

## DECISION AND ORDER

**Decision Issue Date**      Tuesday, April 23, 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): ROBERT THOMPSON

Applicant: AMBIENT DESIGN LTD

Property Address/Description: 10 LAKE PROMENADE

Committee of Adjustment Case File: 17 169514 WET 06 CO, 17 169522 WET 06 MV,  
17 169523 WET 06 MV

**TLAB Case File Number: 18 120054 S53 06 TLAB, 18 120065 S45 06 TLAB, 18 120066 S45 06 TLAB**

**Motion Hearing date:**      Friday January 17, 2019

**DECISION DELIVERED BY S. MAKUCH**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
ROBERT THOMPSON	OWNER	
AMBIENT DESIGN LTD	APPLICANT	
ROBERT THOMPSON	APPELLANT	RUSSELL CHEESEMAN
CITY OF TORONTO	PARTY (TLAB)	PERSIA ETEMADI SARA AMINI
LONG BRANCH		
NEIGHBOURHOOD ASSC.	PARTY (TLAB)	
JUDY GIBSON	PARTICIPANT	
SUE WILLISHER	PARTICIPANT	
DAVID MATOC	PARTICIPANT	
MIKE BORTOLOTTA	PARTICIPANT	
DEBBIE NOLAN	PARTICIPANT	
GRANT GIBSON	PARTICIPANT	
ROBERT CUTMORE	PARTICIPANT	
JUDITH ELLEN CUTMORE	PARTICIPANT	
CHRISTINE PENN	PARTICIPANT	
BRUCE PENN	PARTICIPANT	

## INTRODUCTION

This is a decision in response to an oral motion brought by the appellant, without formal notice, at the end of the presentation of the appellant's evidence on January 17, 2019. The motion was for a finding that evidence regarding Official Plan Amendment 320 (the OPA) and The Long Branch Neighbourhood Character Guidelines (the Guidelines) should not be admitted into evidence at a hearing respecting a minor variance and consent applications in the Long Branch area.

## BACKGROUND

The OPA relates to the *Neighbourhoods* designation in the City's Official Plan. It provides more specific guidance as to how the designation should be applied in determining the physical character of a neighbourhood in the City. The Guidelines,

adopted by Council, provide criteria by which to evaluate new development in the Long Branch Neighbourhood. The OPA was finally approved by The Local Planning Appeal Tribunal on December 7, 2018 and the Guidelines were adopted by City Council in January of that same year.

The matter under appeal was commenced by an application to the Committee of Adjustment on April 20, 2017 and appealed to TLAB on February 20, 2018. The first day of the hearing was September 17, 2018, the Hearing then continued on January 15, 2019.

## **MATTERS IN ISSUE**

The issue is whether the Guidelines and OPA should be admitted into evidence. This issue has two aspects: 1) whether the OPA and Guidelines are relevant; and 2) should they be applied and, if so, how. This issue arises as a result of the “Clergy Principle” which has been applied by the Ontario Municipal Board. The principle generally holds that planning policies adopted or coming into force after an application is commenced should not be applied by an appeal body, such as TLAB, to evaluate the application.

## **JURISDICTION**

TLAB, under its Rules of Practice and Procedure, can determine what evidence is admissible and how its hearings shall be conducted. More importantly, the Divisional Court in *Greater Toronto Airport Authority v Clergy Properties* (O.C.J. File 3/97,p.3), held that the OMB (and thus TLAB) “has exclusive jurisdiction to determine the scope of the issues before it, the procedures to be followed, and the appropriate policy choices to be made and applied in order to arrive at sound policy decisions.” The “Clergy Principle” then traditionally relies on the opinion of the decision maker that “it would be contrary to natural justice to allow the rules to change after the original application is submitted”. ( *Beer v. Halton Land Division Committee* 25 O.M.B.505 at 506). This means that TLAB members have the jurisdiction to determine what evidence should be permitted and if and how the “Clergy Principle” should be applied based on their determination of the fairness of the situation.

It is also important to note with respect to the OPA, that s. 45 of the *Planning Act* provides, in part, that minor variances must maintain the general intent and purpose of the official plan. Further, section 51 states in part that in evaluating an application for consent to sever, regard must be had to whether the severance conforms to the official plan.

