Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, October 25, 2019

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19)of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): GEOFF KETTEL

Applicant: MPLAN INC

Property Address/Description: 16 KENRAE RD

Committee of Adjustment Case File: 18 258780 NNY 26 CO, 18 258784 NNY 26 MV, 18 258785 NNY 26 MV

TLAB Case File Number: 19 170600 S53 15 TLAB

Motion Hearing date: Wednesday, August 14, 2019

DECISION DELIVERED BY JOHN TASSIOPOULOS

APPEARANCES

Name	Role	Representative
MPLAN Inc.	Applicant	
Bita Mehrin Rajaee	Owner/Party	
Mohammad Reza Hajighazi	Primary Owner/Party	Ian Flett
Geoff Kettel	Appellant	
City of Toronto	Party	Lauren Pinder
Leaside Property Owners Assoc.	Party	

INTRODUCTION

This is a decision on a Motion brought, by the owners of the property at 16 Kenrae Road, west of Laird Drive. The Motion, presented in person by their Representative Mr.

Ian Flett, was for dismissal of the appeal without holding a hearing, as permitted under 9.1 a), b), e) and i) of the Rules of the Toronto Local Appeal Body (TLAB). These are the TLAB Rules with respect to subsection 45(12) of the Planning Act. However, these are the incorrect rules given that the appeal filed by the Appellant Mr. Geoff Kettel on behalf of the Leaside Property Owners Association (LPOA), as the matters in issue involve section 53 of the Planning Act. This mistaken reference was identified by the City's representative, Lauren Pinder, during the hearing. Therefore, this Motion for dismissal of the appeal under Section 53 of the Planning Act is being considered with the corresponding Rules 9.2 a), b), f) and j). These Rules authorize the TLAB to dismiss a proceeding without a hearing if, *inter alia*, the reasons set out in the appeal do not disclose any apparent land use planning ground upon which the TLAB could allow the appeal.

BACKGROUND

On May 23, 2019, the Committee of Adjustment (COA) considered the owners, Bita Mehrin Rajaee and Mohammad Reza Hajighazi, application for a consent to sever the property at 16 Kenrae Road into two undersized residential lots. It would allow for the development of a semi-detached residential dwelling with lot frontages of 6.09m for each half of the semi-detached dwelling. The COA approved the consent application subject to conditions to be met before a Certificate of Consent was issued.

The Appellant, Mr. Kettel, representing the LPOA, appealed the decision of the COA. The reasons set out in the Notice of Appeal were:

"In our opinion and that of City Planning the application for severance and minor variances does not meet the requirements of the Planning Act and the Official Plan

Severance into two under-sized lots

The Planning Act (Section 53) requires that any proposed severance must conform to the requirements of the Official Plan and be consistent with the Provincial Policy Statement.

Minor Variances

The variances do not satisfy the four "tests" set out in s. 45(1) of the Planning Act.

The application fails the four independent tests of a minor variance as required by law and the courts:

1. *the application must be minor*
2. *it must be desirable for the appropriate development or use of the land, building or structure*
3. *it must maintain the general intent and purpose of the zoning by-law*
4. *it must maintain the general intent and purpose of the official plan"*

Mr. Flett contends that that the reasons given by Mr. Kettel in the Notice of Appeal, submitted to TLAB on June 12, 2019 are not sufficient and that it is appropriate to dismiss the appeal without a hearing because the appeal is not serious and diligent.

MATTERS IN ISSUE

I cite some matters for consideration:

Does the Notice of Appeal filed by Mr. Kettel on behalf of the LPOA set out apparent land use planning ground reasons upon which the TLAB could give or refuse to give the provisional consent or could determine the question as to the condition appealed to it as per Section 53(31)(a)(i) and Section 45 (1) of the Planning Act. If not, then the TLAB must consider dismissing the appeal.

Should the public or layperson, or in this case the property owner's association be expected to provide land use planning reasons that meet the same level of sophistication as would be provided by a professional land use planner or municipal law professional?

Is the requirement to state grounds for appeal fixed and mandatory or directory? Does the obligation to support the grounds change when a challenge is raised by way of Motion?

Has the appellant in this matter demonstrated through their notice and record of documents, serious and diligent conduct with respect to providing land use planning reasons for the basis of the appeal?

