TORONTO

Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Tuesday, January 29, 2019

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

Appellant(s): Herminio Oliveira

Applicant: Michael Manett

Property Address/Description: 10 Academy Rd

Committee of Adjustment Case File Number: 18 102888 WET 11 CO (B0004/18EYK), 18 102894 WET 11 MV (A0029/18EYK), 18 102900 WET 11 MV (A0028/18EYK)

TLAB Case File Number: 18 249773 S53 11 TLAB, 18 249774 S45 11 TLAB, 18 249775 S45 11 TLAB

Written Motion Hearing date: Thursday, January 24, 2019

DECISION DELIVERED BY S. Gopikrishna

INTRODUCTION AND BACKGROUND

Daniel and Hermenie Oliviera are the owners of 10 Academy Road, located in the former City of Etobicoke, now part of the City of Toronto. They applied to the Committee of Adjustment (COA) to sever the property at 10 Academy Road into two lots, as well as variances to construct a new detached dwelling with an integral garage and a deck in the rear yard, on each of the severed lots. On 10 October, 2018, the COA heard the application and refused the application in its entirety. On 31 October, 2018, the Applicants appealed for relief to the Toronto Local Appeal Body (TLAB). It is important to note that the City of Toronto did not elect for Party status until the deadline for becoming a Party had passed.

On 2 January, 2019, the City of Toronto (City) brought forward a Motion requesting relief from the Rules enabling it to become a Party to the Appeal respecting 10 Academy Road, as well as an opportunity to file Witness Statements.

A Response was filed by Counsel for the Appellants, Mr. Phil Pothen on 11 January, 2019, and the City filed its Reply to the Response to the Appellants' Response on 18 January, 2019. The details of the Response and Reply to the Response appear in the Evidence Section of this Decision.

MATTERS IN ISSUE

The Matters to be decided by way of this Motion heard in writing are the following:
a. If the City should be granted Party Status to the TLAB Appeal for 10 Academy Road;
b. If the City is to be granted the opportunity to submit Document Disclosure and an Expert Witness Statement by February 1, 2018 or such later date that the TLAB deems appropriate; and
c. If an opportunity should be granted to any other party to reply to the City's Document Disclosure and Expert Witness Statement on such time that the TLAB deems appropriate

It may be noted that Components (b) and (c) are extensions of Component (a) of the Motion i.e. should (a) be granted, (b) and (c) would also have to be granted in the interests of procedural completeness and principles of natural justice.

JURISDICTION

The TLAB's Rules of Process and Procedure (the "Rules") provide jurisdiction to be relied upon to rule on the Motion before the TLAB. The City specifically invokes Rules 17.4, 24.1 and 24.6 in its submissions.

EVIDENCE

The Motion put forward by the City on 2 January, 2019, consists of the Notice of Motion accompanied by an affidavit, signed by Nathanial Muscat, a solicitor with the City's legal department. The Motion submission includes a completed Form 4 (Intention to be a Party or Participant), followed by a chronological explanation for the City's seeking Party status after the deadline for filing of documents.

After listing the Relief sought, as recited earlier in this Decision, the Affidavit requests that the Motion be heard in writing, before describing the chronological history of the application culminating in the Appeal to the TLAB. It acknowledges that the City's missing the deadline to elect for Party status on 12 December, 2018 as well as the deadline to provide an Expert Witness Statement by 27 December, 2018, and provides the following reasoning:

At the time of the Applicants filing an Appeal, the City Solicitor had not received instructions from the City regarding this Appeal. The Affidavit stated that Councilor Frances Nunziata, the local Municipal Councilor, indicated to the City Legal Department that she would ask the City of Toronto Council to formally direct the City's legal department to support the COA decision and oppose the Appeal before the TLAB. The City's legal department determined that the earliest date on which a Motion could be brought forward, enabling the City Council to formally take a position on this Appeal, would be the meeting scheduled for 30 January, 2019, which seems to be the basis for the City's stating that it can file its submissions on 1 February, 2019. The submission recognized that the Appellant and the other parties require time, as well as be given an opportunity, to respond to the City's filings and Expert Witness statement. The City stated explicitly in the Motion that it would not prevent, nor object to any party from filing further and complete disclosure or witness statements, and would consent to any changes other Parties may make to their documentary evidence and witness statements.

