Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Monday, June 17, 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): ERNEST EDWARD WILLSHER, CITY OF TORONTO

Applicant: DESIGN PLAN SERVICES

Property Address/Description: 80 TWENTY THIRD ST

Committee of Adjustment Case File Number: 17 268079 WET 06 MV, 17 268072 WET 06 MV

TLAB Case File Number: **18 211133 S45 06 TLAB, 18 211149 S45 06 TLAB**

Motion dates: Thursday, June 13, 2019

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Role	Representative
Mark and Maria Liani	Owner/Party	Russell Cheeseman
TJ Cieciura	Expert Witness	
Ernest Edward Willsher	Appellant	
City of Toronto	Appellant	Aderinsola Abimbola
Long Branch Neighbourhood Assoc.	Party	
Deborah Hardy	Participant	
Dorothy-Anna Orser	Participant	
Brian Bailey	Participant	
Sue Willsher	Participant	

OVERVIEW

These are two oral motions brought in the course of an appeal with respect to 80 Twenty Third St, whose owners are represented by Mr. Cheeseman. Long Branch Residents Association, which I will call LBNA or the Association, is a Participant and has filed a Participant's Witness Statement.

MOTION 1

Mr. Cheeseman requests me to disallow Ms. Gibson's (who is the LBNA's authorized representative) question to Dorothy Anna Orser. She asked Ms. Orser about statements made by Sonya Koops, the vendor to the Lianis, (present owners of 80 Twenty Third and Mr. Cheeseman's clients). As well as representing Lianis, Mr. Cheeseman represented the owner of 86 Twenty Third, the next-door property, in an OMB hearing in 2015. I allowed the question over Mr. Cheeseman's objections. These are the reasons for this decision.

Ms. Koops was the former owner of 80 Twenty Third and had experienced negative impacts from 86 Twenty Third before she sold to the Lianis. She testified to this effect at the Hearing before OMB Member Susan de Avellar Schiller. Ms. Schiller wrote:

> [74] Ms. Koops, the neighbour to the south adjacent to the newly built existing dwelling, testified to the lack of privacy and overlook on to her property [80 Twenty Third] that resulted from the design of the dwelling now on the subject site [86 Twenty Third].
>
> [75] The Board agrees with the Proponent that a decision on the requested variances that resulted in the construction of a new dwelling on the north side [away from Ms. Koops] would not change the impact of the existing dwelling.
>
> [76] The benefit of the newly built existing dwelling being fully in place is that the Board is able to appreciate the impact another similar dwelling would have on a neighbour. (my interpolations)

The basic statutory framework for tribunals to decide admissibility is s. 15(1) of the *Statutory Powers Procedure Act* [1], which gives a tribunal the power to admit hearsay.

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[1] Evidence
What is admissible in evidence at a hearing
15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
(a) any oral testimony; and

The evidence of Ms. Koops as to the impact of the built form of 86 Twenty Third on her enjoyment of 80 Twenty Third is admissible, first because, while it is hearsay to me, it has all the usual protection against a false statement. Ms. Koops was speaking under oath and Mr. Cheeseman cross examined her on that statement. Second, she said it to the trier of fact in that case, Ms. Schiller, who made the finding just quoted. I am required to take judicial notice of Ms. Schiller's signature because of s. 36(2) of the *Evidence Act* [2] and there is also provision under the *Statutory Powers Procedure Act* for me to accept any document of whose authenticity of which I am satisfied. I find the copy of the OMB case authentic. This part of what Ms. Orser said is admissible, despite it being hearsay. It is relevant to this hearing because a similar building form is proposed at 80 (subject property in my hearing) as was built at 86.

Ms. Orser went on to say that Ms. Koops inspired her to become more involved in Committee of Adjustment hearings in Long Branch. I consider this not a hearsay statement but simply an explanation of what motivated Ms. Orser, about her thoughts and actions on which she is fully entitled to testify.

Ms. Orser also said that Ms. Koops became so discouraged with the negative impacts that she sold her house to the Lianis.

Mr. Cheeseman has a valid point, and while admissible under the *Statutory Powers Procedure Act*, I will disregard this part of Ms. Orser's evidence, that is, Ms.

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,
(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Koops' motivation for the sale. It occurred after the OMB case, and while relevant, it appears to be inflammatory and Mr. Cheeseman is unable to cross-examine Ms. Koops on this statement.

Result
Mr. Cheeseman's Motion is dismissed but the part of the evidence on motive for sale will be disregarded.

Motion 2

Mr. Cheeseman objects to Long Branch Residents Association's calling of Ronald Jamieson as its witness, instead of Christine Mercado. The basis of the objection is the following:

(a) It isn't fair; Ms. Mercado was supposed to be Long Branch's witness, not Mr. Jamieson; and
(b) the rules do not permit this.