Does the Motion to dismiss the appeal prejudice or limit the public participation and limit accessibility with respect to land use matters before the TLAB and create a precedent that further restricts that participation and therefore is not in the public interest?

The language of the TLAB Rules and statute govern and provide a list of grounds as a basis to dismiss an appeal without a Hearing. Those rules and statutes are listed in the following section.

JURISDICTION

The TLAB Rules of Practice and procedure, section 9.2 notes that:

In the case of an Appeal under section 53 of the Planning Act the Local Appeal Body may propose to, or upon Motion, dismiss all or part of a Proceeding without a Hearing on the grounds that:

a) the reasons set out in Form 1 do not disclose any apparent land use planning ground upon which the Local Appeal Body could give or refuse to give the

provisional consent or could determine the question as to the condition Appealed to it;

b) the Appeal is frivolous, vexatious or is commenced in bad faith;

c) the Appeal is made only for the purpose of delay;

d) the Appellant has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;

e) the Appellant did not make oral submissions at a public meeting or did not make written submissions to the Committee of Adjustment for the City of Toronto before a provisional consent was given or refused and, in the opinion of the Local Appeal Body, the Appellant did not provide a reasonable explanation for having failed to make a submission;

f) the Appellant has not provided written reasons for the Appeal;

g) the Appellant has not paid the required fee;

h) the Appellant has not complied with the requirements provided pursuant to Rule 8.2 within the time specified by Rule 8.3;

i) the Proceeding relates to matters that are outside the jurisdiction of the Local Appeal Body;

j) some aspect of the statutory requirements for bringing the Appeal has not been met; or

k) the submitted Form 1 could not be processed and the matter was referred, pursuant to Rule 8.4, for adjudicative screening.

The Planning Act Section 53 (31) outlines the criteria for a dismissal without a Hearing.

EVIDENCE

The owner's counsel, Mr. Flett, had filed a Motion to Dismiss, supported by the affidavit of the planning expert witness, Michael Manett. Mr. Flett stated that Mr. Kettel's Notice of Appeal incorrectly indicated both the file numbers concerning the consent for severance and the minor variances when the Notice of Appeal indicates Section 53 of the Planning Act which would be relevant to the consent for severance alone.

In the Motion, Mr. Flett explained that Mr. Kettel's Notice of Appeal does "not provide genuine, legitimate and authentic planning reasons in support of an appeal of the consent approved by the Committee of Adjustment in this matter. They merely allege the lots created are "under-sized" and restate, inaccurately, a criteria concerning the Official Plan" (Exhibit #1, Part 4, par.3). He asked whether just saying broadly that the

application does not meet the requirements of the Planning Act and the Official Plan is sufficient. He explained this was not a reason for an appeal; it was just a restatement of the test. He further explained that although Mr. Kettel's reference to severance into two under-sized lots, in the Notice of Appeal, provides a reason, it *"does not provide a land use planning reason as is expected of a notice of appeal."*

He opined that by not providing any reference to specific Planning Act sections or specific policies within the Official Plan, the appellant is only restating tests and is not providing reasons that could form the basis of an appeal. Mr. Flett noted that although some may argue that the TLAB should allow for an appeal based on such reasons, because it was created to be accessible to the public, "the Divisional Court is pretty clear that an appeal is a serious matter." He explained that an appeal entails the hiring of lawyers and planners at great expense to respond to appeals, and that it may hold up the aspirations people have for their properties and that to allow for an appeal to move forward on the basis of a simple statement then that would not be fair.

Mr. Flett then went on to refer to the City's submission of a decision by TLAB Member Yao on 11 Stanley Avenue which indicated that the TLAB process "is accessible to ordinary citizens." He explained that he looked at the Notice of Appeal that was submitted for 11 Stanley Avenue (Exhibit #2, p.4 of 5) and that in this instance a layperson had provided ample reasons for the appeal and had referred to specific sections and policies with respect to the Planning Act, the Official Plan, the Secondary Plan, and the Zoning By-Law. Mr. Flett indicated that this was an example of a properly prepared Notice of Appeal and provides land use planning reasons for the appeal that are serious and suggest diligence in its preparation.

