Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Monday, September 30, 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): DIXIL PROPERTIES INC

Applicant: DOMUS ARCHITECTS

Property Address/Description: 1982 ISLINGTON AVE

Committee of Adjustment Case File Number: 17 265553 WET 04 MV

TLAB Case File Number: 18 131764 S45 04 TLAB

Motion Hearing date: September 3, 2019

MOTION DECISION DELIVERED BY S. GOPIKRISHNA

APPEARANCES

Name	Role	Representative
DOMUS ARCHITECTS	Applicant	
DIXIL PROPERTIES INC	Appellant/Owner	JOEL FARBER
MUSTAFA MASTER	Party (TLAB)	
BRIARCREST MANOR	Party (TLAB)	KELLY OKSENBERG
CITY OF TORONTO	Party (TLAB)	MATHEW LONGO/ELLEN PENNER
DAVID MILNE	Participant	
SILVIA ESTEVEZ	Participant	
GORDON GARFIELD BEATTY	Participant	
KATHLEEN MARION BEATTY	Participant	
URSULA MAHNKE	Participant	
MARIA BELLOMO	Participant	

BRUNO BELLOMO	Participant
LINDA MILNE	Participant
ROBERT ANSTIE	Participant
NANCY LARIN	Participant
SONIA MARY WERHUN	Participant
JULIO ESTEVEZ	Participant
RONALD BELLOMO	Participant
ROCCHINA BELLOMO	Participant
GRANT LAWSON	Participant

INTRODUCTION AND BACKGROUND

I am the presiding Member hearing the Appeal respecting 1982 Islington Ave, and have completed two days of hearing with respect to this Appeal, the most recent being July 26, 2019. It is important to briefly discuss the highlights of the Hearing held on 26 July, 2019.

On July 26, 2019, (Second day of the Hearing) the City of Toronto called its Witnesses, Mr. Tony Lieu, and Ms. Kirsten Flood; the former is a planner who provided expert evidence in the area of planning, while the latter provided expert evidence in the area of heritage matters. While Mr. Lieu completed his examination in chief, cross-examination, and re-examination, Ms. Flood had not completed her examination in chief, by the time the Hearing ended at 4:30 PM.

It may be of interest to note that Mr. Lieu substituted as the planning Witness in lieu of Ms. Covello, and had adopted her Witness Statement, but had not resubmitted the Expert Witness Statement, under his own name, notwithstanding my Decision dated May 30, 2019, which specifically ordered the City's new planning Witness to resubmit the Witness Statement under their signature. When I drew Mr. Lieu's attention to his not submitting the statement on July 26, 2019, Ms. Ellen Penner, Counsel for the City apologized, and stated that she had inadvertently not followed through on the submission of the Statement. By way of editorial comment, the lack of submission of an updated Witness Statement is an issue of interest to the determination of what information was available to the Appellants at the commencement of the Hearing on July 26, 2019.

While Ms. Flood had submitted a Witness Statement dated October 26, 2018, she commented on other issues not explicitly referred to in the aforementioned Statement during the course of her examination in chief, including opinions where she disagreed with the evidence given on Heritage Policies by Mr. Adrian Litavski, Expert Witness for the Appellants. Mr. Joel Farber, Counsel for the Appellants, expressed his surprise at

the “lack of disclosure” during the course of Ms. Flood’s testimony, and I specifically asked the City for the submission of, what appeared to me, *prima facie,* to be an updated Witness Statement, relied upon by Ms. Flood, when giving her evidence.

On Aug 1, 2019, the Appellant, Mr. Meffe sent emails to the TLAB with copies of five documents, accompanied by a Party Witness Statement, which listed three issues (referred to henceforth as the “three points”), as outlined below:

1) We have always been prepared to accept the HPS conditions as per their report to the C of A and as per Site Plan Application requirements and we have commissioned and have received the report. We accept the conditions, so the variances if approved by the TLAB are not final and binding until HPS signs off.

