Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, July 12, 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): Nicole Washington-Lee

Applicant(s): Nicole Washington-Lee

Property Address/Description: 6 B Shamrock Ave.

Committee of Adjustment Case File Number: 18 261090 WET 06 MV (A0862/18EYK)

TLAB Case File Number: 19 128777 S45 03 TLAB

Motion Hearing Date: Monday, June 17, 2019

DECISION DELIVERED BY S. Talukder

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Nicole Washington-Lee
Appellant's Legal Rep.	Davies Howe (Andy Margaritis)
Party	Eduardo Fazari
Party's Legal Rep.	Martin Mazierski
Participant	Andy Choles
Participant	Kerry Pohling Khoo-Fazari
Expert Witness	Franco Romano

INTRODUCTION

1. This is a motion by the party, Edward Fazari (Moving Party), to dismiss the appeal of the Applicants/Appellants on the grounds of *res judicata* and because the appeal is frivolous, vexatious and constitutes an abuse of the process.

2. The Applicants, Nicole Washington-Lee and Walter Lee, are the owners of the property located at 6B Shamrock Avenue (subject property).

3. The Moving Party is the owner of the property at 8 Shamrock Avenue, which is the property adjacent to the subject property.

BACKGROUND

Procedural History

4. The following is a summary of the procedural history of this matter, which is not disputed.

5. 6 Shamrock Avenue was the subject of applications to the Committee of Adjustments (COA) for a consent to sever the land along with a request for minor variances. The owner of the property was Adam Ivan Chapman. On March 20, 2014, the COA issued decisions refusing the consent and minor variance applications.[1]

6. The decision of the COA was appealed to the Ontario Municipal Board (OMB). On October 31, 2014, the OMB issued a decision (OMB Decision[2]) allowing the appeal, subject to the conditions for approval for minor variances (Schedule 2 of the OMB Decision). One of these conditions was that there shall be no decks above grade.

7. This condition is the sole focus of this motion. At the time of the OMB hearing, the owner of the property was Hybrid Green Industries Inc. The Moving Party was a participant in the OMB hearing.

8. The property was severed into lots 6A Shamrock Avenue and 6B Shamrock Avenue (subject property). The subject property was bought by the Applicants after the construction of the new dwelling on the subject property.

9. The Applicants made an application to the COA in early 2018 for a construction of a deck. The COA issued a written decision on June 21, 2018 refusing the application.[3]

[1] COA File Nos.: B84/13EYK; A609/13EYK and A610/13EYK
[2] OMB Case No.: PL 140328
[3] COA File No.: A0333/18EYK

10. On November 11, 2018, the Applicants filed another application with the COA for the construction of a smaller deck. After initiating the application, a new zoning notice was issued and filed with the COA, which included the final list of variances sought to be approved at the COA. On March 7, 2019, the COA issued its decision (COA Decision),[4] which included:

    Approval of the following variance, Variance 2:

    Ontario Municipal Board decision issued on October 31, 2014, Case No. PL 140328 granted several variances to Zoning By-Law 569-2013 which are subject to condition 5 in Schedule 2 of the decision which states: "5. No decks above grade." This condition prohibits the construction of an above grade deck.

    Refusal of the following variance, Variance 1:

    Section 10.20.40.50.1(B), By-law 569-2013

    The maximum permitted area of each platform at or above the second storey of a detached house is 4 m².

    A previous Committee of Adjustment application (A0333/18EYK) refused a rear platform with an area of 10.86 m².

    The proposed second storey rear platform will have an area of 8.09 m².

11. The Applicants appealed the COA Decision to the Toronto Local Appeal Body (TLAB).

MATTERS IN ISSUE

12. The motion materials raise the question of whether the doctrine of *res judicata* and associated doctrines of frivolous and vexatious litigation, and abuse of process, apply with respect to Variance 2 at appeal at the TLAB, such that this matter should be dismissed without a hearing.

