Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date: **Wednesday, May 1, 2019**

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

Appellant(s): ROBERT ULICKI

Applicant: LEA WILJER

Property Address/Description: 459-461 SACKVILLE ST

Committee of Adjustment Case File Number: 17 253383 STE 28 MV

TLAB Case File Number: **18 150889 S45 28 TLAB**

Motion Hearing date: Friday, March 22, 2019

DECISION DELIVERED BY STANLEY MAKUCH

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Lea Wiljer	Applicant	
Sherry D'Costa Correia	Owner	
Robert Ulicki	Primary Owner/Appellant	Ian Flett
City of Toronto	Party	Matthew Longo
Jane Pepino	Party's Legal Rep	
Paul Stagl	Expert Witness	
Alan? Lloyd	Expert Witness	
Michael Tedesco	Expert Witness	
David Sajecki	Expert Witness	
Ryan Sankar	Expert Witness	

Name	Role	Representative
Kassel Prince	Expert Witness	
Sauius Jaskus	Party	
Patricia Brubaker-Poulin	Party	
Judy Woodin	Party	
Glen Woodin	Party	
David Cole	Party	
Colette Hegarty	Party	
Gary Hill	Party	
Lillian Maniscole	Party	
Lorraine Mackenzie	Party	
Michael Butler	Party	
Patricia Milne	Party	
Shauna Macdonald	Party	
Robert Jerrard	Party	
Nara Jung	Party	
Alexandra Vandelle-Gillespie	Party	
Gregory Turcot	Party	
Trudy Macneill	Party	
Douglas Woodall	Party	
Abdurrahman Al-Hesayan	Party	
Patrick Robertson	Party	
Jason Van Bruggen	Party	
Russell Goodfellow	Party	
Deirdre Sadler	Party	
Gabrielle Mcintire	Party	

Name	Role	Representative
Thomas Keeling	Party	
Howard Bortenstein	Party	
Mark Angelis	Party	
Katherine Tozer	Party	
Blaine Pearson	Party	
Caroline De Angelis	Party	
Alastair Dadds	Party	
Hasan Uran	Party	
Erin Blair	Party	
Jane Roffey	Party	
Mark Alboino	Party	
Jutta Polomski	Party	
Jim McNamara	Party	
Charles Fahlenbock	Party	
Kenneth Mathieson	Participant	
Beverley Jenkins	Participant	
Elizabeth Reynolds	Participant	
Johanne Laperriere	Participant	
Louise Garfield	Participant	
Brandeis Jolly	Participant	
Susanne Hudson	Participant	
Christina Best	Participant	
Randy Brown	Participant	
Judy Lu	Participant	
Sara Josselyn	Participant	

Name	Role	Representative
Thorben Wiedilz	Participant	
Rosemary Macklem	Participant	
Maggie O'Connor	Participant	
Marc Cote	Participant	
Catherine Steinmann	Participant	
Jocelyn Richardson	Participant	
Ronan Rogers	Participant	
Lee Anne Rogers	Participant	
Janice Williams	Participant	
Douglas Wilson	Participant	
Lindsay Matheson	Participant	
Derek Sweeney	Participant	
Allen Zhang	Participant	
Christopher Wirth	Participant	
Alexandra Conliffe	Participant	
Linnea Obern	Participant	

INTRODUCTION

This decision is in response to a motion filed by a party to the above proceeding, Robert Jerrard. The motion was subsequently argued on his behalf by legal counsel, Jane Pepino.

The motion seeks permission to permit reference and thus admission of a written "report", or second witness statement. Notice of Motion was filed seven days before the party was to give oral evidence in opposition to the appeal. That evidence was to be given on March 22 ,2019. Robert Jerrard is a Professor of Mathematics at the University of Toronto and a Fellow of the Royal Society of Canada, elected on the basis of his mathematical scholarship.

He had already filed a first witness statement of 5 paragraphs in length on August 13, 2019. His second witness statement is 33 pages in length and is entitled "Analysis and Discussion of Tedesco's Report on Parking and Traffic at 459-461 Sackville Street." The Tedesco Report is a 39 page "Parking and Traffic Needs Assessment" (plus attachments) of a proposed daycare centre at the same address. The Tedesco report had been completed and made available to the parties in August 2018. Additional traffic information and analysis was filed by Mr. Tedesco in the fall of 2018 and Mr. Tedesco had given all this oral evidence on his Report prior to this motion being heard.

BACKGROUND

Professor Jerrard is a resident of 432 Sackville St. which is directly across the street from 459/461 Sackville St. He filed a notice of intention to be a party on May 29, 2018, and in addition to filing his first witness statement, "he attended hearing dates, as possible". His first witness statement addressed "only one issue…the question of how many families could be expected to arrive by car at the proposed day care facility." His basic premise in the first witness statement was that the prediction of the number of families who would walk to the proposed day care should not be based on the percentage of families estimated to be walking to a surrogate day care as Mr. Tedesco had done but, rather, that such a prediction should be based on, or extrapolated from, the number of families, who it was estimated, actually walked to the surrogate day care.