The affidavit argued that the timelines for the filing of the City's documentary evidence, Expert Witness statement and a reply to its Witness Statements by other parties and participants would still give parties sufficient time to prepare for the hearing. The City's stated position was that should the Motion be granted, there would be no change required to the hearing date fixed by the TLAB, which would enable the TLAB to adjudicate the planning issues in a just, expeditious and cost effective manner- in other words, while other deadlines may be established with respect to submissions of Responses by the Appellants, the final hearing date would remain unchanged. Further, the City stated that it would consent to any reasonable adjustments in disclosure deadlines , as well as adjournment of the hearing date in order to accommodate the other Parties or Participants to the hearing, notwithstanding the aforementioned conclusion about there being no required change to the hearing date.

The submission also stated that the City "*has a genuine and valid interest in participating in the appeals of planning applications and the City would make a relevant contribution to the TLAB's understanding of the issues in this proceeding*"., and asserted that " *The harm to the City if prohibited from participating in the hearing of this matter far outweighs the inconvenience to the applicant resulting from the City's late involvement*".

In their Response to the Motion dated 11 January, 2019, the Appellant opposed the granting of the relief requested by the City. Their submission stated that the City did not provide any specific justification for a significant departure from the prescribed timeline, and the "specifics of this case" meant that granting the City of Toronto Party Status, permitting Document Disclosure, or allowing the City to file an Expert Witness Statement, after the deadlines, would result in prejudice to the Appellant, especially if there would be an adjournment to a later date.

The Appellant further pointed out that that the Moving Party had not been formally instructed by the City to attend the hearing, and that there was no justification for this failure. The Appellants asserted that an inexperienced Party, or a Party with limited means, may not be aware of their obligations, and therefore request for relief from submission deadlines. However, according to the Appellants, the City of Toronto is the “antithesis” of an inexperienced Party, and therefore should not be granted relief.

On the issue of the chronology pertaining to the Motion, the Appellant pointed out that the City Council met on 4 December, 2018, and did not use the opportunity to consider the Appeal, and issue instructions, as needed. They argued that Councilor Nunziata’s continuance as the local councilor, before and after the Municipal Election held in October 2018, should have facilitated the City’s taking a position earlier in the Appeal process.

Pointing out that the Appellant is a private individual who are “paying the costs from their pocket”, the Response discussed the prejudice to the Appellant if the Appeal is allowed. They stated out that their counsel, Mr. Pothen would be out of the country for two weeks beginning Saturday, February 2, 2019, and could not participate in responding to submissions from the City, if the Motion were granted. Mr. Pothen also alluded to the cost of responding to extra submissions, and additional carrying costs, and a reduction of the likelihood that construction will get under way during the 2019 construction season, if the Motion were approved.

Lastly, Mr. Pothen stated that “*the relationship between the City of Toronto and the TLAB gives rise to a potential for the reasonable apprehension of bias which ought to be considering* (sic*) in evaluating the Moving Party’s motion*”

In their Reply to the Response submitted on 18 Jan, 2019, the City pointed out that the appellant’s Response to the City’s Notice of Motion focused on:

a. the belief that the City Solicitor should have received instructions earlier; and,

b. that the relationship between the Toronto Local Appeal Body (the "**TLAB**") and the City gives rise to a potential for the reasonable apprehension of bias.

After pointing out that the City Solicitor had no control over when instructions are received, the City argued that the Appellants’ assertion that the City Council could have considered the matter at their meeting on December 4, 2018, is incorrect, for the following reasons, as recited from the City’s submission:

- Neither the City nor the City Solicitor can engage in matters without City Council authorization, unless it is to preserve City Council’s statutory right of appeal before it expires. The Notice of Hearing is not a statutory right of appeal or a statutory document, therefore the City Solicitor has no inherent authority,

delegated or otherwise, to engage in litigation matters without City Council direction

- City Council's first meeting on December 4, 2018 was limited to conducting ceremonial business and electing a Speaker and Deputy Speaker. No other business was considered.
- Unlike private parties, City Council is not readily available to provide instructions at its leisure
- The fact that the Councilor remained the same for the applicable Ward was not confirmed until the meeting of City Council on December 4, 2018 and occurred after the Notice of Intention to be a Party was due. In any event, this is not a relevant consideration in the discussion of Council instructions.