Mr. Flett turned to the concern about the appeal being brought forward in bad faith. He explained that the Applicant's Planner, Michael Manett had met with the LPOA along with Mr. Kettel on March 25, 2018 and that at the meeting a preference for a detached or semi-detached house form had been expressed. Given that the Applicant brought forward to the COA a semi-detached building that was then opposed by the LPOA at that hearing could be construed as acting in bad faith.

Mr. Flett then spoke to the variances that were approved for the lots created by the consent for severance and suggested that the COA's approval of the variances associated with the lots makes the argument about undersized lots moot. The approval of the variances, according to Mr. Flett suggests that they met the intent and purpose of the Official Plan and the Zoning By-Law. He further suggested that the application wasn't so offensive as to be turned down by the COA.

Mr. Flett then turned to the Cases outlined in the Notice of Motion starting with *East Beach Community Assn. v. Toronto (City)*. He explained that this was also a motion for

a dismissal of an appeal without a hearing because the Notice did not disclose land use planning grounds. In this case, the "*Board granted the motions dismissing the appeals without a hearing on the basis that the language in the statute did not merely invite parties to "deploy" planning language, but empowered the Board to "...examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons"* (Exhibit #1, Part 4, para. 26). He went on to explain that the *"snapshot"* to be considered is the Notice of Appeal and further opined that *"someone cannot come up after the challenge has been laid down in a Motion and say let me...fix the problems of my Notice of Appeal now and tell you all my great land use planning reasons because that is just not fair…you have to meet the statutory obligation on the day that you're required to in your Notice of Appeal.*" (Hearing recording excerpt of Mr. Flett). Furthermore, Mr. Flett pointed to the Divisional Court's decision on *Zellers Ltd. v. Royal Cobourg Centres Ltd.* quoting that *"Through a motion to dismiss, members of the OMB, people who have the background and expertise in planning matters, are given the power to ensure that steps open to participants in the planning process are employed for legitimate purposes. Decisions to participate in this process and particularly to launch an appeal are serious and must be pursued diligently"* (Exhibit #1, Part 4, para. 27). Mr. Flett explained that what should be focused on is whether the appeal is serious and diligent. He referenced again the Notice of Appeal prepared for 11 Stanley Avenue as an example of a serious and diligent example while the appellant in this case was not. Mr. Flett concluded that should the TLAB consider the land use planning reasons given in Mr. Kettel's Notice of Appeal as acceptable without more specific planning references than those provided then *"the pendulum of public access has swung so far as to make it unfair to Applicants."*

Mr. Kettel, representing the LPOA, explained that the appeal was not being filed on his own behalf but on behalf of the LPOA and that the appeals filed by it are considered very seriously and have land use and legal planning professionals on their board.

Mr. Kettel mentioned that the language used in the appeal had been used in numerous previous appeals by the LPOA and this has never been an issue in the past. He mentioned that in the past the LPOA submitted appeals based on the same legislation and that this was then followed, based on hearing deadline dates, with the submission of further detailed evidence. He continued that their appeal was based on similar objections the LPOA had with respect to the COA application and felt it was supported by the City Planning staff report; the appeal was consistent with this position.

Mr. Kettel explained that although they did not prepare a "dissertation on why" but enough information was stated in the Notice of Appeal by referencing Section 53 of the Planning Act dealing with Consent and Official Plan conformity. He indicated that this reason had also been expressed in the LPOA's letter of objection at the COA and that the City Planning staff report had also indicated these as planning issues.

Mr. Kettel then turned to the issue of bad faith explaining that the LPOA had been happy that they were invited by the Owner's representatives to a meeting and that it had arranged for neighbours to also attend the meeting. The nature of the meeting was not

a discussion on planning matters but rather on tenure and the size of the building. He explained that at the meeting the LPOA did not express an opinion either for or against the proposal. The LPOA had not heard back regarding this application until they had received notice of the COA hearing. He explained that the LPOA is very active in liaising with City Planning and they meet regularly especially on matters of severances which he said are not common in Leaside.

