Toronto Local Appeal Body

40 Orchard View Blvd, Suite 253
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: **November 2, 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): HAMED ISMAILZADEH

Applicant: GLENN RUBINOFF DESIGN GROUP

Property Address/Description: 80 THIRTY NINTH ST

Committee of Adjustment Case File Number: 17 228728 WET 06 CO (B0079/17EYK), 17 228734 WET 06 MV (A0789/17EYK), 17 228731 WET 06 MV (A0790/17EYK)

TLAB Case File Number: 18 152342 S53 06 TLAB, 18 152353 S45 06 TLAB, 18 152350 S45 06 TLAB

Motion Hearing date: Thursday, October 18, 2018

DECISION DELIVERED BY S. MAKUCH

INTRODUCTION

This is a motion by the applicant in the above matter for permission to bring additional evidence through a new expert witness, namely an arborist, after the commencement of the hearing and after the applicant's sole witness had completed his evidence-in-chief and cross examination of him had commenced. The new evidence is with respect to the impact of the proposed development on a City owned tree.

BACKGROUND

After the completion of the evidence-in chief and during cross examination of the applicant's only witness, a land use planner, the hearing was adjourned, due to a lack of sufficient time, for almost three months so that two additional days could be scheduled for its completion. The issue of the impact of the proposed development on a City owned tree was raised and addressed by the planner in his evidence. Nevertheless, the applicant's solicitor during the adjournment seeks permission to call further evidence respecting that issue through an arborist for whom no notice had been given, and for whom no witness statement or document disclosure had been filed in accordance with the TLAB Rules.

MATTERS IN ISSUE

The only matter in issue is whether permission should be given for a new additional expert witness to file a witness statement and an additional document disclosure and to give evidence at this stage of the hearing.

JURISDICTION

TLAB has jurisdiction under its Rules of Practice and Procedure to determine the conduct of hearings in accordance with its Rules and to interpret the Rules "to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits."

EVIDENCE

It is clear that the issue of the impact of the development on the City owned trees was an issue: before the Committee of Adjustment; in the participant statements, expert witness statement, and disclosure documents; and indeed in the evidence of the planner. The applicant, however, filed no notice of an arborist witness and no witness statement by such a witness and disclosed no documents to be relied upon respecting the issue in spite of it being an obvious and important issue prior to the commencement of the proceedings before the Committee of Adjustment. It was only after commencement of the hearing before me and after completion of the planner's evidence that the applicant decided that such evidence should be provided.

The Rules prohibit the bringing of a motion less than thirty days before a hearing (Rule 17.1), and require witness statements to be filed no later than forty-five days after the notice of hearing (Rule 16.6). The motion is thus fifty-eight days late and the filing of the witness statement is one hundred and forty-six days late. ‘

ANALYSIS, FINDINGS, REASONS

The City and participants oppose the motion on the grounds that the Rules would not be adhered to if the motion were granted and that they should be strictly followed, especially since the applicant was well aware of the issue at and even prior to the Committee of Adjustment hearing. It is argued, in particular by the City, that granting the relief sought would: change the structure of the hearing and be prejudicial to the parties in opposition; be contrary to the rules of natural justice; and jeopardize the completion of the hearing in the two remaining days allocated for it. The City also argued that the applicant had ample opportunity to file the required notice and the motion was simply to allow the applicant to buttress the evidence of the planner. The applicant's solicitor, on the other hand, argued that there is no prejudice to the parties as they would be allowed to file statements and documents and call evidence in reply. Moreover he argued that the hearing can still be completed in the allotted time as the new evidence will be brief and that it is because of a change in the City's position regarding this issue that there is a need for additional evidence.

In my opinion, the motion should be granted.

There is no doubt that: the Rules specifically prohibit what the applicant proposes: the applicant knew of the tree issue and should have addressed it in disclosure documents and witness statements prior to the commencement of the hearing; there was no significant change in the City's position regarding the issue so as to justify new evidence; there is a concern that the applicant's conduct is unreasonable in attempting to buttress his case with new evidence after his case was completed.

I, nevertheless, find the motion should be granted for the reasons which follow.

This is a quasi-judicial hearing which does not require strict adherence to the Rules. Indeed, as noted above, Rule 2.2 states that the Rules are to be interpreted liberally to secure the just determination of a proceeding on its merits. In this proceeding a determination on the merits could be enhanced by allowing all relevant evidence to be heard, including the new evidence proposed by the applicant at this late time in the proceedings. Moreover, in my view, it would be just to allow such evidence provided the opposing parties have an opportunity to review the evidence and respond to it. The purpose of the Rules regarding disclosure is to ensure there is no "ambush" at a hearing; that is there should be no surprise evidence which an opposing party does not have an appropriate opportunity to respond to. Allowing the evidence in this case will not result in an "ambush" if the opposing parties have an opportunity to review it and respond to it fully. Under such circumstances no one will be prejudiced by the granting of the motion.

DECISION AND ORDER

The motion is granted. An expert witness statement and document disclosure may be filed on behalf of the applicant respecting the issue of the impact of the proposed development on City owned trees no later than five days after the date this decision is issued. Reply witness statements and reply document disclosure may be filed by the City and participants no later than seven days after the applicant's filings and any responding witness statements and document disclosure may be filed by the applicant no later than three days after the filings of the City and the participants.

The applicant's arborist may give evidence-in-chief and be cross-examined after the cross examination of the applicant's planner is completed.

X 

S. Makuch
Panel Chair, Toronto Local Appeal