

DECISION AND ORDER

Decision Issue Date Friday, September 21, 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

Property Address/Description: 11 STANLEY AVE

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

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

Hearing date: Friday, September 14, 2018

DECISION DELIVERED BY T. YAO

APPEARANCES

Name	Role	Representative
Giuseppina Deo, Joe Deo	Party/Owner	Russell Cheeseman
Victor Hipolito	Expert Witness/Applicant	
Theodore Cieciora	Expert Witness	
Charlotte Sheasby-Coleman	Appellant	
Max Dida	Witness	
David Godley	Witness/Participant	
Michael Smith	Witness	
Nancy Ditchfield	Participant	

Name	Role	Representative
Ulrich Fekl	Participant	
Craig Goodman	Participant	
Marion Jenson	Participant	

INTRODUCTION

These are reasons relating to an interlocutory decision in which I permitted Craig Goodman to qualify himself to testify as an “opinion” witness as well as a “fact” witness. His opinion will be in the area of “*architecture, with a perspective on urban planning*”. I allowed Mr. Goodman to be so qualified, over the objection of Mr. Cheeseman, lawyer for Ms. Deo. Mr. Cheeseman requested that I provide written reasons for this ruling. His evidence is being given on a proposed severance and minor variances for the Deo lands at 11 Stanley Ave.

MATTERS IN ISSUE

There are two questions to decide:

1. Whether Mr. Goodman may testify without having previously filed an expert witness statement, as required by Rules 16.6 (deadline for filing 45 days after receipt of notice of Hearing] and 17.7 (content of Expert Witness Statement).
2. Whether Mr. Goodman can provide, in the words of form 6, “opinion evidence that is fair, objective and non-partisan”, given that he lives in close proximity to the subject property.

BACKGROUND

Charlotte Sheasby-Coleman lives at 9 Stanley Ave.; her neighbour to the south are Guiseppina and Joe Deo (11 Stanley Ave.) and the next house is owned by the Georgette Nunes (15 Stanley Ave.). Both owners successfully obtained permission to sever their lots into two from the Committee of Adjustment; the Nunes family on February 8, 2018 and the Deo family on March 8, 2018.

The adjacent Nunes property (15 Stanley Ave.) came on for TLAB hearing on September 4, 2018. Last March 2018, Ms. Sheasby-Coleman appealed the severance for 15 Stanley Ave, but not the minor variances. She explained that her failure to do so was an error on her part because she was unfamiliar with the procedure. She did appeal all three files (one consent for severance and two minor variance files) for the

subject Deo property, which had been approved by the Committee of Adjustment.

This application came on for a hearing on September 14, 2018. The Nunes decision was released minutes before this hearing commenced. Chair Lord refused the severance at 15 Stanley Ave, on the basis of the tree-related and environmental evidence adduced by Ms. Sheasby-Coleman and others.

Mr. Cheeseman asked to be able to file case law on the issue. For convenience, I allowed Mr. Goodman to testify and reserved the decision on whether he was qualified to give opinion evidence. On September 18, 2018, Mr. Cheeseman forwarded two cases to me with the following cover email:

Please find attached the two OMB cases to which I referred. The first is PL140319, concerning 82 Twenty Seventy Street. I have highlighted paragraphs 7 to 11 of Member Whitney-Carter's Decision, which I would like to bring to the attention of Mr. Yao.

The second case is PL140328, concerning 6 Shamrock Avenue. I have highlighted paragraphs 13 to 15 of Member Taylor's Decision, which I would like to bring to the attention of Mr. Yao.

Both cases speak to the principle that the hallmark of an expert is his or her independence from the outcome of the matter.

Our position is neither Mr. Godley nor Mr. Goodman should be qualified as experts in the within matters.