2). Contrary to Mr. Lieu’s evidence, we have been diligent in addressing Natural Heritage system issues and of course we submitted our complete and well received reports to the City (and to TRCA) in connection with the 6 storey site plan application. The development proposal is modestly less impactful than what was previously studied and which received TRCA sign off – as has the current proposal. We will provide any further update to the NHIS that may be required as part of Site Plan approval as required by the Official Plan.

3). In making our application, we received a “Municipal Applicable Law” notice setting out the legal requirements and approvals that we needed to obtain to permit the project.

The five documents submitted by way of email are:
1. Heritage Impact Assessment (HIA) by ERA dated 4 February 2019 (48 pages)
2. Demolition Permit Application for 1982 Islington Building dated 22 December 1992 (1 page)
3. Transmittal of submission to the City & TRCA of 2 hard copies of NHIS dated 23 December 2015 (1 page)
4. Email of revised NHIS submission to the City & TRCA dated 13 June 2016 (1 page)
5. Preliminary Project Review (PPR) by the City dated 27 August 2018 (10 pages) Includes the latest revised design

It may be noted that:

1) In his Reply Witness Statement, there is no direct reference to Mr. Meffe’s desire to take the stand to give evidence, when the Hearing resumed on November 19, 2019. This is an inference drawn from the words “reference during this testimony” appearing on Page 2 of the completed Party Witness Statement, reinforced by a reference to “reply evidence” in his Affidavit dated August 30, 2019.
2) No formal Motion asking to submit Reply Evidence, with submission of the five documents referred to earlier

The City brought a formal Motion on August 19, 2019, followed by a Response from the Appellants dated August 30, 2019, and a Reply from the City on September 7, 2019.

The purpose of this Decision is to make a ruling on a Motion brought forward by the City of Toronto, requesting that some documents introduced by the Appellants, by way of the aforementioned email dated August 1, 2019, be excluded.

MATTERS IN ISSUE

In its Motion dated August 19, 2019, the City objects to the following being admitted as reply evidence:

i.) Each of the three Points listed as issues and the outline of intended Evidence

ii.) Document Number 1 “Heritage Impact Assessment (HIA) by ERA dated 4 February 2019” (the “Expert Report Document 1”); and

iii) Document numbered 5 in Parts “Preliminary Project Review (PPR) by the City dated “August 27, 2018” (the “PPR Document 5”)

The “three Points” have been recited in the Introduction section in italicized letters.

Alternatively, the City wants an order restricting the use of the evidence listed in the paragraph above to:

1) new issues that have not already been addressed in the Appellant’s evidence; and
2) non-opinion evidence

The City further requests that this Motion be heard in writing pursuant to Rule 17.5 of the TLAB Rules

The Appellant requests the following relief:

(a) An order denying the City of Toronto's Notice of Motion to exclude from evidence the submissions in Part 5 of the Party Witness Statement Form 12, submitted by the Appellant on August 1, 2019.

The Appellant further requests that this motion be heard orally, following the conclusion of the City's case in chief.

JURISDICTION

The City relies on the TLAB’s Rules of Practice and Procedure (the Rules) , with specific reference to Rules 2.2, 2.3, 2.5 16.8, 16.11, 16.12 and 17.5, in support of its Motion.

The City reiterated the relief it requested in its initial Motion in its Reply to the Response of the Appellants.

EVIDENCE

On Aug 1, 2019, Mr. Dominic Meffe, the Appellant, sent an email to the TLAB, with a completed Party Witness Statement, stating that he wanted to "provide testimony" to introduce the following documents, and " reference them during his testimony" :

1. Heritage Impact Assessment (HIA) by ERA dated February 4 2019 (48 pages)

2. Demolition Permit Application for 1982 Islington Building dated December 22 1992 (1 page)

3. Transmittal of submission to the City & TRCA of 2 hard copies of NHIS dated December 23 2015 (1 page)

4. Email of revised NHIS submission to the City & TRCA dated June 13 2016 (1 page)

5. Preliminary Project Review (PPR) by the City dated August 27 2018 (10 pages) Includes the latest revised design

By way of editorial comment, It is important to note that Mr. Meffe makes no explicit reference to his taking the stand to give evidence; the inference about providing testimony is an inference drawn from the words "reference during this testimony" appearing on Page 2 of the completed Party Witness Statement.

