15 Stanley included both the consent to sever and requested variances on the proposed buildings on the severed lots. Ms. Deo, Ms. Beato and Mr. Goncalves elected for Party Status and retained Mr. Russell Cheeseman, Barrister and Solicitor, to represent them.

TLAB scheduled the Appeal for 11 Stanley to be heard on 14 September, 2018 while 15 Stanley is to be heard on 4 September, 2018.

Ms. Sheasby-Coleman then introduced a Motion to be heard in person on 15 June 2018, which requested that the Appeals respecting 11 and 15 Stanley Ave be heard together and provided reasons for her rationale. In his Notice of Response dated 22 June, 2018, Mr. Cheeseman opposed the Motion and asked the hearings proceed separately as scheduled, and provided reasons for his opposition to the Motion. The matter needed to be resolved after evidence was heard in person.

MATTERS IN ISSUE

The only issue to be decided in this Motion is if the Appeals respecting 11 and 15 Stanley, presently scheduled to be heard on the 14th and 4th of September, 2018, can be heard together

JURISDICTION

1) Rules 12 of the Rules of the TLAB- Rights of Parties
2) Rule 13 of the Rules of the TLAB of the Rules -Rights of Participants.
3) Rule 17 of the TLAB- Motions
4) Rules 21 and 22 of the TLAB- Consolidation of Proceedings and Hearing Matters together

EVIDENCE

The Hearing to make a Decision on this Motion was heard in person on 29 June, 2018. Ms. Charlotte Sheasby-Coleman represented herself while the Respondents were represented by Mr. Russell Cheeseman.

Ms. Sheasby-Coleman commenced her remarks with a brief background and stated that she lived at 9 Stanley Ave., in a 102 year old house. She said that the neighbourhood had been considered for Heritage Status but had not been formally designated as a Heritage Site. She stated that the neighbours at 11 and 15 Stanley had written letters to support each other at the COA and had obtained approvals together. However, Ms. Sheasby-Coleman was appealing both decisions to the TLAB and wanted for the Appeals to be heard together.

Ms. Sheasby-Coleman pointed out that the Applicants have adjoining properties with “identical “severance applications and applied to the Committee of Adjustment at the same time and wrote letters of support for one another with almost identical language. When the Appeal was launched, the Applicants retained the same lawyer and the same planning expert and are relying on many of the same documents.

Ms. Sheasby-Coleman then pointed out that the Applicants are using the same lot study areas and photographs, and had substantial overlap in the evidence presented by the expert witness , which meant that it would “clearly be a duplication to hear them separately”.

Ms. Sheasby-Coleman asserted that the appellant and the witnesses for the Appellant (including those summoned) would be providing, for the most part, the same evidence for each of the Applicant properties. She then said that the success of one application would have the potential of establishing an unfortunate precedent in the neighbourhood for the success of the other appeal. It was therefore important that TLAB hear both Appeals together in order to appreciate the cumulative impact of the proposed severances.

Ms. Sheasby-Coleman asserted that there would be no prejudice to either Applicant by hearing the proceedings together as is clearly established in Section 22.3 of the TLAB *Rules and Procedures* which states, that:

a) statutory requirements for each Proceeding apply only to that particular Proceeding and not to the others;

b) Parties to the Hearing are Parties to their individual Proceedings only and not Parties to the other Proceedings; and

c) Unless otherwise ordered by the Local Appeal Body, evidence in the Hearing is only evidence in each Proceeding to which it could be apply.

Ms. Sheasby-Coleman then pointed out that hearing the Applications together would result in cost- effectiveness for TLAB, City staff (including witnesses), the Applicants and the Appellants. Ms. Sheasby-Coleman declared that she would have the Supervisor of Forestry Services would be subpoenaed. Lastly, she stated that convenience of the “unpaid” witnesses who must “turn their lives around to attend such hearings is clearly

important" as explained in the revised Public Guide (August 2017) where it says that "TLAB may set a specific time for participants as a matter of convenience to all present."

Lastly, Ms. Sheasby-Coleman reiterated her concern that if the two Appeals were heard separately, the approval of any case would create a "precedent" for the next. She stated that the sum of the parts is larger than the parts themselves, which meant that the impact would be better appreciated if the matters were heard together.

Mr. Cheeseman spoke next on behalf of the Respondents. He asked that the Motion be denied in its entirety, based on the Applications as well as case-law that he would speak to later in the hearing. Mr. Cheeseman pointed out that the only Parties to theTLAB Appeal respecting 15 Stanley Avenue are the Appellant, Ms. Charlotte Sheasby-Coleman and Ms. Giuseppina Deo, owner of 15 Stanley Avenue. That appeal concerned a Decision of the COA to permit a severance into two lots, which meant that the evidence would focus on Section 51(24) of the Planning Act. He also stated that the Applicant for 15 Stanley before the COA was EKP Design, of 537 Rogers Road.