Thank you,

Russell D. Cheeseman

In the first case, Member Whitney-Carter refused to allow David Godley (a potential witness in this case) to testify as an opinion witness, saying it was not "appropriate". In the second, Member Taylor allowed Mr. Godley to testify, reserving on the issue of qualification. Although Member Taylor found Mr. Godley was not qualified, he did discuss his evidence and compared it with other qualified opinion witnesses, and in my view, in effect admitted Mr. Godley's evidence provisionally, but after doing so found it was of little weight.

ANALYSIS, FINDINGS, REASONS

I held a short hearing to determine Mr. Goodman's fitness to give opinion evidence. Mr. Goodman testified that he was an architect licensed to practice in Ontario, for some 30 years, had attended some twenty sessions of the Committee of Adjustment, sometimes on behalf of a client and sometimes just to observe. He was also cognizant of planning documents such as the Toronto Official Plan through continuing education and self-study. I found that an architect, whose job consists of

designing the physical form of buildings in compliance with the zoning by-law, is well situated to give possibly relevant evidence on the issues in this hearing.

TLAB Rules are modelled on the Rules of Civil Procedure. Please see Table 1 where the expert’s duty and the mandatory content of an expert reports to be placed before the TLAB are shown on the left and the corresponding Court rule is on the right.

Table 1.	
TLAB Rules 16.7 and 16.8	Civil Procedure Rule 4 Duty of Expert
<p>16.7 An expert engaged by or on behalf of a Party who is to provide opinion evidence in a Proceeding shall acknowledge his or her duties as an expert in writing by executing a Form 6. An expert witness’ duties include:</p> <p>a) providing opinion evidence that is fair, objective and non-partisan;</p> <p>b) providing opinion evidence that is related only to the matters that are within the expert’s area of expertise; and</p> <p>c) providing additional assistance to the Local Appeal Body as may reasonably be required to determine a matter in issue.</p> <p>16.8 The duties of an expert provided in Rule 16.7 prevail over any obligation owed by an expert to the Party on whose behalf he or she is engaged.</p>	<p>4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,</p> <p>(a) to provide opinion evidence that is fair, objective and non-partisan;</p> <p>(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and</p> <p>(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.</p> <p>Duty Prevails</p> <p>(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.</p>
TLAB Rule 16.9	Civil Procedure Rule 53 Experts’ Reports
<p>16.9 The witness statement of an expert shall include:</p> <p>a) the expert’s name, address and area of expertise;</p> <p>b) the expert’s qualifications, employment and educational experiences in his or her area of expertise;</p> <p>c) the instructions provided to the expert in relation to the Proceeding;</p>	<p>53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.</p> <p>(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:</p>

<p>d) the nature of the opinion being sought and, where there is a range of opinions given, a summary of the range and the reasons for the expert's opinion within that range; and</p> <p>e) the expert's reasons for his or her opinion, including a description of the factual assumptions, research and any Documents relied upon by the expert in forming his or her opinion.</p>	<ol style="list-style-type: none">1. The expert's name, address and area of expertise.2. The expert's qualifications and employment and educational experiences in his or her area of expertise.3. The instructions provided to the expert in relation to the proceeding.4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.6. The expert's reasons for his or her opinion, including,<ol style="list-style-type: none">i. a description of the factual assumptions on which the opinion is based,ii. a description of any research conducted by the expert that led him or her to form the opinion, andiii. a list of every document, if any, relied on by the expert in forming the opinion.7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.
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Both rules refer to "instructions" from a party, implying that the party always has control over the expert witness. This is not true for Mr. Goodman, who is a volunteer who happens to share Ms. Sheasby-Coleman's basic position. His failure to realize that he ought to have labelled his document "Expert's Witness Statement" and sought qualification as an opinion witness may be excused because he would have had to understand these rules of evidence, particularly expert versus lay evidence (which I will come back to later and will relabel opinion versus fact). It is not reasonable to expect every neighbour, even if they happen to be planners or architects, to understand the rules of evidence.