When I asked what the prejudice was, Mr. Cheeseman could not provide any, but he said that he preferred to cross examine Ms. Mercado as he had done so previously and was not familiar with Mr. Jamieson. This does not seem to me to be unfairness to Mr. Cheeseman.

Mr. Cheeseman did not cite any rule, but it seems he was referring to Rule 16.4:

> 16.4 If a Party intends to call a witness the Party shall Serve a witness statement on all other Parties and File same with the TLAB, using Form 12, not later than 60 Days after a Notice of Hearing is Served. A Party Witness Statement shall include, where applicable:
>
> a) a short written outline of the Person's background, experience and interest in the Appeal;
> b) a list of the issues they will discuss and a written outline of that Person's intended evidence;
> c) the date; and
> d) the full legal name, Email address and full mailing address of the witness.

LBNA has filed a Witness Statement in timely fashion, which I will discuss shortly. It is possible for LBNA to interpret "Person" as itself, a corporation, and for it to be required to give a short written outline of LBNA's background, etc. The Rule then goes on to talk about the "witness" and here lies the confusion.

This witness statement is filed as "Participant's Statement Form 13" and described in the TLAB web site as filed by C. Mercado. The body of the Statement makes it clear that it is LBNA's Statement, not C. Mercado's in her personal capacity:

> "The **LBNA** is opposed to the proposed FSI on the property as it is contrary to the OP and Long Branch Neighbourhood Character Guidelines and negatively impacts the adjacent neighbours." (my bold)

The primary purpose of Rule 16.4, to provide notice and prevent surprise, has been accomplished, and I find that once it has filed the Statement, the Rules should permit LBNA to furnish Mr. Jamieson as a witness.

LBNA is aware of the confusion the above filing can cause. Is the statement Ms. Mercado's or LBNA's? It has asked TLAB staff to accept filings on behalf of LBNA alone, without Ms. Mercado's signature, but is told that the TLAB will only accept a document signed by a natural person. So, I conclude that in the light of **TLAB filing practice**, a document signed by an agent may lead to the inference that it is the agent's rather than the corporation's. This is surprising because the TLAB deals with many corporations, e.g. XYZ Ontario Limited, without anyone questioning the authority of the person filing it, nor any confusion as to whose document it is.

Ms. Gibson's position is that she would like this issue clarified. She advises that both TLAB Chair Lord and Member Makuch have stated in the course of presiding over prehearing conferences for *80 Thirty Ninth, 27 Thirty Ninth* and *11 Shamrock* that the LBNA is free to choose whoever it wishes as its witness, irrespective as to who has actually signed the document. I will call this the "mix and match rule" for ease of reference. Another TLAB hearing officer, Member Leung, also applied the "mix and match rule" in a written decision for *77 Thirty Fifth;* a near identical fact situation to this case. In *77 Thirty Fifth*, Ms. Mercado had filed a witness statement on behalf of the appellant, Paul Accadia, but discovered she would be unavailable for that hearing, then two months in the future. As soon as he learned this, Mr. Accadia brought a motion in writing to adjourn the hearing date on this basis. It was opposed by the owner and Mr. Leung denied the motion:

> Mr. Accadia could, in theory, request assistance from other members of LBNA with the TLAB process.

Ms. Gibson states that they discovered that Ms. Mercado would be unavailable for this case, some three weeks ago, in late May. They had already received Mr. Leung's decision, so LBNA thought it was futile to request an adjournment of this date (June 13, 2019). They held a meeting and passed a motion to have Mr. Jamieson give evidence for LBNA in this hearing. In consequence, Mr. Jamieson also filed a participant's election to have himself on record as a participant in his personal capacity, if necessary. They did not bring this to the attention of Mr. Cheeseman, who did not notice this filing. Ms. Gibson announced her intention to call Mr. Jamieson at the beginning of the day. Mr. Cheeseman made no objection until after Mr. Jamieson had been sworn.

I reserved my decision tin order to read Mr. Leung's decision and I find that at least three of my colleagues are applying a "mix and match rule" and, in Mr. Leung's case, formally ordered a hearing to proceed when LBNA's preferred witness was known to be unavailable. I cannot speak for the other Members other than Messrs. Lord, Makuch and Leung, but I agree with this approach. If there is any common thread running through all of this, it is that hearings should not be delayed, and I believe LBNA acted throughout with the intention not to delay proceedings. Since this issue arose just after Mr. Jamieson was sworn and he has not given evidence, and since the Hearing is to be adjourned to September in any event, the issue of who was to give evidence last June 13 is moot. On the basis of the reasons I have just set out, LBNA is at liberty to choose whoever it desires and on the basis of whoever is available.

Result

Mr. Cheeseman's Motion to compel LBNA to put forward a witness on the basis of who signed the LBNA witness statement is dismissed.

X

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