His second Witness Statement postulates that the analysis therein "eliminates the problem of the sampling error via a mathematical formula that expresses the …parking demand in different scenarios. With this formula one can arrive at the following mathematically rigorous conclusions…" that the Tedesco estimates of parking demand are off by approximately 30 % or more.

MATTERS IN ISSUE

The only matter in issue is whether the second Witness Statement should be admitted, referenced and used by Professor Jerrard in his evidence.

JURISDICTION

The Divisional Court held in Greater Toronto Airport Authority v Clergy Properties (O.C.J. File 3/97,p.3), 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." I, therefore, have broad authority to determine how the second witness statement should be treated.

I am assisted in this by the TLAB Rules of Practice and Procedure (the Rules) which state:

16.6   Parties shall serve an expert witness statement on all Parties and File same with the Local Appeal Body, using Form 14, not later than 45 Days after a Notice of Hearing is served.

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:

   a) providing opinion evidence that is fair, objective and non-partisan;

   b) providing opinion evidence that is related only to the matters that are within the expert's area of expertise; and

   c) providing additional assistance to the Local Appeal Body as may reasonably be required to determine a matter in issue.

16.9   The witness statement of an expert shall include:

   a) the expert's name, address and area of expertise;

   b) the expert's qualifications, employment and educational experiences in his or her area of expertise;

   c) the instructions provided to the expert in relation to the Proceeding;

   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

   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.

EVIDENCE

In exercising my jurisdiction regarding this motion I find that the second witness statement should not be admitted. and that reference should not be made to it by Professor Jerrard in giving his evidence. My reasons for this are as follows.

I find his second witness statement to be an Expert Witness Statement. Not only does its heading specify his expertise by reference to his status as Professor of Mathematics at the University of Toronto but it also makes reference to his fellowship in the Royal Society of Canada. His summary refers to the "mathematically rigorous conclusions" he is going to make. The headings in the Report refer to: Mathematical Issues, Choice of Parameters, Mathematical Details, and More Data. Included in the report are formulae and data which certainly display expertise in mathematics. In his grounds for the motion he states that he will comment on the mathematical validity of the Tedesco Report and that he will not give expert opinion on traffic but rather comment "specifically on mathematics."

Most importantly perhaps, the Report is an analysis of a report by an expert. Mr. Tedesco was qualified as a transportation engineer. Any useful analysis of the Tedesco

Report could only be undertaken by an expert. A lay person without expertise could not undertake the in depth review of Mr. Tedesco's report which Professor Jerrard did. I cannot agree with Ms. Pepino that this simply was an analysis undertaken by a smart resident of the area who should not be considered an expert. The second report is expert mathematical evidence submitted by an expert in mathematics.

ANALYSIS, FINDINGS, REASONS

I find Professor Jerrard's second Witness Statement to be expert evidence based on mathematics. I need to consider, therefore, the TLAB Rules regarding the admission of an Experts Witness Statement. I find that Professor Jerrard did not comply with any of the Rules set out above: he did not file the second Witness Statement on time (Rule 16.6); he did not file a Form 6, acknowledging his duty and obligation as an expert (Rule 16.7); and he did not give sufficient evidence about the range of appropriate opinions and why his opinion and analysis were preferable. (Rule 16.8).

Most importantly, he gave no reasons for failing to adhere to these Rules or why his statement should not be considered an Expert Witness Statement. I note as well that if it were not to be considered an Expert Witness Statement it should have been listed as a document to be relied on in his first witness statement.

Finally, I find that it would be unfair and prejudicial to allow such a statement into evidence after Mr. Tedesco had completed all of his evidence. Had it been filed at the required time Mr. Tedesco could have addressed it in his evidence. To have him do so in reply would lengthen a hearing which has already been delayed significantly. The purpose of the Rules is to ensure no party is surprised by the evidence in the proceeding. To allow this evidence would be a surprise as there was no reference to it in the first Witness Statement. The first Statement sets out clearly the reasoning for the 33 page second Witness Statement - that Professor Jerrard prefers the assumption that the same number of families will walk to the proposed day care than the same percentage of families, as assumed by Mr. Tedesco.

Finally, I note that "These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits." (Rule2.2) To allow new mathematical evidence would run counter to this Rule because of the additional cost and delay, and because the fundamental premise regarding the basic assumption that the number of families walking is to be preferred to the percentage of families walking is already before me.

DECISION AND ORDER

The motion is denied. Professor Jerrard will be limited to his first Witness Statement in presenting his evidence.

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S. Makuch

Panel Chair, Toronto Local Appeal