## **EVIDENCE**

There is no dispute as to the evidence. The applications for the minor variances and consent, which are the subject of this appeal, were commenced long before the

OPA was approved by the Local Planning Appeal Tribunal and came into force, and long before the Guidelines were approved by Council. It is also undisputed that the Guidelines are not part of the Official Plan or other document and thus have no formal status or legal impact under the *Act*. They are, as stated above, an implementation tool approved by Council for the evaluation of development applications.

## **ANALYSIS, FINDINGS, REASONS**

I find that, based on the decision of the Divisional Court in the Clergy case referred to above, I clearly have the authority to determine whether the OPA and Guidelines should be admitted into evidence and the weight they should be given.

I find that both documents should be admitted into evidence for the following reasons.

Firstly, they are both relevant to the appeal before me. The OPA relates to how neighbourhood character in general, is to be evaluated, including the Long Branch Neighbourhood. The Guidelines specifically set out development criteria for this neighbourhood.

Secondly, I find it is not unfair or contrary to natural justice to consider these documents even though they were approved after the application was made and, in the case of the OPA, well after the appeal was commenced. I find that the traditional rationale for the application of the “Clergy Principle” is not compelling in this case.

There is a legitimate public interest in Council clarifying how the physical character of all neighbourhoods should be evaluated. This is done in the OPA. There is a substantial public interest in providing details for the evaluation of development applications in the Long Branch Neighbourhood. This is done in the Guidelines.

Neither document was directed at these particular applications or in any way sought to impair these particular variances or consent. To prohibit the application of a bona fide public policy simply because the policy was approved after an application was made is to unduly limit the ability of municipalities to prepare and apply relevant public policy.

I find that procedural fairness applies to decisions which adversely affect the ability to have a fair hearing. Such fairness includes such rights as; the right to counsel, the right to cross examination, the right to a hearing itself. It also includes, in my view, the right to know the case one must meet. It would be unfair to change a policy and apply a new policy in a hearing without notice and an opportunity for a party adversely affected to address the new policy. Such was not the case here. There was disclosure that both documents would be at issue in the hearing: the Guidelines on June 25, 2018, and OPA 320 on January 15, 2019 at the recommencement of the hearing, and an opportunity for the appellant to address them.

Thirdly, there was public notice of the status and relevance of both documents. The public, including those involved in these proceedings, had a clear opportunity to

keep abreast of where these documents were in the approval process. The Guidelines were approved many months before the hearing and the OPA was in the approval process since it was first adopted by Council on December 9, 2015. There was no last-minute attempt or secretive endeavour by the City or any other body to adversely impact the rights of this appellant.

Finally, I note that if the appellant believes that there should be an alteration in the hearing process itself to provide a fairer process, (for example an adjournment to prepare evidence or an opportunity to bring reply evidence) he may seek such relief.

Therefore, I conclude it is not unfair to allow the two documents to be admitted into evidence. Procedural fairness does not include freezing all new public policy.

With respect to their weight, I find that the Guidelines can be used as evidence of good planning criteria by which to evaluate this development. As is pointed out in the Guidelines, they were the result of a special study by planners retained by the City, who in public consultation with residents in the area prepared a report to Council. They were subsequently approved by Council, after public consultation, and thus are a clear indication of the City's view of good planning.

OPA 320, on the other hand has more weight. It is an approved part of the Official Plan of the City. As stated above, under section 45 of the Planning Act, the variances being sought must comply with the general intent of the Official Plan as amended by OPA 320. Moreover, regard must be had to whether the severance conforms to the Official Plan as amended by OPA 320. I see no basis to alter these statutory requirements once the OPA is admitted.

## **DECISION AND ORDER**

The Guidelines and OPA 320 will be admitted into evidence and given the following weight. The Guidelines are evidence of criteria of good planning in the evaluation of the variances and consent. The OPA is an amendment to the City's Official Plan, which must be applied in accordance with sections 45 and 51 of the *Planning Act*.

X 

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S. Makuch  
Panel Chair, Toronto Local Appeal