JURISDICTION

13. There is no dispute that the doctrine of *res judicata* and associated doctrines apply to administrative tribunals such as the TLAB. The criteria required to establish the application of *res judicata* are same for both courts and administrative tribunals.

14. In addition, section 45(a) of the *Planning Act* allows TLAB to dismiss all or part of an appeal without holding a hearing if the appeal is not made in good faith or is

[4] COA File No.: A0862/18EYK

frivolous or vexatious, or the appellant has persistently and without reasonable grounds commenced proceedings that constitute an abuse of the process.

15. The parties have directed me that the relevant principle of issue estoppel, as a branch of *res judicata*, applies in determining this motion. There is no dispute as to the correct approach to analyzing issue estoppel.

16. The TLAB has previously dealt with the principle of issue estoppel. The motion decision by Chair Ian Lord for the property located at 2915 St. Clair Avenue[5] provides a detailed legal analysis of issue estoppel. As detailed below, I have adopted this legal analysis for addressing this motion.

17. In *Angle v. Minister of National Revenue* (*Angle*),[6] the Supreme Court of Canada set the preconditions for the operation of issue estoppel as the following:

> (1) the same question has been decided;
>
> (2) the judicial decision which is said to create the estoppel was final; and,
>
> (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (*as summarized by the Supreme Court in Danyluk v. Ainsworth Technologies Inc. (Danyluk)* at para. 24).[7]

18. *Danyluk* (at para. 33) sets out a two-step process to determine whether the doctrine of issue estoppel applies to a matter:

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (B.C. C.A.), at para. 32; Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (Ont. C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173 (N.S. C.A.), at para. 56.

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[5] TLAB Case File No.: 17 188179 S45 31 TLAB
[6] 2 S.C.R. 248; 1974 Carswell 375, at para 23.
[7] 2001 SCC 44.

19. In *Lofaro v. Toronto (City) Committee of Adjustment*[8] (*Lofaro*), the OMB discussed the following principles for the application of issue estoppel, at para 14:

> 1) the power under Section 45(17) to dismiss the appeal without holding a hearing is discretionary;
>
> 2) it is in the public interest that there be an end to continual litigation in appropriate circumstances - this will avoid multiplicity of proceedings and leads to certainty in the outcome of matters;
>
> 3) the City and the abutting residents should not be subjected to proceedings more than once for substantially the same relief, otherwise there can be an abuse of process;
>
> 4) the concept of res judicata can apply to planning appeals where there has been no change in the applicable law/planning instruments or where the basic facts remain unchanged from one appeal to the next;
>
> 5) the Board must consider whether the current application/appeal is substantially different from a previous application/appeal heard by the Board;
>
> 6) has anything changed since the time of the prior hearing by the Board to warrant a new hearing - this could include, without being an exhaustive list, a change in abutting residents and their positions on the application/appeal, a change in the owner of the subject property, a substantial lapse of time between applications, or a change in the planning regime applicable to the property;
>
> 7) the concepts of abuse of process and res judicata fall within the general rubric of frivolous or vexatious' under Section 45(17) of the Planning Act;
>
> 8) the Board can presume the best case for relief from the zoning by-law was advanced by the Applicants at the previous hearing and should consider whether all or part of the current relief sought could have been granted at the prior appeal.

20. Counsel for the Moving Party, Mr. Mazierski, also referred to the decision, *Georgian Bond Avenue Inc. v. Toronto (City)*, where in para. 11, the OMB states that:

> In order to avoid the application of the doctrine of res judicata, and to ensure that there is not a multiplicity of hearings on the same matter, the Applicants has the onus to demonstrate one or all of the following:

[8] 2002 CarswellOnt 6978, [2002] O.M.B.D. No. 209

- The relief being requested is different from that requested in a previous hearing.

- There have been changes in the planning regime and/or in the planning policies applicable to the site and relevant to the Board's consideration, since the previous hearing and decision.

- There has been a significant change in the physical context of the lands which is relevant and which was not contemplated by the Board in the previous hearing and decision.