The City's Reply then discussed the impact of granting the City Party status on the hearing scheduled for March 28 and March 29, 2019, if the Motion were granted, and pointed out that the City was committed to filing its documents on 1 Feb, 2019, "close to 2 months", before the hearing. They also reiterated that "*Should the Appellant require more time, the City will not oppose any request for an adjournment.*"

After conjecturing that the "Appellant could have made an informed guess about the City's position given the reports filed by Planning Division in 2018.", the City's Reply asserted that there would be no prejudice caused to the Appellant if the City were granted Party Status. The City reiterated its willingness to let the Appellant make submissions after reviewing its submission, which would "permit the Appellant an opportunity to rectify any necessary response required to the City's materials".

The City then invoked Rule 12.4 of the Rules and stated that it satisfied the requirements set there in to become a Party. The Rule, as recited in the submission reads:

In deciding whether a Person's status as a Party to a proceeding should be denied, at any time, the Local Appeal Body may consider, among other things:
a) Whether the Person's interests may be directly or substantially affected by the Proceeding or the result;
b) Whether the Person has a genuine interest, whether public or private, in the subject matter of the Proceeding; and
c) Whether the Person is likely to make a relevant contribution to the Local Appeal Body's understanding of the issues in the Proceeding.

On the issue of prejudice to the Appellant, the City argued that the costs alluded to by the Appellants were incurred before the City's intervention, because it had already retained counsel, and an expert witness before filing submissions. On the matter of Counsel for the Appellant not being able to review material for 2 weeks, the City argued that there still would be ample time to review the material, and that the Witness could assist Counsel during this period to review submissions.

The City responded to the “construction delay” concern by stating that the Appellant were making a number of assumptions including::
a. the TLAB would render a decision instantly;
b. the proposed development would be approved;
c. the Appellant will have satisfied any and all conditions that the TLAB may impose;
d. all documentation will be properly prepared and a building permit issued.

The City finally stated its Motion was unrelated to any effect on the likelihood that construction would begin during the "2019 constructions season", because “Requests for Party Status at the TLAB are not judged against presumptuous construction timelines”.

Lastly, the City’s Reply addresses the Appellant’s concerns of possible bias between the TLAB and the City.The City’s submission referred to Section 115 of the *City of Toronto Act, 2006*, in which the Province provided authority to the City of Toronto to constitute an appeal body for land use planning matters.

The City then submitted that the TLAB was an “independent quasi-judicial tribuna”l that provided an independent public forum for the adjudication of land-use disputes under the above listed jurisdiction. They alleged that the inference that there is a “potential for the reasonable apprehension of bias” attacked the very legislative provisions that enable the TLAB to exist, and stated that the allegation also challenged the Province’s wisdom in enacting legislative provisions that provide authority to the City, and other municipalities to create appeal bodies such as the TLAB.

Lastly, the City’s submissions advised the Appellant that if “they feel so strongly about this alleged potential for a reasonable apprehension of bias”, the appropriate venue to challenge "the relationship between the City of Toronto and the TLAB, would be the Superior Court of Justice”, and not the TLAB. Their submission also pointed out to the Appellants that it they chose to pursue such a claim, this matter could be adjourned *sine die* until the court made a determination on the matter.

ANALYSIS, FINDINGS, REASONS

The principal issue before the TLAB is the granting of Party status to the City notwithstanding the latter missing the deadlines for election as a Party, and the filing of documents. As stated in the “Matters in Issue” section, granting the City Party Status would have to be followed by granting them the right to make submissions as a logical extension to its being granted Party status.

The following issues may be taken into consideration for decision making purposes on the Motion, based on the submissions made by Parties:

1) The reason for seeking status after the deadlines elapsed

2) The balance of prejudice if the Motion were granted
3) The apprehension of bias if the Motion were granted because of any relationship, real, perceived, or assumed, between the TLAB and the City.

The City Solicitors office explained how they could not appeal the Decision pending instruction by the City Council, at some length, and that the instruction was provided only after the deadlines had elapsed. The process for the City's taking a position was elucidated, from which it was evident that the City could take a formal position only after the Council meets at the end of January, 2019. While the Appellant asserted that the City could have taken a position at its meeting of 4 December, 2018, because of the incumbency of the local Municipal Councilor., I am satisfied by the City's response regarding the ceremonial nature of the meeting convened for 4 December, 2018, and that there was a need to formally confirm ward boundaries (to confirm who the councilor was), before a position could be taken on the Appeal.