However, in the case of TLAB Case File Numbers 18 135459 S53 06; 18 135460 S45 06; and, 18 135463 S45 06 respecting 11 Stanley Ave., the Parties were Ms. Sheasby-Coleman, Ms. Sara Beato and Mr. Jose Goncalves. That Appeal focused on the COA decision to permit the severance, as well as the variances for the houses to be constructed on the 2 severed lots which meant evidence would be provided on both Sections 51(24) and 45(1). Mr. Cheeseman further stated that Ms. Deo, the Respondent in the Appeal respecting 15 Stanley Ave. and Ms. Beato and Mr. Goncalves, the Responds in the Appeal respecting 11 Stanley Ave, had no interest in participating in each other's hearings. According to Mr. Cheeseman, both had the right to have the Appeals heard in an expedited and cost-effective fashion.

Mr. Cheeseman stated that the convenience of the Participants in the relief sought by the Appellant is not a matter to be considered in this matter, because Participants do not have the rights nor obligations of a Party, as set out in Rules 12 and 13 of the TLAB. According to Mr. Cheeseman, the Witness lists had not been exchanged and the Witness Statements are not available which meant that the inconvenience asserted was on behalf of unknown and unnamed people.

Mr. Cheeseman then said that "precedent" was a process that was not relevant here because each case was independent of the next, and the two appeals could result in mutually contrary results.

Mr. Cheeseman then provided case-law, and OMB decisions to substantiate his arguments. He began with the case of ***Activa Holding*****s *Inc.* (Activa Holdings Inc., Re, 2014 Carswell Ont. 1310, 82 O.M.B.R. 337)** where at Paragraph 20 of the decision, Member Rossi discusses the circumstances for consolidation and hearing matters together. The Board will:

" *consider a variety of factors beyond common facts, common issues and common [planning] law (that is, an explicit nexus) to assess whether consolidation of matters is appropriate. These include whether the matter makes efficient use of the Board's time, the prejudice that might result to any party, fairness to all parties, whether a decision in one matter might predetermine a subsequent matter before the Board, whether the act of consolidation might result in the possibility of inconsistent decisions and the capacity of the Board to deal with all of the issues comprehensively*".

While discussing the Activa Holdings decision, Mr. Cheeseman drew my attention to Paragraph 24 of the decision, where the Panel relied on ***Wells v. Ontario (Minister of Municipal Affairs & Housing)*** (2007 Carswell Ont 8349 (O.M.B.)), which in turn followed the reasoning of ***Durham (Region) Official Plan Amendment No. 60, Re (2001), 41 O.M.B.R. 495 (O.M.B.)***. These cases illustrated the Panels' conclusions that for cases to be heard together, it was important that policies to be considered were the same rather than the fact that the cases were being duplicated. The Panels also held that commonality of policies was more important than geographical proximity, which Mr. Cheeseman interpreted to mean that Appeals involving only a Consent couldn't be heard together with an Appeal where both consent and variances were being appealed, notwithstanding the cases involving adjacent properties.

Mr. Cheeseman then referred to the decision in **NRI industries Inc. (NRI Industries Inc. v. Toronto (City) Committee of Adjustment, 2005 Carswell Ont 6969, 51 O.M.B.R. 398)** where OMB Panel Members Granger and Lee had to rule on a Motion made by a Party for the Appeal arising from a COA decision. The Motion sought an order requiring these appeals to be heard consecutively by the same panel with the Portland phase of the City of Toronto New Official Plan Central Waterfront Secondary Plan, or in In the alternative, consolidate these two proceedings. However, the Panel held that the request had no merit because while the former case dealt merely with an Appeal arising from the COA decision, the latter had attracted "multiple Parties with objectives, both complex and simple". The Board had also stated, in Paragraph 9 of the decision, the requisite tests to determine if cases can be consolidated or heard consecutively "*commonality of issues, parties, and locations as well as the nature of proceedings before consolidation or consecutive hearings is ordered. Additionally, before allowing the order, the Board should be mindful of the expediency a consolidation order will render and the prejudice that may ensue".*

Mr. Cheeseman then stated that the issue of prejudice had to be taken into account, based on the reasoning of the Panel. He said that, analogous to the findings in NRI Industries Inc., the prejudice to the proponents outweighs prejudice to appellants. He reiterated that Party Goncalves had no interest in the case involving Guiseppina Deo, where both Consent and Variances were to be considered, and that there would be severe prejudice to Respondent Goncalves if the matters were heard together, including time, resources and Expert Witnesses.