In this case, Mr. Goodman filed a letter dated March 7, 2018 to the Committee of Adjustment and a Participant's statement July 9, 2018. He identifies himself as a principal with CS & P Architects Inc. so except for his "educational experiences", the provisions of TLAB Rules 16.9 a and b are satisfied. Rule 16.9 c "the instructions provided to the expert in relation to the proceeding" does not apply since there was no contractual relation between Ms. Sheasby-Coleman and the witness Mr. Goodman; he learned of the issues through the mailed Committee of Adjustment hearing notices not

Ms. Sheasby-Coleman. Mr. Goodman has not hidden the fact of being a neighbour and Mr. Cheeseman did cross examine him on that issue and is free to argue weight. This is different from disallowing the evidence at the outset.

So, in the end, the elements of an expert witness statement are present except for the “educational experiences”, but this can be inferred from his being a licensed architect. So, I find that his Participant’s Statement Form 13 is equivalent to an Expert’s Witness Statement Form 14 and there has been substantial compliance with Rule 16.7 requiring Acknowledgment of Expert’s Duties. Under TLAB Rule 2.9 and s. 28 of the *Statutory Powers Procedure Act*, substantial compliance with a rule is sufficient.

Opinion (i.e. expert) vs fact evidence

I now turn to the second aspect of the decision, whether Mr. Goodman should be disqualified because he lives near the subject premises and therefore should be deemed to be unable to certify that his evidence is “fair, objective and non-partisan”. Mr. Goodman was cross-examined on this issue and he stated that in his practice, there is always a second client in the room, that is, “the neighbourhood”. This is similar to the “public interest” in para 2 of the Ontario Professional Planners Institute Rules of Professional Conduct.¹

Planning evidence, unlike more scientific evidence, does not fit easily into the model of fact versus opinion or expert evidence. According to an online legal dictionary²:

What is Expert Evidence?

Testimony related to a professional or scientific subject. It is based on training and experience in a subject area. The expert must give their opinion to aid the court in a decision or judgement. They are questioned before being allowed to testify.

Planning documents are intended to be read and acted on by members of the broad public and is therefore couched in everyday language. For example, development criteria in Neighbourhoods (a policy that is frequently a test in many TLAB applications) states:

¹ 1.0 The Planner's Responsibility to **the Public Interest**

Members have a primary responsibility to define and serve **the interests of the public**. This requires the use of theories and techniques of planning that inform and structure debate, facilitate communication, and foster understanding. Accordingly, a Member shall:

1.1 practice in a manner that respects the diversity, needs, values and aspirations of the public and encourages discussion on these matters; . . . 1.3 acknowledge the inter-related nature of planning decisions and their consequences for individuals, the natural and built environment, **and the broader public interest**; (my bold)

² <https://thelawdictionary.org/expert-evidence/> title="EXPERT EVIDENCE">EXPERT EVIDENCE

5. Development in established Neighbourhoods will respect and reinforce the existing physical character of the neighbourhood, including in particular: . . . b) size and configuration of lots; c) heights, massing, scale and dwelling type of nearby residential properties;

Thus, for the TLAB, “fact” and “opinion” overlap, particularly when interpreting non-technical words such as “respect”, “reinforce”, and “configuration of lots”.

Furthermore, the TLAB is a specialized tribunal without much need to be “aided” in the same way as other tribunals which must resolve issues of a more scientific or technical nature. In my view, if a person states, like Mr. Goodman did, that he intends to offer evidence that is fair, objective and non-partisan, then this should be taken at face value, just like a witness who swears to tell the truth, the whole truth and nothing but the truth. Any frailty of his evidence arising from the fact that he lives in the same neighbourhood can be tested in cross examination.

DECISION

I find that Mr. Goodman is qualified to give opinion evidence on architecture with a perspective on urban planning.

X



Ted Yao
Panel Chair, Toronto Local Appeal Body
Signed by: Ted Yao