Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Wednesday, August 28, 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): TEUTA GUCI

Applicant: SAM SPAGNUOLO

Property Address/Description: 111 Gough Ave

Committee of Adjustment Case File: 18 107807 STE 29 MV (A0082/18TEY)

TLAB Case File Number: 19 147891 S45 14 TLAB

Hearing date: Thursday, August 15, 2019

DECISION DELIVERED BY T.YAO

APPEARANCES

NAME	ROLE	REPRESENTATIVE
Ted Hanlan	Moving Party	
Teuta Guci	Appellant/Owner and Responding Party	Amber Stewart, Anthony Soscia
City Of Toronto	Party	Marc Hardiejowski
Heather De Veber	Participant	
Al Kivi	Informal Advisor to Mr. Hanlan	
Robert Brown	Observer	

INTRODUCTION

This is a motion by Ted Hanlan to dismiss Teuta Guci's appeal without a hearing. Ms. Guci, owner of 111 Gough in the Logan/Danforth area, wishes to demolish her existing dwelling and replace it with a new larger building. The new building needs five variances, including building depth, floor space index, exterior main walls, and for an integral garage with access from Gough Ave. The by-law requires that houses with laneway access, as does 111 Gough, use the lane for access to the required parking space. The Committee of Adjustment refused her application on April 23, 2019, and Ms. Guci appealed. Thus, this matter comes before the TLAB.

Notice of Appeal
Form 1

Part 6: Appeal Specific Information

Provide specific information about what you are appealing using numbered paragraphs and include the Committee of Adjustment File Number(s).

Provide the nature of your appeal and the reasons and grounds for your appeal. Be specific and provide only land-use planning reasons. Include the specific provisions, sections and/or policies of the Official Plan or By-law(s) which are the subject of your appeal as applicable.

WE ARE APPEALING THE committee of ADjustment file Number A0082/18TEY for property address 111 GOUGH AVE, LEGAL DESCRIPTION PLAN 1152 N PT LOT 30 based on the panel descission was based on emotions presented by neighbours and not on the four test of Planning Act which states S45(1) of the Planning Act states that Committee of Adjustment shall make their decisson if the variances meet the four tests

1) MAINTAIN the general intent and purpose of the offical Plan
2) MAINTAIN the general intent and purpose of the zoning by-law
3) BE DESIRABLE for the appropriate or use of the land, Building or structure; and
4) BE minor in nature.

WE believe that the proposal presented to the committee meets these four test.

Upon receipt of her appeal (Form 1, reproduced above) the TLAB issued a "Notice of Hearing", with deadlines for Parties and Participants to elect and file additional documentation. Ms. Guci automatically became a party; the City and Mr. Hanlan elected to become Parties; the City's election being within the deadline and Mr. Hanlan's a few days late. Everyone, including Ms. Guci, filed disclosure (Expert Witness Statements, etc.) by the deadline of July 29, 2015. Mr. Hanlan then brought this motion returnable August 15, 2019.

THE MOTION

I am going into some detail as to why I am dismissing the motion, as I feel motions such as this should be discouraged. The grounds for Mr. Hanlan's motion are that in his estimation, the appeal (which I will call Form 1) must have a minimum content by virtue of s. 45(17) of the *Planning Act* — Ms. Guci's words must indicate an "apparent planning ground", which he alleges her Form 1 does not. He further alleges this requirement is reinforced by the TLAB's instructions: "Be specific and provide only land use planning reasons" at the top of the box in Form 1 (page 2 of this decision). He says her Form 1 was defective, and her appeal must be dismissed: ""It's like building a house on a bad foundation".

