

DECISION AND ORDER

Decision Issue Date **Friday, August 16, 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): DARYLE MOFFATT, CITY OF TORONTO

Applicant: CUNHA DESIGN CONSULTANTS LTD

Property Address/Description: 38 THIRTY FIRST ST

Committee of Adjustment Case File: 17 186733 WET 06 CO, 17 186731 WET 06 MV, 17 186732 WET 06 MV

TLAB Case File Number: 18 173153 S53 06 TLAB, 18 242672 S45 06 TLAB, 18 242684 S45 06 TLAB

Hearing date: Friday, August 02, 2019

DECISION DELIVERED BY STANLEY MAKUCH

APPEARANCES

Name	Role	Representative
Cunha Design Consultants	Applicant	
Terra Heights Developments Inc	Owner	
City of Toronto	Appellant	Laura Bisset
Daryle Moffatt	Appellant	
Carmine Cesta	Party	Mary Flynn-Guglietti
Franco Romano	Expert Witness	
Tom Bradley	Expert Witness	
Max Dida	Expert Witness	

Name	Role	Representative
Ian Gram	Expert Witness	
David Godley	Participant	
Alexander Donald	Participant	
Catherine Rezler	Participant	
Giselle Goncalves	Participant	
Adam Kataoka	Participant	
Christine Mercado	Participant	

INTRODUCTION

This is an order resulting from an objection raised by counsel for the appellant, Mary Flynn-Guglietti. The objection was that a participant, Mr. Donald, filed a revised witness statement six months after he filed his original witness statement which was filed in accordance with the TLAB Rules. Apparently he filed some documents later than the Rules permit, although counsel was not objecting to that conduct as such. The revised statement was filed on June 10, 2019; the complaint was made by letter on July 26, 2019 and orally at the recommencement of the hearing on August 2, 2019. As a result of the breach of the rules Ms. Flynn-Guglietti requested that “all material filed by Mr. Donald, and any other party or participant, after the deadlines clearly set out in the Notice of Hearing, dated October 30, 2019, not be allowed.”(sic) I assume the date is meant to be 2018.

BACKGROUND

The revision was filed after the all of the appellant’s evidence had been heard and cross examined, and prior to the hearing of the evidence of those in opposition. It was argued that the filing of the revised witness statement, was in breach of the Rules respecting: the introduction of an issue or evidence not previously disclosed, (Rule 28.6(a)); failure to act in a timely manner, Rule 28.6(c); failure to comply with the Rules, Rule 28.6(d); and failure to adequately prepare for a hearing, Rule28.6(e). Moreover, it was argued that the late filing was unfair to the appellant and Mr. Donald’s conduct was unreasonable and potentially prejudicial.

MATTERS IN ISSUE

The matter in issue is whether I should not allow, as a result of the complaint, any material to be filed after the deadline of October, 30, 2018.

JURISDICTION

There is no question that I have jurisdiction over the conduct of the hearing and the determination of whether the Rules have been breached and to determine the consequence of any breach.

EVIDENCE

There was no evidence presented regarding the breach of the various Rules. There was only an unidentified and unsworn document which was computer generated to demonstrate the differences between the two witness statements presented. There was no sworn evidence respecting the nature or significance of that difference or how the revised statement was prejudicial to the appellant. No formal motion was brought in accordance with the Rules, and thus no affidavit filed in support of a motion in accordance with the Rules. Neither Ms. Flynn-Guglietti herself, nor any witness for the appellant had read the revised statement.

Mr. Donald did not provide formal evidence in reply but in oral argument stated that that he did not hear the appellant's evidence and thus did not revise his witness statement to address the appellant's evidence. He stated that he revised it to make it less repetition, and "nit-picky" and to make it more on point. He also stated that he wanted to take into account a recent Tlab decision, and made no change in his basic argument. Mr. Jamieson who represented the Long Branch Neighbourhood Association opposed Ms. Flynn-Guglietti's request and argued that the revised statement did not change in intent or argument from the original and also stated that the revision was in response to a recent TLAB decision. Mr. Ivanov, counsel for the City also opposed Ms. Flynn-Guglietti's request, arguing that the revision reduced the number of documents Mr. Donald relied on, added a reference to the recent Tlab decision, and included no new substantial information. He pointed out there was no prejudice to the appellant as there was no new evidence.

ANALYSIS, FINDINGS, REASONS

I find that Ms. Flynn-Guglietti's request should be denied. There are numerous reasons for this conclusion set out below. My conclusions are based on the arguments presented as there was no evidence under oath respecting the request by any party or participant. That alone, is a sufficient basis for me to reject the request. Nevertheless, my additional reasons are:

1. First and foremost I must consider the purpose of the TLAB Rules regarding disclosure. That purpose is to ensure there is no surprise or ambush in the proceedings. There is no evidence that the revised statement would result in such. Indeed, it appears it would have an opposite result.

2. Ms. Flynn-Guglietti did not even read the revised statement to determine if there was any substantive difference between it and the original. Apparently there was not.

3. There was no evidence of prejudice to the appellant. Indeed, the evidence was that the revised statement made reference to a recent Tlab decision which was relevant to these proceedings and it was of benefit for Ms. Flynn-Guglietti to know that.

4. Ms. Flynn-Guglietti argued strenuously that the it was “unfair” that the revised statement be allowed. She, however, gave no reasons for the unfairness other than the Rules should be followed. She thus did not appear to consider that there was no surprise, no lack of opportunity to cross examine on the difference between the two statements, and no new information was being submitted as a result of hearing the appellant’s evidence at the hearing.

5. No consideration or discussion occurred as a result of recognizing that Mr. Donald was a lay person inexperienced in legal details. A discussion with him might have been more beneficial than a request for relief.

6. It does not make sense to prohibit all future filings at this time, as Ms. Flynn-Guglietti requested, as there may be valid reason for such a filing by a party or participant, including the appellant.

7. Finally I note the irony of arguing that breaches of the Rules regarding disclosure should not be allowed, when that argument was presented without following the Tlab Rules.

In conclusion I find the request should be denied, particularly since the request deals with a lay participant acting in good faith. While the Tlab Rules clearly apply to him, and he and all parties and participants should attempt to follow them, opposing counsel, in my view, should be careful in how he/she seeks to enforce the Rules. To do so when there is no prejudice, harm or breach of the purpose of the Rules can, in my view, diminish the reputation of the legal profession and the legal process in the eyes of the public and result in an inefficient use of everyone’s time.

DECISION AND ORDER

The request is denied. The hearing will proceed on August 20, 2019, as scheduled.

X 

S. Makuch
Panel Chair, Toronto Local Appeal