Mr. Kettel went on to address the issue raised by Mr. Flett, paraphrasing that if the bar was made low for an appeal it would *"open the floodgates"* and be unfair to the Applicant. He explained that as a layperson who has some experience with planning tribunals, he felt there are numerous barriers to involvement at TLAB because of the *"highly detailed system of forms".* He noted that one needs to be able to understand the TLAB website, have an understanding of how to file forms online, and that some quasi-legal knowledge seems to be required so he found it difficult to understand how this would open the "*floodgates".* He felt that there was enough of a barrier posed by the current TLAB process of forms and that he did not think the intent of the Notice of Appeal was to create another barrier. He explained that when the LPOA was preparing the appeal, they proceeded on the basis that City staff had been opposed; further, that after waiting for two hours at COA they only had five minutes to present. He felt that the decision made by the COA was random.

Mr. Kettel concluded that "you don't need a lot words" since there was a negative staff report regarding the application at COA, that a letter in opposition from the LPOA had been submitted to the COA, and that reference had been made to the legislation. He submitted that this should be all that is required and that is all the LPOA has done in the past.

Ms. Pinder, representing the City, began by challenging Mr. Flett's comparison of the Notice of Appeal for this matter and the one referenced from the 11 Stanley Avenue hearing. She explained that comparing the sophistication levels of Notices of Appeal was unfair and inappropriate. There was a concern with stating that one is better than the other or that one should be considered a standard by which all other appeals by a layperson should be considered. She went on to explain that a Google search of the author of the Notice of Appeal for 11 Stanley Avenue had been done and that the author in question revealed they were a litigation research specialist with a Ph.D. in Literature. Ms. Pinder said that it was unfair to state that this is the level expected of the laypersons Notice because the level of experience and sophistication varies from person to person.

Ms. Pinder then went on to note that with respect to the alleged shortcomings in the Notice of Appeal from the LPOA, the City was not of the opinion that it provides the basis upon which the TLAB should dismiss the appeal. The City was opposed to the Applicant's Motion and requested that the matter move forward to a Hearing on the merits. She pointed out that the Applicant was relying on Section 53 (31) of the Planning Act and TLAB Rule 9.2. It was emphasized that it provided TLAB with the discretionary authority to dismiss an appeal where one of the grounds is not satisfied. She contended

that the matter did not warrant the exercise of this discretion and that it should proceed to a hearing where expert planning evidence could be provided to the TLAB so that it may make an informed decision on whether the proposal should be granted or refused.

Ms. Pinder outlined the three arguments made by the Applicant representative, Mr. Flett, beginning with whether land use planning grounds were provided in the Notice of Appeal upon which TLAB could refuse or approve the Consent. She noted that the Notice sufficiently indicates that the application is being appealed with respect to non-conformity with the Official Plan and noted that the issue the Applicant has is with the specificity provided in the Notice of Appeal. She explained that although the language used in the Notice of Appeal differs from 51(24) using conformity to the Official Plan instead of conformity to the requirements of the Official Plan, the issue being raised is still one of conformity.

Ms. Pinder also referred to *East Beach Community Assn. v. Toronto (City)* with respect to the dismissal provision quoting that it allows approval authorities *"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"* (City Case Book, Tab 8, para. 9). She stated the City's position is that the "*issue of conformity to the Official Plan is identified in the Notice of Appeal, is an issue that should affect a decision in a hearing and is worthy of the adjudicative process as it is one of the core issues that a Consent hearing determines."*

With respect to *Zellers Ltd. v. Royal Cobourg Centres Ltd.,* Ms. Pinder also referred to the quote referred to by Mr. Flett earlier, quoting that "*people who have the background and expertise in planning matters, are given the power to ensure that steps open to participants in the planning process are employed for legitimate purposes"* (City Case Book, Tab 9, para. 32). She explained that whether an application conforms to the Official Plan is a legitimate purpose of an appeal *"as it is an enumerated criteria to have regard to when considering a Consent application."*

Ms. Pinder then turned to Member Yao's decision on 11 Stanley Avenue, explaining that it recognizes that the planning process at the TLAB is intended to be accessible to ordinary citizens and that the Planning Act in Section 1.1 (d) provides for a planning process that is open and accessible. She contended that dismissing the appeal of an unrepresented resident or resident association for failing to provide specificity in the Notice of Appeal despite identifying a land use planning issue of Official Plan conformity would undermine an accessible process. Mentioning Mr. Flett's reference of the Divisional Court's decision on *Zellers Ltd. v. Royal Cobourg Centres Ltd.,* that an appeal is a serious matter, she noted that it was "*equally serious to circumvent an Appellants right of appeal that is provided by statute.*"