Notice of Motion Form 7

Part 4: On the grounds that:
(State the reasons and grounds using numbered paragraphs and reference any supporting Affidavits identified in Part 6 or materials filed listed in Part 5)
[1] With regard to The Notice of Appeal (Form 1) signed by the Appellent, Teuta Guci, on May 01, 2019. This form lacks planning rationale to justify the appeal of the Committee of Adjustment refusal decision. [2] The full reasons and grounds for the appeal as stated in Form 1 is as follows: "We are appealing the Committee of Adjustment file number A0082/18TEY for property address 111 Gough Ave, legal deascription Plan 1152 N PT Lot 30 based on the panel discussion was based on emotions presented by neighbours and not on the four tests of the Planning Act which states S45(1) of the Planning Act states that Committee of Adjustment shall make their decision if the variances meet the four tests 1) Maintain the general intent and purpose of the official plan 2) Maintain the general intent and purpose of the zoning by-law 3) Be desirable for the appropriate or use of the land, building or structure; and 4) Be minor in nature. We believe that the proposal presented to the Committee meets these four tests." [3] The submitted Form 1 did not describe the nature of the appeal and the reasons and grounds for the appeal are not specific. There were no land-use planning reasons. [4] Form 1 did not include the specific provisions, sections and/or policies of the Official Plan or By-law(s) which are the subject of the appeal. [5] The hearing should be dismissed as the Applicant has not provided adequate reasons for proceeding with the Appeal, as per Rules 9.2 (a) and (f).

The

The relevant provision for the motion— s. 45(17) of the *Planning Act*

Dismissal without hearing

45(17) . . .the Tribunal may dismiss all or part of an appeal without holding a hearing, . . .on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process;

(b) the appellant [i.e. Ms. Guci] has not provided written reasons for the appeal;

(c) the appellant has not paid the fee charged under the *Local Planning Appeal Tribunal Act, 2017*; or

(d) the appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal. 2017, c. 23, Sched. 5, s. 98 (5).

History of s 45(17) of the *Planning Act*

S. 45(17) was introduced into the *Planning Act in* 1994. Prior to that, parties could bring a motion before the OMB to dismiss an appeal without a hearing on the grounds that the appeal letter indicated no "triable issue". S 45(17) codified the pre-existing practice. The 1994 amendment to s. 45(17) was accompanied by similar provisions allowing dismissal of appeals of Official Plan approvals (17(45)), zoning by-law approvals (34(25)) and consents (53(31)). These provisions were expanded in 2006 to include abuse of process (e.g. 45(17)(a(iv))[1].

MATTERS IN ISSUE

In my view, there are two issues:

1. Is the hearing officer to only look at the notice of appeal, that is Form 1, or can all the available information be canvassed?
2. Assuming the latter, should the motion succeed?

[1] Mr. Hanlan is only relying on 45(17)(a)(i), "no apparent land use planning ground" for his motion.

My answer is that the jurisprudence shows that all available information should be canvassed on motions like this, and that this motion should fail.

THE EVIDENCE

Mr. Hanlan placed before me four sample Form 1s, to be discussed below. Ms. Stewart then filed an affidavit of her planner, Franco Romano stating that he was retained after Ms. Guci had drafted her Form , and that in his (Mr. Roman's) opinion Ms. Guci has correctly recited the four-part planning test. His also recapped his already-filed planning opinion.

Mr. Hanlan assumes that 45(17) should be strictly interpreted; that I should only look at the Form 1 and that they be graded, like an examination at school. Two Form 1s (*60-62 Shaftesbury* and *161 Howland*) have not yet gone to hearing but they are written by law firms and in Mr. Hanlan's estimation, "passed". Two (*37 Hatherley Rd* and *13 Denton*) have been the subject of successful 45(17) motions, and therefore Mr. Hanlan says they "failed". I will now review those "failed Form 1" decisions.

These were both cases where a successful owner brought a 45(17) motion against a neighbour's appeal. In the present case those fact situations are reversed; this is an owner's appeal against a refusal; not a neighbour's appeal against a successful Committee of Adjustment granting of a variance.