- There has been a significant change in circumstances relevant to the land use planning principles considered and applied by the Board in the previous hearing and decision.

- The issues to be adjudicated are significantly different than those considered by the Board in the previous hearing and decision.

21. A determination of the application of issue estoppel must be carefully analyzed to ensure consistency with the principles of fairness because it relates to depriving a party of the right to a hearing on an appeal. There are considerations to balance, which are avoiding duplication in litigation, ensuring integrity of the administrative process and the need to have a finality in decision making process on the same subject matter. A decision on the application of issue estoppel is ultimately discretionary based on the evidence and argument provided.

EVIDENCE

22. Evidence on behalf of the Moving Party was provided in the form of an affidavit by Andrew Choles, the owner of 12 Jasmine Avenue, the property located behind the subject property.

23. In his affidavit, Mr. Choles stated the he has participated in all the committee and tribunal hearings for 6 Shamrock Avenue and the subject property. At the appeal hearing at the OMB, he, as a participant, raised concerns about the likelihood that the then proposed juliette balconies on the elevated main floor living room walkout, which is on the second floor, can be replaced by a deck.

24. Mr. Choles made a reference that the Applicants were using the same planner as the previous owners of 6 Shamrock Avenue. I note that this is of no relevance to the matter at issue.

25. The remainder of Mr. Choles' affidavit dealt with the procedural history of this matter, which as stated, is not in dispute.

26. Evidence on behalf of the Applicants was provided by Franco Romano, Registered Professional Planner, who was retained by the previous owner of 6 Shamrock Avenue. Mr. Romano was a witness who provided expert evidence at the OMB hearing.

27. Mr. Romano mentioned that he had reviewed the objection letter of Mr. Choles that was submitted to the COA application process in 2014. This letter did not include any reference to decks or similar structures. He noted that at the OMB hearing, the drawings for the then requested variances included juliette balconies and the drawings of the proposed buildings that was before the Board did not include any deck, platform or similar structures. As the Application before the OMB did not seek approval of a deck, Mr. Romano did not provide any evidence to such a deck. He was not cross-examined about a deck or similar structure. The City of Toronto's witness was also not cross-examined about a deck at the OMB hearing.

28. Mr. Romano recalled that participants had described impacts associated with large decks, such as the one at 73 Twenty Seventh Street, but this was unrelated to 6 Shamrock Avenue. He remembered that the deck at 73 Twenty Seventh Street was about three times the size currently proposed at the subject property.

29. Mr. Romano also provided his opinion as to why the condition regarding a deck was included in the OMB's decision. It is not necessary for a witness to give their opinion on the reasons as to why the OMB made a decision regarding the prohibition of a deck. I am satisfied that the reasons for the OMB's Decision is clearly set out in OMB's Decision itself.

30. The evidence provided by the Moving Party is sparse. Much of the analysis on issue estoppel was based on submissions by both counsel on the applicability of the legal doctrine.

ANALYSIS, FINDINGS, REASONS

31. As set out in the case law, the first part of the analysis of the applicability of issue estoppel is to determine:

    - whether the same question has been decided,
    - whether the judicial decision was final, and
    - whether the parties to the judicial decision were the same persons as the parties to the current proceeding (as per the *Angle* decision).

    All three considerations must be satisfied for issue estoppel to apply.

32. The current appeal at TLAB deals only with variances related to the construction of a deck. The application before the OMB included variances related to lot area, lot front, floor space index, front and side yard setbacks, landscaping, eaves setback, maximum height of exterior main walls and maximum height of the first floor (paras. 10 and 11 of the OMB Decision). The application for the minor variances at the OMB did not include variances for a deck.