With respect to Mr. Flett's comment that arguments regarding the conformity to the Official Plan are moot because the variances associated with the consent have been approved, Ms. Pinder pointed out that it is possible to refuse a Consent even where variances have been approved referring to *Braovac v. Ottawa (City) Committee of*

Adjustment (City Case Book, Tab 1) and that the TLAB has also refused a Consent for failure to conform to the Official Plan in the case of 103 Westbourne Avenue (City Case Book, Tab 6). She further mentioned that Mr. Flett suggestion that: "*Conformity to official plans is not a requirement of the Planning Act as it concerns severances, it is rather one of several factors decision makers must have regard for"* (Exhibit #1, Part 4, par.16). Ms. Pinder submitted that this was a misstatement for the requirements to grant a Consent and referred to *Leal v. Wellington (County)* indicating that in that case the LPAT had concluded that applications must conform to the Official Plan and that *"…conformity with an official plan is not a discretionary exercise in the sense that a policy can be applied or not applied in a particular case... To the extent that there may be some flexibility when having "regard" to an applicable policy, that flexibility is not whether the policy can be overlooked, but whether the application sufficiently satisfies the policy to be considered in conformity with it."* She further referred to the 103 Westbourne Avenue TLAB decision by Member Yao where he concludes that if the Consent *"does not conform to the Official Plan, it should not be granted"* (City Case Book, Tab 6) demonstrating that failure to conform with the Official Plan is a sufficient basis to refuse an application. Given this, Ms. Pinder noted that the Notice of Appeal does not fail to identify a land use planning ground for which the TLAB could dismiss an appeal as per Section 53 (31) of the Planning Act.

Ms. Pinder turned to the final argument being that the Appellants appeal is vexatious and brought in bad faith stating that the City's position on the alleged facts is that they do not warrant a dismissal of the appeal given that there is a land use planning issue to be considered. She referred to *Fockler v. Toronto (City) Committee of Adjustment* in which decision the former Ontario Municipal Board identified what constitutes an appeal that is frivolous, vexatious or not commenced in good faith as follows:

"The Board generally finds a lack of good faith when it is apparent that the appeal was filed for a purpose unrelated to the planning merits of the application. An appeal is frivolous, where there is patently no substantive planning issue. An appeal is vexatious, when there is clear intent to cause some prejudice to the applicant for reasons unrelated to any valid substantive planning issue" (City Case Book, Tab 7, para. 20).

Ms. Pinder stated that the land use planning reasons of conformity and that the lots created would be undersized are both substantive planning issues. She further explained that although the City could not comment on the allegations made about the meeting between the Applicant and the LPOA because it did not participate in it, they are insufficient to warrant the dismissal of the Hearing given the interest in obtaining a decision on the merits of the planning issues.

Ms. Pinder concluded that while the application was approved by the COA, it was opposed City Planning staff; its report opposed, the LPOA filing its appeal and City Council directed the City Solicitor to attend the Hearing. Given the identification of conformity with the Official Plan in the Notice of Appeal as a land use planning ground, it was requested that Motion to dismiss be refused and that this matter proceed to a

hearing where the planning merits could be considered in light of planning evidence that would allow for the arrival to an informed decision.

Mr. Flett responded to Ms. Pinder's presentation. He began by noting that Section 1.1 of the Planning Act not only indicates that planning process be open and accessible but also*"to provide for planning processes that are fair by making them open, accessible, timely, and efficient".* He submitted that planning processes must also be timely and efficient to help tribunals manage their affairs. By allowing for the dismissal of appeals that do not demonstrate apparent planning reasons, it allows the TLAB to not only manage its affairs, but to also be timely and efficient.

Mr. Flett then referred to Ms. Pinder's description of the planning issue identified in the Notice of Appeal as falling within "the realm of a planning issue." He suggested that within the realm would not be enough and as per his previous reference to *East Beach Community Assn. v. Toronto (City)* that indicated that it was not enough to mouth a land use planning reason to be sufficient, but that one has to demonstrate seriousness and diligence.