In *37 Hatherley,* Maria Cabezas obtained a side yard variance of 0.44 m (1.8 m required) from the Committee of Adjustment. Member Ms. Burton posed the issue as follows:

> While it appears that Mr. Quintieri [the neighbour appellant] has raised a legitimate objection on a planning ground, i.e. the side yard setback is too small, potentially posing a safety hazard, are there other factors in this situation which would mitigate against accepting the appeal as valid?

Mr. Quintieri's response to the motion was to offer to withdraw his appeal on certain conditions. Ms. Burton accepted Mr. Quintieri's withdrawal, considering it ended her jurisdiction. In the alternative, she found Mr. Quintieri's appeal met the 45(17) test, as the previous setback was in the 0.36- 0.38 m range.

In *13 Denton*, the moving party/owner (Madia Raja) moved to dismiss Samad Rashid's appeal. John Ramirez was Ms. Raja's contractor and agent. Technically Mr. Rashid was not a "neighbour", as TLAB Member Mr. Leung observed, but a person living outside the 60 m radius for notice, who made it his (Mr. Rashid's) practice to watch the City's Committee of Adjustment notices to follow Mr. Ramirez's variance applications. Mr. Rashid

alleged that Mr. Ramirez, a former business partner, had a pattern of constructing without a building permit and then going to the Committee of Adjustment to legalize the construction.

Ms. Raja brought a motion pursuant to two branches of the 45(17):

"no apparent land use planning ground"; and

"bad faith".

Mr. Leung found Ms. Raja succeeded on both branches of the statute. With respect to the second branch he found Mr. Rashid's conduct appeared to be "a retaliatory action".

So, in both cases tendered by Mr. Hanlan, there is support for Ms. Stewart's (Ms. Guci's lawyer) contention that the TLAB is entitled to go beyond the four corners of Form 1.

ANALYSIS FINDINGS REASONS

Overview

I regard the issues in this case as exercises in statutory interpretation: what do the words in 45(17) mean? Statutory interpretation means the Ontario Legislature has given me instructions in the form of s. 45(17) and I must decode those instructions according to the facts before me. This is a specialized legal task that Mr. Hanlan, understandably, is not equipped to do. The task requires looking at the *Planning Act* in its **total purposive, historical and syntactic context**, which includes:

the *Legislation Act, 2006;*
other sections of the *Planning Act;*
the *Statutory Powers Procedure Act*;
the TLAB Rules, Forms and Public Guide; and finally,
the relevant precedents.

The Legislative context

Mr. Hanlan's motion goes to the heart of what the TLAB does, and I give him credit for advocacy on behalf of his neighbourhood as well as reading hundreds of TLAB cases. In other motions to dismiss cases, it is usually the represented party moving to dismiss the unrepresented party's appeal; here the tables are turned.

In construing [i.e. determining what rules to apply], there are many "rules of interpretation". The basic rule is that I have to look to the purpose of the statute; what was the Legislature trying to accomplish? This is set out in section 64 of the *Legislation Act,* which states:

> Rule of liberal interpretation
>
> **64** (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Since the object of the *Planning Act* is to ensure good land use planning, I have to interpret s. 45(17) as attempting to achieve good land use planning. Good planning means persons should not be deprived of their appeal rights without good reason. Because adjudication of disputes is integral to the scheme of resolution of land use conflicts, I should resist the extinguishment of appeal rights, except in the clearest of cases. What the Legislature was trying to accomplish was to discourage people from filing appeals and then walking away. This is not the situation here, with an owner appellant.