On Aug 19, 2019, Ms. Ellen Penner, Counsel for the City, brought forward a Motion to be heard in writing, in which she acknowledged receipt of the email from Mr. Meffe, about the "Reply Evidence", and asked for relief in the form of:

A) An order excluding from the evidence the submissions in Part 5 of Party Witness Statement(Form 12) dated August 1, 2019 (the "Party Witness Statement'), filed by Mr. Domenic Meffe (the 'Appellant'). Specifically, the City objected to the following being admitted as reply evidence:

i) each of the three Points listed as issues and the outline of intended evidence;
ii) . Document number 1 "Heritage Impact Assessment (HIA) by ERA dated 4 February 2019" (the "Expert Report - Document 1"); and
iii) . Document numbered 5 in Parts "Preliminary Project Review (PPR) by the City dated 27 August 2018" (the "PPR - Document 5")

B) Alternatively, an order restricting of the use of the evidence to:

i) new issues that have not already been addressed in the Appellant's evidence; and
ii) non-opinion evidence

The reasons put forward by the City assert that "The issues and documents" do not constitute "proper reply evidence", because reply evidence is reserved for new issues

that the Party could not have anticipated. The Motion alleges that the Appellant is trying to "split" their case, or reinforce evidence already given to the TLAB.

The City's submission declares that It is a long standing rule of common law that an applicant may not "split its case" through selective deployment of facts, or evidence in its case in chief, and repeat facts and evidence, or present new facts or evidence to bolster their argument then through reply evidence,. The submission cites the Supreme Court of Canada's observations in the case of *Krause v. R,* [1986] 2 S.C.R. 466 (5CC.) at paragraphs 15 and 16

"There are well-established principles of common law that reply evidence is reserved for new issues that the party could not have anticipated and a party is not entitled to "split' their case or reinforce evidence that has already been given under the guise of reply evidence and should be excluded

The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear

The City's submission also relies on the decision of the Ontario Court of Appeal in *Alicock, Laight & Westwood Ltd v Patten*, which reinforces the Supreme Court's conclusion about case splitting, with the caveat that the "party beginning" must not split its case. The decision states:

It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on prima facie proof, and when this has been shaken by his adversary, adducing confirmatory evidence.... The rule is now so well settled that it requires no further elaboration.

Lastly, the City relies on the findings of the former Ontario Municipal Board (OMB) in the matter of ***CIC Management Services Inc. v. Toronto (City)***, in a dispute concerning reply witness statements filed in advance of the hearing, the Panel held:

"The jurisprudence is clear that a party may not under the guise of replying to reconfirm the case it was required to make out in the first instance. A party must exhaust its evidence in the first instance and may not split its case by first relying on prima facie proof and when this case has been shaken by adducing further confirmatory evidence"

The City's position is that "contrary to the fundamental principles of reply evidence," the Appellant presented its case, and waited until after the City presented its evidence, including Ms. Flood's assertion that a Heritage Impact Statement was required, and was then looking to introduce Document 1 as "reply evidence". The City states that in the points raised by the Appellants in their submissions of August 1, 2019, there is no "new

matter" arising, which the Appellant "has had no opportunity to deal with" and which the Appellant "could not reasonably have anticipated", because

"*All issues purportedly addressed by the evidence in Point 1 were identified as an issue in comments provided to the Committee of Adjustment by Heritage Preservation Services dated March 1, 2018 (TAB 12 in the City's Document Book)",* and " *The Appellant has also known that the City intended to call a Heritage Preservation expert witness and the contents of Ms. Flood's Witness Statement since it was submitted on October 26 2018.*"

The City's submission then cites specific instances where its Witnesses specifically drew attention to the need for a "Heritage Impact Assessment" to satisfy the intent of the Official Plan Heritage Conservation policies. According to Ms. Penner, this point, in conjunction with "*significant deficiencies of the HIA previously provided by the Appellant*" is referenced in Paragraphs 8, 11, 12 and 13 of Ms. Flood's statement.