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Lastly, Mr. Cheeseman drew my attention to the matter of **Sifton Properties Inc. (Sifton Properties Ltd. V. Brantford (City), 2011 Carswell Ont. 3257, 68 O.M.B.R. 493)** where consolidation was ordered by the OMB. Referring to Paragraph 11 of the decision, Member Conte stated that:

"*Consolidation order is a safety valve, not an engine. Generally speaking, hearings at the Board should remain nimble, manageable and small. A consolidation order will expand the scope of a hearing and enlarge the number of parties. It is to be eschewed until a valid case is made*".

Mr. Cheeseman pointed out that the decision in the Sifton case had followed the logic of the decisions in the NRI case, where the determinative factors to decide consolidation or hearing cases together had been spelt out explicitly.

Mr. Cheeseman stressed that there was no factual base that supported hearing the cases together, because of different issues, Parties and facts. The prejudice to Party Goncalves would be significant if the cases were to be heard together and this, in Mr. Cheeseman's opinion, outweighed every other factor.

Mr. Cheeseman then referred to what he saw as a "practical issue" based on TLAB practices, and how it could prejudice his clients. He pointed out that the TLAB assigns hearing dates one at one time, which meant that the consent could be done in one day while the other case with consent and variances, can take multiple days. In this situation, Mr. Cheeseman asserted, that his clients who had to only argue a consent would be prejudiced by the delay in the completion of their case, and obtaining a decision subsequently.

Lastly, Mr. Cheeseman stated that the Affidavit introduced by Ms. Sheasby-Coleman was "improper" because the Affidavit can't be sworn by the person arguing the case in person.

In her response, Ms. Sheasby-Coleman stated that she was not a lawyer, and had relied for advice on the lawyer in front of whom she swore her affidavit, who had not advised her of the restriction pointed out by Mr. Cheeseman. She said that in her point of view, Rule 22.3 of the TLAB Rules, as reproduced below, provided sufficient protection to all Parties where matters were heard together.

22.3 When two or more Proceedings are heard together but not consolidated:
a) statutory requirements for each Proceeding apply only to that particular Proceeding and not to the others;
b) Parties to the Hearing are Parties to their individual Proceedings only and not Parties to the other Proceedings; and
c) unless otherwise ordered by the Local Appeal Body, evidence in the Hearing is only evidence in each Proceeding to which it could apply

She said that reading the three clauses together demonstrated that the participation of Parties was restricted only to their matter, and would not be influenced by other matters. Ms. Sheasby-Coleman repeated that the Respondents had the same lawyer and Expert Planner, and would rely on the same arguments because the Zoning and Official Plan would apply to both sites in the same way. She said that the only other Witness, besides the neighbours, would be the Urban Forestry Supervisor who would be subpoenaed and that the major part of the evidence "would focus on the Consent to Sever***"*** She stated that the reason behind her restricting herself to appealing only the Consent to sever in one case was because of financial reasons. Ms. Sheasby-Coleman also pointed to Rule 22.4 where the TLAB had the ability to reverse the condition of "hearing cases together if if it determines that the Proceedings have become unduly complicated, delayed or repetitive or a Party is unduly prejudiced".

She pointed out that all the cases referred to by Mr. Cheeseman discussed consolidation, which wasn't an issue in front of the Panel. Ms. Sheasby-Coleman, stressed that she had referred only to hearing cases together, and not consolidation. She then interpreted the Panel's comment from the Sifton case about "consolidation being a safety-valve" to support her case for hearing cases together because different planners had looked at the two cases separately, and without reference to each other, resulting in their not taking into account, the combined impact of 2 applications on neighbouring properties. The same TLAB Panel Member hearing the cases together, in her opinion, was the very safety valve that the OMB Panel Members referred to, because it would allow them to see the whole picture and the combined impact of 2 applications on neighbouring properties.

Mr. Cheeseman then stated that while he did not have the right of reply, he wanted to speak to correct the record. He said that he wanted to demonstrate that the case-law referred to discussed hearing the cases together, in addition to consolidation. He then drew my attention to the case of **Activa Holdings**, where in Paragraph 1, the relief sought and addressed, includes "consolidation or hearing the cases together ". In the case of **NRI Holdings**, the relief requested, as discussed in Paragraph 5 of the Decision, is for the "Appeals to be heard consecutively by the same Panel, or consolidated". Lastly, in the **Sifton case**, Paragraph 8 discusses Section 57 of the OMB's Rules, which refers to "Combining or hearing the cases together".