Planning Act

The second place I have to look is the *Planning Act*. I have noted that s. 17(45) is part of a "family" of legislative provisions allowing a preemptive strike against planning appeals and as well as appeals from variance decisions there is provision for dismissing for example, an appeal against a Council decision to rezone or adopt an Official Plan amendment. But the Legislature has "packaged" those other provisions with more obligations. For Official Plan Amendments, the appellant must show the approval is "inconsistent with Provincial policy statements". To even qualify as an appellant, the person must also have made written or oral statements at the public meeting. No such requirement exists for s. 45(17); all that is necessary is that the person "have an interest in the matter". This suggests to me that the Legislature intends the hurdle to appeal an Official Plan amendment is higher; similarly the barrier to appeal a variance decision is lower. The reason is obvious; variance hearings are likely to be short, frequently involve self-represented parties, and little hearing time is saved by a dismissal without a hearing.

There is a further section of the *Planning Act* to consider, as pointed out by Ms. Stewart:

> 45 (8.1) The decision of the committee, whether granting or refusing an application, shall be in writing, shall be signed by the members who concur in the decision and shall,
>
> (a) set out the reasons for the decision; and
>
> (b) contain a brief explanation of the effect, if any, that the written and oral submissions mentioned in subsection (8.2) had on the decision. 2015, c. 26, s. 29 (3).

The April 23, 2019 Committee of Adjustment decision consisted of a recitation of the four *Planning Act* tests and no explanation of the effect, if any, of numerous written and oral submissions. In that respect, Ms. Guci's appeal is marginally superior to the Committee's decision because it describes the opposing oral submissions as "emotional". Nonetheless, whatever the effect of 45(8.1), there is no question that the Committee's decision was legally valid and binding, prior to Ms. Guci's appeal. I conclude that from the *Planning Act* context, her Form 1 was consistent with the purpose of s. 45(1).

Statutory Powers Procedure Act

The third place to look is the *Statutory Powers Procedure Act*, of which s. 25.1(12) allows a tribunal to make rules and s. 28 states substantial compliance with any rule or form is "sufficient".

Ms. Guci's appeal was produced under tight timelines; there were only 20 days in which to produce her Form 1, and failure to do so would have eliminated Ms. Guci's right of appeal. Late disclosure e.g. a subsequent Witness Statement or Expert Witness Statement does not have the same drastic effect of a late appeal. The Legislature has created a scheme by which the filing of the appeal has a strict timeline and subsequent filings are subject to less stringent deadlines. This suggests that for the appeal, **when** it filed is more important than **what** it say. According to the Divisional Court case of *Stornelli,* it is permissible to supplement the content of Form 1 at a later time.[2]

The s. 45(17) words are permissive:

> The Tribunal **may** dismiss … if it is of the **opinion** .that the reasons do not disclose any **apparent** land use planning ground upon which the Tribunal **could** allow . .the appeal."

The word "may" in particular suggests that the remedy is discretionary, and the word "opinion" is similarly broad and invites a multidimensional balancing of different policies. The words "apparent" and "could" suggest the threshold is low. The word "opinion" is the same word used in s. 45(1), and according to the rule of interpretation "same words, same meaning, different words, different meaning", I take it that Ms. Guci's intention from the

[2] "The Divisional Court has ruled that for a dismissal Motion that the respondent can supplement the grounds in the appeal letters." (*Luigi Stornelli Ltd. and Centre City Capital Ltd.*, 1985 CanLII 2057 (ON SC), 50 O.R. (2d) 417 (Ont. Div. Ct.))". This quote is taken from OMB Member L. M. Bruce, para. 21, *Romandale Farms Limited v Markham (City)*, 2018 CanLII 29839 (ON LPAT), PL170781. *Romandale* was a motion to dismiss an appeal by the owner who appealed a refusals to amend a zoning by-law and refusal to approve a plan of subdivision. Thus, whatever deficiencies were in Ms. Guci's letter could be supplemented later according to *Stornelli* and *Romandale.*

outset was to prove she satisfied the appropriate four part test that is required by the *Planning Act.*

My two colleagues in *37 Hatherley* and *13 Denton* did not hesitate to look beyond the Form 1 content; indeed, they scarcely concerned themselves with those documents. They tried, in the spirit of Rule 2.2, “to secure the just, most expeditions and cost-effective determination of every Proceeding”.

