

DECISION AND ORDER

Decision Issue Date Thursday, May 09, 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): YURI KVYETKO

Applicant: GUITBERG GROUP INC

Property Address/Description: 12 BEARWOOD DR

Committee of Adjustment Case File Number: 18 253849 WET 04 MV (A0807/18EYK)

TLAB Case File Number: 19 110854 S45 02 TLAB

Motion Hearing date: Wednesday, April 17, 2019

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Walter Lowes	Moving Party	
Yuri Kvyetko	Responding Party	Amber Stewart

INTRODUCTION

Mr. Lowes brings a motion to:

- (a) Exclude the Arborist Report of Andrew White [Mr. Kvyetko's arborist] dated April 9, 2019 from the hearing set for June 25, 2019;
- (b) Exclude certain opinions of the Planning Report of Franco Romano [Mr. Kvyetko's planner], because they are based in part on the April 9, 2019 Arborist Report; and
- (c) Find that Mr. Romano is "not recognized as having expert witness status in the specific hearing."

Dealing first with the relief sought under (c), any determination of Mr. Romano's qualifications or lack of qualifications should be left to the Panel Member hearing the case on June 25, 2019.

I understand the basis for the desired exclusions in (a) and (b) rest on common facts. The date for disclosure in this hearing is April 12, 2019. However, Mr. Lowes was aware of Arborist Mr. White's investigation because it (Mr. White's first report of December 5, 2018) was filed at the January 2019 Committee of Adjustment hearing. Ms. Stewart [Mr. Kvyetko's lawyer] included the first White report in her "Appellant Disclosure" of March 28, 2019. Once he saw Ms. Stewart was relying on it, Mr. Lowes retained his own arborist, Mike Spencely, who wrote a Peer Review Report of March 16, 2019, which was disclosed to Ms. Stewart on March 22, 2019.

Ms. Stewart showed the peer review report to Mr. White and he wrote a second report dated April 9, 2019. Mr. Romano's Planning Report, with the second White report attached as an appendix, was filed on April 12, 2012, the deadline for disclosure for both parties.

Mr. Romano states:

7.1f As the **attached Arborist report** describes for regulated trees, the proposed work is expected to result in the removal of 1 tree (34cm Flowering Crab) near to the dwelling, an injury risk to 2 trees of over 10cm while maintaining 21 trees including all City trees. (my bold)

Upon receipt of Mr. Romano's report, Mr. Lowes commenced the motion. In her Response to Mr. Lowes' Notice of Motion, Ms. Stewart states:

"Mr. White issued an updated Arborist Report with a revised date of April 9, 2019. . . .
. . . there was no attempt to represent that this was a duplicate of the December 5 report — it had a new date of April 9, 2019 on the cover page. . . ."

There is no basis to attribute any deceptive or otherwise improper intent to the decision to revise the Arborist Report. On the contrary it was a concerted effort to respond to . . . the concerns raised in the documentary disclosure filed with the TLAB [i.e. the Spencely Peer Review Report]."

ANALYSIS, FINDINGS, REASONS

This case is very similar to *61 Cluny*, in which I said:

By posting the documents on the TLAB website, they have now entered the public domain and I see no practical way of preventing anyone including the authors from referring to

them. It is true that a trier of fact may ignore new evidence, but I do not think it is useful to have a hearing in which the witnesses must do so.

In both *61 Cluny*¹ and *12 Bearwood* (this case), the proponent filed an expert's report, the opposing party retained an expert who wrote a report critical of the first report and the proponent wished to file a second report (or in this case a revision of the first report) answering the criticism. The rules do not contemplate a second sequence of disclosure and thus in both cases motions were brought to clarify their admissibility. In both cases the second report is already in the public domain; in *61 Cluny*, by the proponent's motion to admit a report, and in *12 Bearwood* by the attaching of the second report as an appendix.

If Mr. Lowes could show prejudice, over and above the fact that he disagrees with the conclusions, a TLAB member could exclude or discount the second White report, or some aspect of it. In this case, I feel both White reports should be available to the Hearing Panel Member and Mr. Lowes is at liberty to cross examine Mr. White on the substance of both reports and make argument or inference from that cross-examination. All of this is best handled by the Hearing Member.

In this case, I do not think there is a compelling reason to exclude the second White report or Mr. Romano's conclusions based on that report. A planner is entitled to rely on another expert in coming to a planning conclusion, but an opponent can attack the planner's conclusion by showing that the other witness's expertise was faulty in some way, and I have indicated the path is open for Mr. Lowes to do so.

DECISION AND ORDER

I decline to exclude the April 9, 2019 Arborist Report and decline to delete any portion of the Romano Planning Report.

X



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

¹ The *61 Cluny* case can be read on the TLAB website.