I drew Mr. Cheeseman's attention to the case of **NRI holdings**, where the relief requested was for consolidation or hearing the cases consecutively, and asked what was meant by "hearing the cases consecutively" and whether this was the same as hearing the cases together. Mr. Cheeseman responded that hearing the cases together was to hear them in succession, and reiterated that "hearing the cases consecutively or consolidation " had to be interpreted in light of their common origin in Section 57 of the OMB Rules".

I thanked the Parties for giving evidence and stated that I would reserve my decision, and would provide it in a short period of time given the time sensitivity of the case.

ANALYSIS, FINDINGS, REASONS

Ms. Sheasby-Coleman's rationale for combining the hearings for 11 and 15 Stanley are grounded primarily, in the impact that the result of one hearing would have on the other if the two are heard separately, best encapsulated in her witness statement "The sum total of the two parts is larger than the original". The secondary reason, is the inconvenience caused to community members who, according to Ms. Sheasby-Coleman, feel strongly about both cases and want to participate in both cases, but are prevented from doing so as a result of multiple trips to TLAB on separate dates to provide the same evidence.

While I certainly appreciate the sense of inconvenience and hardship caused to the Participants for taking multiple days off work, Rules 12 and 13 of the TLAB's Rules specifically discusses the rights of Parties and Participants. It is evident that the Rules gave weight to the prejudice caused to Parties but not the Participants. While Ms. Sheasby Coleman has been careful to refer to "inconvenience" and not "prejudice", the fact remains that inconvenience speaks to a lower threshold than prejudice, and inconvenience to Participants does not have to be factored into decision making by the Panel.

On the matter of the decision of one Appeal influencing the neighbour, it is necessary to reiterate that notwithstanding a commonality of geography, decisions on properties in the same area can be different based on what evidence is introduced at the hearing and the intentions of Parties, where different in the two appeals. The simplest example of this is where the Parties agree to settle in one case, while the Parties involved in an identical case next door, can't settle and proceed to a contested proceeding. It is also important to point out that the cases don't constitute "precedent" in the sense of the legal doctrine of "*stare decisis*". Decisions of the COA, the former Ontario Municipal Board, and the TLAB may be informative, but not determinative, where the determination of one case chronologically precedes the latter.

Based on this reasoning, it is difficult to conclude that the result of one of the Appeals will influence the unannounced result of the other.

Before analyzing the cases discussed by Mr. Cheeseman, it is important to determine, if they are relevant, based exclusively on the nature of the relief requested. There is an explicit reference to requesting relief in the form of hearing cases together, both in the case of **Active Holdings** and **Sifton Properties**. The **NRI Holdings** case requests relief in the form of consolidation or "hearing the cases consecutively". While there is no direct reference to hearing the cases consecutively, the reference to Rule 57 of the OMB, which also considers hearing cases together, provides a demonstrable nexus between the NRI case and the matters to be determined by this panel.

The Respondents have utilized case law to set out precedent of what factors need to be considered, which includes commonality of planning issues to be canvassed and prejudice to Parties. The cases advance the perspective that cases ought to be heard together only if no Party asserts prejudice and the planning issues are similar. Even if one accepts Ms. Sheasby-Coleman's assertion that the major part of the evidence would focus on the severance, there is no denying that a substantial portion of evidence to be heard in the case of 15 Stanley, will focus on variances. There is no apples-to-apples comparison between a case restricted to a consent to sever a property, and another involving consent to sever the property as well as variances, because the latter involves Section 45(1) of the Act, in addition to Section 51(24), which is common to both cases.

Secondly, there is a well-articulated and reasoned assertion of prejudice by Party Goncalves, if the cases were heard together. Should the cases be heard together, the decision involving the property of Party Goncalves is bound to take longer, and could be unnecessarily influenced by the determination of the variance component respecting the next property. I agree with Mr. Cheeseman that possible prejudice to this Party outweighs the convenience of any other Party or Participants.

Given the above findings, I find that the tests prescribed in Activa and NRI strongly oppose the requested relief of hearing the cases together. The Appellant's reasons for request of relief based on collective impact and convenience, are either not supported in law, or are accorded lower weight by the Rules. Notwithstanding my empathy for Ms. Sheasby-Coleman and other Participants, I find that the reasoning provided by Respondents is stronger, as well as being supported by case-law.

I therefore conclude that it would be in the optimal interests of Parties to hear the cases separately. The requested relief to hear the cases together is therefore denied.

DECISION AND ORDER

1. The Motion to hear the Appeals respecting 11 and 15 Stanley together is refused.
2. The Hearing dates for 15 Stanley and 11 Stanley remain unchanged; they will commence on the 4th and 14th of September respectively.
3. No relief has been requested for other dates. Consecutively, no order is made with respect to other dates or obligations as listed in the Notice of Hearing; both dates and obligations remain unchanged.

So orders the Toronto Local Appeal Body

X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body