TLAB Rules, Forms

The substantial compliance principle is repeated in TLAB Rule 2.10. Rule 2.11 allows the TLAB to make all “all necessary exceptions” to any Rule. Thus, I reject the main thrust of Mr. Hanlan’s argument. Moreover, the TLAB rules do not consider that the application is frozen for eternity once the Form 1 is filed. An applicant may change their application (i.e., eliminate or modify variances) within 20 days of the TLAB Notice of Hearing and these 20 days are themselves subject to Rules 2.10 and 2.11. This is consistent with s. 18.1.1 of the *Planning Act*, permitting late minor amendments to the original application. Together the *Planning Act* and Rules create a regime that encourages a change of position to effect a compromise.

Mr. Hanlan referred to Rule 9.1 Adjudicative Screening, which tracks the language of 45(17). This section also offers clues as to the purposive interpretation of “apparent planning ground”. The remaining three sections:

Rule 9.1 (b) “frivolous”
Rule 9.1(c) “delay”; and
Rule 9(1(d) persistent commencement of proceedings;

plainly contemplate an appeal made by a person, unlikely to be an owner applicant, who has no real interest other than to frustrate and harass the applicant. Frivolous appeals, appeals meant only to delay and abusive commencement of proceedings are in principle, easy to detect and represent wrongful conduct. These are quite different from the "apparent lack of planning grounds" type of scrutiny suggested by Mr. Hanlan, which involves a nuanced examination of planning judgement and could be the result of an innocent mistake. This ground of dismissal is different and good drafting will signal this by packaging (a) in its own paragraph in the Adjudicative Screening Section of the Rules and not as a subsection of a paragraph (grounds (b), (c) and (d)). The author of the Rules must be taken to not to draft clumsily, which is further reason to avoid the literal interpretation of Rule 9.1(a) given by Mr. Hanlan.

Mr. Hanlan was not prejudiced

Ms. Guci's appeal was filed on May 1, 2019 and Mr. Romano's (her planner's report) filed on July 29, 2019; as was Mr. Hanlan's Witness Statement. So, at most, Mr. Hanlan was possibly disadvantaged for those 60 days between May 1 and July 29. I asked what prejudice he suffered, and he replied it was unfair for Ms. Guci to have "blown smoke". This overlooks the process at the TLAB with its extensive prefiling requirements once the Notice of Hearing is sent to those on the mailing list. I suggested that if he was in doubt as to her position and needed a more detailed planning rationale, he could have communicated with Ms. Stewart prior to filing his Witness Statement. He replied that it was not his responsibility to supervise his opponent. True, but my suggestion was not aimed at an obligation to "supervise" Ms. Stewart but to communicate with her in advance and to enable Mr. Hanlan to best draft his own Witness Statement.

The *East Beach* decision[3]

This 1996 OMB decision is the leading case in this area. In the legislative history section on page 4, I mentioned that similar motions could be brought against Official Plan amendments and rezonings and the language is identical for those types of motions. A search of "East Beach Community Association" on the LPAT e-decisions website yields about a hundred OMB and LPAT cases which have cited *East Beach*, divided between about 20% variances and 80% rezonings, official plan amendments and consents. I read only the variance cases and found only one (*Matteliano v Copland*[4]), in which the moving party was unsuccessful. In that case as well as this one, there was some planning evidence upon which the appellant **might** be successful.

First let me describe the factual background for this leading case. It was brought very soon after the 1994 *Planning Act* amendments and concerns the redevelopment of the Greenwood Racetrack in eastern Toronto, a large site which was comprehensively redeveloped for mostly residential uses, but also for a school and open space. However, it also was proposed to have a "teletheatre", being an off-track betting shop, to take advantage of its non-conforming status as a racetrack. Two community associations, including the East Beach Community Association, which gives the case its name, opposed the development. Their opposition was to the project as a whole and although the Board infers that their

[3] Appendix 1. I reproduce it because I want it to be available to persons who only have access to free law information websites.