. The prejudice cited by the Appellant is related to costs, or reviewing submissions by the City, if the Motion were granted- this issue is no different from the issues faced by any Party making submissions in a contested, multi-Party hearing. While the Counsel may not be present to review the City's submissions for 2 weeks, they may be given extra time to respond to the City, a scenario that the City is agreeable to. Given these reasons, the "prejudice" asserted by the Appellants seems to be closer to inconvenience, rather than real prejudice. The apprehension about a delayed construction season rest on several factors, not the least of which is the assumption of an approval by the TLAB; such speculation is assigned no weight. The reasoning behind prophesizing the result of the Appeal is not clearly explained by the Appellant.

While the City could have better explained its interpretation of the" Public Interest" and how this intersects with the conditions set forth in Section 12.4 of the Rules in more detail, a reading of the latter helps one understand how the City satisfies all the criteria set forth, in the literal sense of the words. If the Motion were granted, the City would be able to inform the process through Expert Witness testimony, and ensure that public interest issues were expressed and safe guarded, from the City's perspective. It is important to recognize the City, or other levels of Government, have been found by the courts to be better positioned to protect the public interest than a private party. While the arguments provided by the City don't establish a straightforward nexus between its "interest" and the Appeal, it stands to reason to conclude that the statutory powers on appeal are vested, in the first instance, in the City and that the Councilors position was informed, and influenced by the neighbours residing in the vicinity of the subject property, who claim to be be impacted significantly by the Applications. I am in agreement with the City's position that approving their Motion upholds the public interest, as opposed to denial of the Motion based on inconvenience to the Appellant.

Lastly, it is important to address the novel stance taken by Mr. Pothen about there being possible bias as a result of the relationship between the TLAB and the City. There is no explanation, nor foundation what-so- ever of what this alleged relationship is, or its substance, nor is there any rationale concerning how allowing this Motion is a manifestation of bias. .

I agree with the City that this unsubstantiated submission is not consistent with the spirit of Section 115 of the City of Toronto Act, 2006, because the submissions suggests that a tribunal created by the City would not have the ability, sagacity or honesty to shield itself, or be shielded from favouritism towards the City of Toronto. The suggestion seems to ignore the degrees of separation between the tribunal and the City, and does not provide any justification capable of consideration.

Consequently, no weight is accorded to the allegation of bias.

It behooves all Parties appearing before the TLAB, including on these specific Appeals, to conduct themselves with decorum, ensure that their comments are made responsibly, and don't unnecessarily undermine public confidence in the administration of justice.

In closing, I think it important to draw attention to how the submissions of both Parties seem to draw on conjecture- the Appellant describes, without any basis, what they consider to be an unsophisticated Party before concluding that the City does not fit the profile. The City's submissions seem to question why the Appellants couldn't deduce the City's concern, or predict it's taking a position in opposing the Appeal, from the contents of various City authored reports submitted to the COA. These conjectures are but conjectures, and are given no weight.

Based on the above, the Motion requesting Party status by the City is allowed, and the following deadlines are set forth:

- The City is given Party status with reference to the Appeal respecting 10 Academy Road, and may make submissions, including a Witness Statement on document disclosure and Witness Statement on 6 February, 2019.
- The Appellants may make any submissions in response by the 28th of February, which should give counsel and the Party adequate time to analyze and respond to the City's submissions , even taking into account the former's two week absence.
- The Hearing Dates as set in the Notice of Hearing remain as no specific relief was requested by either Party; this step also responds to the Appellants' allegation that an adjournment would prejudice its case.

DECISION AND ORDER

1. The Motion requesting Party status with reference to the Appeals 10 Academy Road, and may make submissions, including document disclosure and Witness Statement obligations, on or before 6 February, 2019
2. The Appellants may make any submissions thereto by the 28th of February,2019, which should give counsel and the Party to analyze, and respond to the City's submissions how they could not appeal the Decision pending instruction by the City Council..
3. The Hearing Dates of March 28, 2019 and March 29, 2019, as set in the Notice of Hearing, remain unchanged.

So orders the Toronto Local Appeal Body

X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body