

# DECISION AND ORDER

**Decision Issue Date**      Friday, October 18, 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): CHRISTOPHER MICHAEL ARNTS

Applicant: ROBERT ABRAHAMS

Property Address/Description: 27 Duart Park Rd.

Committee of Adjustment Case File: 19 105127 STE 19 MV (A0041/19TEY)

**TLAB Case File Number: 19 180472 S45 19 TLAB**

**Hearing date:**      **Heard in Writing**

**DECISION DELIVERED BY S. GOPIKRISHNA**

## APPEARANCES

NAME	ROLE	REPRESENTATIVE
GINESSA LYNN ARNTS	OWNER	
ROBERT ABRAHAMS	APPLICANT	
ROSE MARIE JONES	PARTY (TLAB)	PHIL POTHEN
CHRISTOPHER MICHAEL ARNTS	APPELLANT	ROBERT ABRAHAMS

## INTRODUCTION AND BACKGROUND

GiNESSa Lynn Arnts and Christopher Arnts are the owners of 27 Duart Park Road, located in Ward 19 (Beaches- East York) of the City of Toronto (City). They applied to the Committee of Adjustment (COA) for the approval of variances, which would have allowed them to construct a new, three-storey, detached dwelling, with a rear third-storey deck, a front porch, and a rear sunken patio. The COA heard the application on June 12, 2019, and refused the application in its entirety.

On June 28, 2019, Mr. Robert Abrahams, Agent for the Applicant, appealed the decision of the COA to the Toronto Local Appeal Body (TLAB), which scheduled a Hearing on November 4, 2019.

The neighbour residing at 29 Duart Park Road, Ms. Rosemarie Jones, elected to be a Party, in opposition to the Appeal on August 7, 2019. On September 9, 2019, Mr. Phil Pothen, Ms. Jones' lawyer, submitted documents which included an Expert Witness Statement prepared by Mr. D. Andrew White, an arborist, accompanied by an Acknowledgement of Expert's Duty, and Mr. White's *Curriculum Vita*..

On September 23, 2019, Mr. Abrahams brought forward a Motion, asking that the "evidence" of Mr. Andrew be dismissed, because it was not relevant to the Appeal. On October 1, 2019, Mr. Pothen, counsel for Ms. Jones, filed a Response to the Motion, asking that the Motion be dismissed, for reasons discussed in the Evidence Section.

As of the time this Decision is being released, no Reply has been filed by the Moving Party in response to the Response filed by the Opposition on October 1, 2019.

## **MATTERS IN ISSUE**

The question in the Motion brought forward by the Appellants is:

Should the Expert Witness Statement of Mr. Andrew White, filed by the Opposition, be dismissed, because of alleged non-relevance to the Appeal?

## **JURISDICTION**

The Moving Party' did not specify which of the TLAB's Rules of Practice and Procedure (i.e. the Rules)., were being relied on in support of the Motion. However, I have relied on the TLAB's Rules to determine procedural matters

## **EVIDENCE**

The Motion brought forward by Mr. Roberts, dated September 23, 2019, argued that the Expert Witness Statement, filed by the Opposition, on September 9, 2019, should be dismissed, because there was no demonstrable nexus between the requested variances, and Mr. Andrew's Expert Witness Statement, which identified "excavations within 5 m of the tree, as a potential threat to the trees' stability".

By way of editorial comment, the Motion provided no details as to which tree was being referred to; the Expert Witness Statement makes it clear that the tree in question is a "black walnut tree", located on 29 Duart Park Road, such that the base of the tree, is about a quarter of a metre from the property line fence, and about two metres from a retaining wall to the south."

Mr. Abraham pointed out that no variances were sought from the Tree By-Law, and then reviewed each of the variances requested under By-Laws 569-2013, and 438-86. He concluded that there was no ostensible connection between the variance, and the tree in question.

Finally, Mr. Abraham stated that “all construction [...] , required a permission from the City’s Urban Forest Tree Protection and authority of the Plans Review Office.” He explained the mandate of the Tree Protection Act and Plan Review Office, and said that the office could issue permits to cut the trees, based on the Private Tree Bylaw. Believing the tree cutting permit to be adequate to address the opposition’s concerns, Mr. Abraham concluded his submission by asking that Mr. Andrew’s Witness Statement be “dismissed” from the record.

In his Response filed on October 1, 2019, Mr. Pothen disagreed with the Appellant’s submission, and asked that the Motion be dismissed in its entirety. Mr. Pothen explained that in the Oppositions, opinion, that the proposed variances were contrary to the purpose and intent of the Official Plan, because of their alleged inability to satisfy Policy 3.4.1(d), as well as the tests of appropriateness, and minor

Mr. Pothen also stated that the question of whether, and to what extent, a proposed development, would impact a mature, native, protected tree, is plainly material to the four-part *Planning Act* test for minor variances. He also disputed the Appellant’s assertion that the “Application to Injure or Remove Trees” process, overseen by the City’s Urban Forest Tree Protection and Plan Review Office, is adequate to evaluate the risk of injuring or destroying Ms. Jones’ tree by itself. He clarified the connection between Section 45.1, and the permit issued by the Urban Forestry Department for cutting trees, by stating that if the COA approved “variances which directly impact private protected tree(s)”, the Urban Forestry department would authorize replanting conditions to replace the loss of the impacted trees.

Mr Pothen also asserted that the moving party had not provided admissible evidence, in support of their assertion that the Expert Witness Statement was not material to the present appeal”. Mr. Pothen concluded his Response by reiterating that the Motion be dismissed.

## **ANALYSIS, FINDINGS, REASONS**

It is important to note that there is no record of the Appellants’ submitting a Witness Statement that they wish to rely on to argue their Appeal. The only submission made by the Appellants, besides the Motion before me, is a letter dated 29 July 2019, which lists an updated set of variances to be ruled on by the TLAB, accompanied by a Zoning Notice. Mr. Andrew’s Expert Witness Statement, dated September 9, 2019, does not discuss any applicable policies, nor demonstrate the connection between the contents of the Statement, and Section 45.1.

*Prima facie*, there does not seem to be a nexus between the requested variances, and the tree in question. Under these circumstances, I would have approved the Motion put forward by the Appellants.

It is only after perusing Mr. Pothen's submission, dated October 1, 2019, is the connection between the Arborist's report, and the variances, clarified- the opposition's position is that the proposal cannot satisfy Policy 3.4.1(d) of the Official Plan, , and cannot satisfy the tests of appropriate development, and minor, because of alleged damage to the black walnut tree in question.

Given how it was left to Mr. Pothen's Response to illustrate the connections between the proposal, and Section 45.1, I cannot help but conclude that both the Appellants' submissions, and the opposition's Statement, could have better illustrated how the proposal would satisfy, or not satisfy, the four tests under Section 45.1. I agree that evaluating the impact of a proposal on trees to be cut down, falls within the jurisdiction of the TLAB, and that the Tree Cutting Permit process is not adequate by itself, to limit damage to trees.

I find that it would be appropriate to include Mr. White's Expert Witness Statement in the submissions as I find it germane to this case, and consequently refuse the Appellants' Motion in its entirety. Mr. White's Statement may be relied upon by the Parties in testing the evidence.

## **DECISION AND ORDER**

- 1) The Motion put forward by the Appellants, dated September 23, 2019, is refused.
- 2) The Witness Statement of Mr. D. Andrew White, Arborist, may be relied upon by the Parties for evidentiary purposes.

So orders the Toronto Local Appeal Body

X 

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S. Gopikrishna  
Panel Chair, Toronto Local Appeal Body