[4] In this case, Mr. Matteliano had built a garage without a building permit. He sold the property and the new purchasers asked to have the situation regularized, so Mr. Matteliano applied to the Committee of Adjustment for front, side yard and landscaped area variances. Hamilton City staff wrote a negative planning report, but the Committee granted all three variances. The Copland/Dufour family appealed; and Mr. Mattelliano's lawyers brought a motion to dismiss. OMB Member Blair Taylor refused the motion and sent the case for a full hearing. This case is consistent with this decision is that the OMB looked beyond the words of the appeal and noted that there was planning evidence that should be subject to the hearing process. (PL170064)

concerns centered on the teletheatre and without saying as much, it seems it considered this not a planning issue.

At the time of *East Beach*, persons complained to the government that a person could simply send a letter, without even paying a fee[5], to appeal a Council approval for the purpose of simply delaying the project. The proponent would be forced to prepare for a hearing and have no recourse except to ask for costs, which the OMB was reluctant to do for fear of discouraging legitimate appeals. The introduction of remedies like 45(17) was a compromise answer to those persons.

To return to *East Beach*, in my view, the panel thought it was wasteful to devote scarce hearing resources to a development that had already undergone a lengthy planning process. The most frequently quoted portion of the decision is:

> The Board is entitled to examine the reasons stated to see whether they constitute **genuine, legitimate and authentic** planning reasons. (my bold)

The bolded words are plainly subjective and *Stornelli* says they can be expanded in later documentation. But they are followed by the sentence:

> This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case.

So, one conclusion is that motions to dismiss without a hearing should be decided on a case by case basis, and I would agree with this.

Conclusion

All the circumstances have to be examined (the approach established by *East Beach*, *37 Hatherley,* and 13 *Denton* and *Romandale,* cited in footnote 2[6]), and each panel member has to satisfied as to whether she or he can come to the opinion whether there is an apparent planning land use planning ground on which the TLAB could allow all or part of the appeal. I am of the opinion there is such ground:

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[5] LPAT new charges a $300 fee for appeals, the same as the TLAB. Ms. Guci has paid this fee.

[6] "In a motion to dismiss, the Board is charged with considering, not whether or not the appeal based can be successful, but rather whether there are any apparent land use planning ground (sic.) upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board. The Board was provided with affidavits from four planning experts. . (names omitted but the planners were from opposing parties). It was evident through the affidavits and evidence provided through cross-examination that there are a range of professional opinions on the issues before the Board. **This diversity of opinions of these experts highlight that there are legitimate and genuine planning issues** upon which the Board could either refuse or grant Appeals in whole or in part." *Romandale*, para. 25, footnote 2, (my bold)

- the purpose of 45(17) is to efficiently and justly use hearing resources;
- it is counterproductive to allow one side “two bites” at the apple, especially as the hearing date is only a few weeks away;
- OMB and TLAB decisions show that panels to go beyond the four corners of Form 1 to dispose of motions under 45(17) and this approach is sanctioned by the Divisional Court (*Stornelli,* footnote); and
- Ms. Guci correctly recited the four tests, which satisfies the low threshold implied by the purposive analysis;
- she purports to be in possession of land use planning evidence in support of her appeal and there will be opposing planning evidence from both neighbours and the City.

I am not seized. I did not assess Mr. Romano’s (Ms. Guci’s planner) planning report other than to note that it existed. Assessment of all of the planning evidence through the hearing process is the prerogative and duty of the presiding panel.

Order

The motion is dismissed.