33. The OMB heard from 9 witnesses for this application. In its voluminous decision, apart from Schedule 2, the OMB made reference to decks twice in the Decision:

    At para 12:

    "The participant from 12 Jasmine Avenue was concerned about overcrowding, the three storey nature of the proposed houses, with views into his rear yard as his property was directly behind the Subject Lands, the likelihood that the current "Juliet" balconies proposed on the main floor would be replaced by a large deck as was constructed at 75 Twenty Seventh Street, and the existing character of the area was single dwellings on single lots 12 m wide or larger. He expressed a view that if approved it will destroy the character of the neighbourhood."

    At para 48:

    "In addition to the recommended conditions of approval found in Exhibit 2, the Board will require an additional condition of approval for the variances (and for the contingent variances) that no decks above grade be permitted. This condition will ensure that adjoining neighbours will not have issues with overview or privacy from an elevated rear yard deck."

34. Based on the OMB decision, the prohibition on decks was included to ensure that adjourning neighbhours did not have issues with overview and privacy from a deck.

35. However, the issue of a deck was not associated with the requested variances before the OMB, and therefore, not an issue before the OMB. The OMB clearly described the variances required for approval at appeal in paragraphs 10 and 11 of the OMB decision, none of which specifically included a deck or a similar rear platform. This can be distinguished by the current appeal before the TLAB, which specifically pertains to approvals of variances for a deck. At most, the deck restriction in the OMB decision is a question that arose collaterally or incidentally during the hearing. It was not fundamental to the OMB's decision.

36. I acknowledge counsel for the Applicants, Mr. Margaritis' submission with respect to collateral issues, in which he directed me to *Angle,* para 3:

    Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same

as was contested in the earlier proceedings? If it is not, there is no estoppel. **It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.** That is plain from the words of De Grey C.J. in the Duchess of Kingston's case5, quoted by Lord Selborne L.J. in R. v. Hutchings6, at p. 304, and by Lord Radcliffe in Society of Medical Officers of Health v. Hope7. **The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings**: per Lord Shaw in Hoystead v. Commissioner of Taxation8. The authors of Spencer Bower and Turner, Doctrine of Res Judicata, 2nd ed. pp. 181, 182, quoted by Megarry J. in Spens v. I.R.C.9, at p. 301, set forth in these words the nature of the enquiry which must be made:

...whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter cannot stand without the former. Nothing less than this will do. [*emphasis added*]

37. I am not implying that conditions imposed by the OMB or similar boards in their decisions are inherently collateral to an issue or are not important. In fact, the TLAB has a standard set of conditions for severances associated with each consent approval, which are of significant importance.

38. The issue of the deck is not an example of a request for the same relief. It is also not an issue of continual litigation resulting in duplication in litigation in which the public interest requires the application of issue estoppel. Rather, the issues at appeal before the TLAB are substantially different than the issues that were before the OMB.

39. The Applicants are not the same as the owners who were before the COA and OMB in the applications filed in 2014. The Applicants purchased the property after the dwellings were constructed. As such, the Applicants were not in a position to litigate or secure their rights on the subject property at the previous OMB hearing. The subject property did not exist before the severance approved by the OMB decision. In these circumstances, dismissing the appeal without a hearing would be substantially unfair to the Applicants.

40. Accordingly, the Moving Party has failed to make a *prima facie* case for the application of issue estoppel.

41. In my view, even if the Moving Party had succeeded in the first step of the application of issue estoppel, the TLAB should use discretion in the second step of the application of issue estoppel and dismiss this motion. With respect to this appeal, it would be procedurally unfair to dismiss the appeal without giving an opportunity to the Applicants to fully litigate the issue of a deck construction, which was not fundamentally before the OMB as an issue.

42. There is no evidence before me that the hearing will be an abuse of the process or the Applicants have acted in a vexatious and frivolous manner. This is the first time that the Applicants are before the TLAB for issues related to the construction of a deck.

DECISION AND ORDER

43. The motion is dismissed. The hearing scheduled for July 26, 2019 will proceed as scheduled.

X 

S. Talukder
Panel Chair, Toronto Local Appeal Body
Signed by: Shaheynoor Talukder