With respect to the Notice of Appeal filed for 11 Stanley Avenue, Mr. Flett mentioned that he had not been aware that the appellant in that case had experienced in legal drafting but noted that the language used in that appeal was still accessible, did not demonstrate specialized language, and could be understood by the layperson. In comparison, he mentioned that Mr. Kettel had indicated that the LPOA had planning and legal professionals on their Board yet did not provide a Notice of Appeal with land use planning reasons that suggested seriousness and diligence. He further argued that indicating interest and diligence in the past up until the Notice of Appeal does not meet the test of legislation and that the Notice of Appeal should have included that same diligence and interest. He said the LPOA could have easily just copied and pasted the reasons in their previous letter into the Notice of Appeal, which would have been more specific but they didn't and only provided simple reasons instead. He insisted that the appeal needed to do more than what was within the appeal.

ANALYSIS, FINDINGS, REASONS

In reaching my decision I have considered the materials presented during the hearing of the Motion to Dismiss, the Exhibit, the supporting documents of the case file that form the record of the matter for 16 Kenrae Road and the recording of the hearing. There were compelling arguments provided by all the Parties in attendance. They required appropriate consideration on the expectation that this decision could form a precedent or justification for future Motions to Dismiss or Notices of Appeal.

Mr. Flett has suggested that the Notice of Appeal filed by Mr. Kettel and the LPOA lacks specific land use planning reasons and that the reasons provided are too broad in

nature, indicating a lack of seriousness and diligence. He has stated that it is not enough to restate general planning reasons; that, based on the case law presented a more specific deployment of planning language and reasons are required in the Notice of Appeal. Furthermore, he suggests that it is not enough for the Appellant to have shown further specificity with respect to land use planning reasons in the past but that they had to be provided throughout the planning process and most importantly during the preparation of the Notice of Appeal.

Mr. Kettel explained that the process followed by the LPOA for this appeal is consistent with past appeals and that the language used speaks to the issue of conformity with the Official Plan. He went on to further explain that the LPOA's opposition to the application has been consistent and documented since the COA hearing and that they are on record with land use planning reasons for their objection. Mr. Kettel explained that planning evidence would be provided at the Hearing that would further elaborate on the issue of conformity with the requirements of the Official Plan. He indicated that it was enough to identify Section 53 of the Planning Act and that it was consistent with the objections of the City Planning staffs report.

Ms. Pinder argued that the dismissal wasn't warranted under Section 53(31) of the Planning Act or TLAB Rule 9.2 which provides the TLAB with the discretionary authority to dismiss an appeal where one of the grounds is satisfied. She suggested that the Notice of Appeal sufficiently indicates the land use planning reason of not conforming to the requirements of the Official Plan. Furthermore, she expressed concern that the level of accessibility and openness of the planning process to ordinary citizens would be compromised by allowing for the dismissal of the appeal: the level of specificity in language that Mr. Flett argued is not required for a Notice of Appeal.

In reviewing these arguments, I have considered the TLAB Rule 9.2 and the grounds under which the Notice of Appeal can be dismissed. Although Mr. Flett has provided some compelling arguments with respect to other decisions dismissing appeals similar to this one, I do not believe that the grounds as outlined in Rule 9.2 have been satisfied. I prefer Ms. Pinder's argument that a land use planning reason has been provided with respect to conformity to the Official Plan as it relates to Consent applications and that the level of specificity Mr. Flett is seeking in the language of the Notice of Appeal may limit openness and accessibility of the TLAB planning process to ordinary citizens.

There are three relevant stages here by which increasing specificity can be sought. The appeal grounds start the process and must raise a sufficiency of grounds to institute the appeal. This requirement is directory under the statute, not absolute or definitive.

Where there is an apparent ground to challenge the appeal, the device of a Motion under the Rule permits that. *East Beach* sets the stage that it is on the Motion the tribunal is to test the authenticity of the grounds for appeal; this is not reaching back to assess whether the language of the appeal letter was prepared with punctilious accuracy. The Tribunal must find assurance on the Motion that a triable issue exists and a genuine intent to prosecute it with evidence is present.

The TLAB has added a third basis to assess authenticity: the requirements to disclose and produce Witness Statements by dates certain, for the purpose of avoiding 'trial by ambush'. It might be reasonable, in some circumstances, to wait for these latter dates to pass before advancing a Motion to dismiss, for the disclosure the Rules require. Especially in a circumstance where the Motion challenges the presence or absence of a planning rationale or seeks to fix the assessment at an earlier point in time with the authorship of the appeal letter.