X Ted Yao

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

Appendix 1

Indexed as:
East Beach Community Assn. v. Toronto (City)

The East Beach Community Association and The Coalition Against the Teletheatre have appealed to the Ontario Municipal Board under subsection 17(36) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from a decision of the Minister of Municipal Affairs and Housing to approve, with modifications, Proposed Amendment No. 58 to the Official Plan for the City of Toronto to redesignate lands bounded by Queen Street East, Eastern Avenue, Coxwell Avenue, Lakeshore Boulevard, and

Woodbine Avenue to provide for a mix of residential, retail/commercial, institutional and open space uses. OMB File No. O960151 MMAH File No. 20- OP-1994-058

The East Beach Community Association has appealed to the Ontario Municipal Board under subsection 34(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended, against Zoning By-law No. 1996-0278 of the City of Toronto. OMB File No. R960213

The East Beach Community Association has appealed to the Ontario Municipal Board under subsection 34(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended, against Zoning By-law No. 1996-0279 of the City of Toronto. OMB File No. R960214

The East Beach Community Association and the Coalition Against the Teletheatre have appealed to the Ontario Municipal Board under subsection 34(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended, against Zoning By-law No. 1996-0280 of the City of Toronto. OMB File No. R960215

[1996] O.M.B.D. No. 1890

42 O.M.B.R. 505

1996 CarswellOnt 5740

File Nos. O 960151, R 960213, R 960214, R 960215

Ontario Municipal Board

B.W. McLoughlin, S.W. Lee

Oral decision: December 4, 1996
Filed: December 19, 1996

(6 pp.)

COUNSEL:

S.M. Bradley, for City of Toronto.
D.P. Smith, for Emm Financial Corporation.
P.L. Van Loan and S. Grieve, student-at-law, for Ontario Jockey Club.

H.G. Elston, for East Beach Community Association.
J.G. Sinclair and B.E. Bussin, for Coalition Against The Teletheatre.

MEMORANDUM OF THE ORAL DECISION delivered by S.W. LEE and ORDER OF THE BOARD:--

1 The motions brought by the City of Toronto ("City") and EMM Financial Corporation ("EMN") relate to the redevelopment of the former Greenwood Racetrack in the City of Toronto. The new project consists of a sizable housing component as well as a school site and open spaces. It will also include a teletheatre which will replace the existing one that is housed in the grandstand. Appeals to the by-laws relating to the requisite official plan amendment and zoning enabling the project to come into being have been appealed by two ratepayer groups.

2 The City and EMM requested the Board pursuant to sections 17(45) and 34(25) of Bill 20, the recent Land Use Planning and Protection Amendment Act, S.O. 1996 to dispense with the hearing.

3 Earlier at the proceeding, the Board had been requested to adjourn these proceedings on the basis that time is required so that the ratepayer associations can apply to the court for the determination whether the status of legal non-conformity applies to the existing teletheatre. For reasons stated at the hearing, the Board refused the request.

4 The materials filed before the Board contain arguments that invite the Board to make the finding that these groups did not exist at the time the by-laws were enacted and were unable to make submissions in their corporate status. However, that question had not been vigorously pursued and this panel does not need to address this question in view of what we are about to find.

5 The primary question before the Board is whether these appeals disclose any apparent planning grounds on which appeals can be given or refused. In short, the Board has been asked to rule whether these appeals pass the tests set out in these provisions, particularly in subsections 17 (45) (a)(I) and 34(25)(i). These provisions state as follows:

> "Section 17(45) Despite the Statutory Powers Procedure Act and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own motion or on the motion of any party if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board,"

"Section 32(25) Despite the Statutory Powers Procedure Act and subsections (11) and (24), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own motion or on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal."

6 The Board has been presented with a wealth of affidavit evidence from both sides as to whether the test set out in these provisions have been met. Mr. Sinclair submitted that all that is required for the appellant to show is that there is an apparent planning ground. If it does, the Board should not concern itself with the merits at all. The implication of his argument is that the Board should not go behind these reasons as a hearing is the best place to deal with the appeal. On the other hand, Mr. Van Loan pointed out to the Board that these are new legislative initiatives. These provisions are to ensure that hearings are to address genuine planning reasons and that the Board should not allow the matters to go to a hearing simply because apparent grounds are cited.