I believe that Mr. Kettel and the LPOA have demonstrated, based on the record of documents within the case file, seriousness and diligence and have been consistent in their objection to the application for 16 Kenrae Road. Mr. Flett has argued that the past record of objection and interest is not relevant in the matter of the Notice of Appeal if the same diligence and seriousness has not been demonstrated. TLAB Rule 9.2 a) indicates one of the grounds for dismissal being if *"the reasons set out in Form 1 do not disclose any apparent land use planning ground upon which the TLAB could give or refuse to give the provisional consent or could determine the question as to the condition Appealed to it."*

I believe that the identification of conformity with the requirements of the Official Plan does demonstrate a land use planning ground and shows diligence and consistency with the LPOA's previous objection at the COA. I was also not convinced by the arguments put forward that the LPOA demonstrated a lack of seriousness, diligence and care in the preparation of its appeal, when considered in the context of the language used or the record of documents in the case file. Furthermore, to ask the TLAB to ignore the past record and only look at the Notice of Motion in isolation with respect to potential dismissal would be equivalent of asking that the appeal be fixed in time and dismissed on an arguable technicality rather than considered as a whole.

Of equal concern in this Motion to dismiss the appeal is whether, as Mr. Flett suggests, an appeal must demonstrate a level of sophistication and detail in the deployment of planning language. This may actually limit public accessibility with respect to land use planning matters before the TLAB. Although, the Notice of Appeal does not include the specificity and range of land use planning language that Mr. Flett feels would be appropriate, the reasons given still refer to land use planning matters and cannot be ignored. Turning to the Divisional Court's decision on *Zellers Ltd. v. Royal Cobourg Centres Ltd,* that was referred to by both Mr. Flett and Ms. Pinder in their submissions and presentations, I focused on paragraph 32 which states that: *"…Through a motion to dismiss, members of the OMB, people who have the background and expertise in planning matters, are given the power to ensure that steps open to participants in the planning process are employed for* ***legitimate purposes****…"* (my emphasis added). In my review of the submissions and the supporting documents in the case file, along with the presentations at the Hearing, I am of the opinion that the Notice of Appeal in this matter is being employed for legitimate purposes. I was not able to identify a particular matter or conduct that might suggest that the appeal was frivolous or vexatious in nature or that it was not commenced in good faith. The LPOA through its letter of

objection and its filing of the appeal appear to have been diligent and consistent in the objections to this application.

Referring once again to *Zellers Ltd. v. Royal Cobourg Centres Ltd*., paragraph 32 also states that:

"The legislation and related jurisprudence make it clear that it is not sufficient that appellants raise land use issues in the Notice of Appeal. ***Such issues have to be worthy of adjudication and the responsibility falls on the shoulders of the appellants to demonstrate through their conduct in pursuing the appeal****, including their gathering of evidence to make their case, that the issues raised in their Notice of Appeal justifies a hearing."* (my emphasis and underline added).

My understanding of this excerpt is that the land use planning issues raised must not only be worthy of adjudication but that the appellant must demonstrate, through conduct, the seriousness of the appeal. I understand this to mean that the Notice of Appeal, and the land use planning issues identified in it, cannot be considered in isolation. The appellant must also demonstrate that the appeal is worthy of adjudication through the conduct in pursuing the appeal. I believe that the LPOA conduct has been consistent from the objection at the COA to the filing of the Notice of Appeal and have demonstrated that the land use Planning reasons are worthy of adjudication.

It is for these reasons that the Motion to dismiss the Notice of Appeal filed by Mr. Kettel and the LPOA should not be allowed and that the matter should proceed to a Hearing where the land use planning merits of the appeal and the application may be considered.

DECISION AND ORDER

The Motion to dismiss the appeal is refused.

In addition, the Hearing date of October 28, 2019 is adjourned as per the request, and as agreed to, by the Parties. A new Hearing date will be provided by TLAB staff in coordination with the schedule Parties appearing in this matter along with any new deadline dates for submission of documents concerning this matter.

X

John Tassiopoulos
Panel Chair, Toronto Local Appeal Body