7 The Board's findings are as follows:

8 There is very little doubt that provisions in the new Act have expanded the discretionary powers of the Board to dispense with hearings. The legislature, in its wisdom, saw fit to confer on the Board additional authority to decide whether a hearing should be convened as it recognized the financial and other burdens in the event of an OMB hearing. From the comprehensive nature of the legislative amendment, one cannot but conclude that additional protocols and requirements have been imposed on appellants. They may be subject to challenge by a motion such as the present one and it is important for the Board to ascertain whether the test

set out in the provisions have been met.

9 With respect to the tests specifically stated in subsections 17(45)(a)(I) and in 35(25)(i), it is our view that these provisions allow the Board to examine whether there has been disclosure of planning grounds that warrant a hearing. In the past, the Board has indicated in a line of decisions and pursuant to the "sufficiency" tests under the former provisions of the Act that they must be triable issues to enable the hearing to proceed. The words in these particular provisions, in the context of the Act, cannot be construed that the test set out is less onerous than the test in the former provisions. If they were to be given the plain and natural meaning, the Board should not treat it as if it is a test whether planning language had been deployed in a notice of appeal. The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case. This does not allow the Board to make a hasty conclusion as to the merit of an issue. Nor does it mean that every appellant should draft the appeal with punctilious care and arm itself with iron-clad reason for fear of being struck down. What these particular provisions allow the Board to do is seek out whether there is authenticity in the reasons stated, whether there are issues that should affect a decision in a hearing and whether the issues are worthy of the adjudicative process.

10 In reviewing the evidence, the Board takes into consideration both the notices of appeals and the supporting evidence. The notices contain concerns that are clearly inaccurate. However, the Board accepts the affidavit evidence presented to support the notices. The support documents are well prepared and counsel for the ratepayer groups have made very able arguments on the basis of these documents. However, we cannot but come to the following finding after a review of their contents and import.

11 It is our conclusion that although in many instances, planning language is deployed and, in others, planning issues have been raised, the substance of these concerns individually and collectively are not such that the tests are met.

12 It is clear that most of the concerns are focused on the teletheatre. With respect to the questions of traffic impact or parking sufficiency, it is our finding that it is not good enough to simply raise apprehension. It would not constitute apparent planning ground by saying that further expert study is required with the hope that once a hearing is convened, more real issues can come forth. Such an approach will never lead to any finality, no matter how careful and sound an opinion is founded.

13 The Board is mindful of the history of the site, the lengthy planning process involved, the abundance and extent of deliberation and efforts invested to work out a scheme dealing with the locations of the new teletheatre site, the school, the open space. The Board is aware of the planning as well as other experts reports that had

been prepared.

14 While none of these efforts or reports prepared should be accepted as gospel or having the final word of the project at hand, the affidavit evidence of Milne, Freeman, Burke which constitute the materials in support of reasons of appeal do not seem to suggest the general thrust of the development is ill-conceived and the underlying considerations and studies are ill-founded.

15 As to the question of land use compatibility with the main street policy and the accommodation capacity of the teletheatre, these may on the face suggest issues that are worthy of a hearing. However, on closer scrutiny, they appear to constitute very little when weighed against the rest. These apparent concerns do not appear to be authentic issues at all.

16 The Board may be more sympathetic if there is an identifiable issue which these experts or decision makers has evidently glossed over. We would have been more persuaded if an issue would make a difference to the impact of the community or raise a real planning concern. This motion took almost four days to argue and the overall impression emerging from the objectors is that more study needs to be done.

17 For these reasons, the Board will grant the motion to dispense with the hearing. If there is any matter in the nature of mechanics, this panel can be spoken to.

B.W. McLOUGHLIN, Member
S.W. LEE, Member