The City's submission then demonstrates that the submission made in Point 1 of Mr. Meffe's submission, dated August 1, 2019, by quoting:

We (i.e. Appellants) were always been prepared to accept the HPS [City of Toronto Heritage Preservation Services] conditions as per their report to the C of A [Committee of Adjustment] and we have commissioned and have received this report [Heritage Impact Assessment Report]. We accept the conditions, so the variances if approved by the TLAB are not final and binding until HPS signs off."

is identical to Paragraph 78 of Mr. Litavski's Expert Witness Statement:

"*Any further details regarding the conservation and/or restoration of specific heritage elements can and will be determined during site plan approval".*

The City's submission then discusses Point 2 , as it appears in Mr. Meffe's submission

"The development proposal is modestly less impactful than what was previously studied and received TRCA sign off — as has the current proposal. We will provide any further update to the NHIS (Natural Heritage Impact Statement) as required by the Official Plan"

and identifies this as being synonymous with in Mr. Litavski's oral testimony, as well as Paragraphs 82 to 89 of his Witness Statement.

"*Although written in regard to the 2015 site plan application, the current proposal before TLAB respects the same 6m setback. It is sufficiently similar that I'm confident that, with appropriate updates as required, the studies will offer similar findings and recommendations which will be appropriately confirmed through the site plan approval process*".

Lastly, the City argues that Point 3 from Mr. Meffe's submission, referencing the PPR, is discussed in Paragraph 32 of Mr. Litavski's Witness Statement, and was discussed on

December 17, 2018, where the latter referenced other approvals required, and spoke about how these approvals tied in with the Site Plan Approval process.

Given the above examples, the City concluded that the Appellants were in effect, reinforcing conclusions, that were expressed clearly during their examination in chief.

Under the heading "**The Party Witness Statement is contrary to the Scheme of the TLAB Rules",** the City offered a detailed, Rule by Rule analysis of how a "*contextual analysis of the scheme of the Rules indicates that response or reply evidence is only to be introduced for "new issues*".

An analysis to support the above conclusion, is presented on the basis of Rules 16.6, 16.10, 17.11, 17.12, 24.9, 31.22 and 31.23.

In the section titled "**The Party Witness Statement submits an Expert Report without an Expert"** in the same submission, the City also asserted prejudice because the Appellant was not bringing forward a heritage preservation, or heritage architect expert to address the heritage aspect of the Appeal. The City also submitted that the "Appellant has not demonstrated any expertise or credentials, in the field of heritage preservation or heritage architecture".

The City 's submission alleges that the inclusion of the "Expert Report" (i.e. Document 1 in the Party Witness Statement ") is an attempt to evade the procedural safeguards put in place for expert opinion evidence, and cautions the TLAB against assigning Expert Witness status to Mr. Meffe. The City's submission asked that Mr. Meffe "should only be permitted to speak to the facts of which he has knowledge, such as the fact that he has commissioned and received Expert Report -Document 1" , and that it would object to anything further "that strays into the realm of opinion evidence".

The City urged the TLAB to hear the Motion in writing, pursuant to Rule 17.5 of the TLAB Rules, and emphasized that it would be in the "interests of the parties to know the outcome of the motion as soon as possible, given the upcoming hearing on November 19, 2018. *(sic*). By way of editorial comment, the date should have read " November 19, 2019."

It may be noted that the City relies on Rules 16.6, 16.10, 17.11, 17.12, 24.9, 31.22 and 31.23 in support of its position

On Aug 29, 2019, Mr. Farber filed his Reply statement, which outlined the Relief sought by the Appellants and their reasoning behind the same, to which an affidavit sworn by Mr. Meffe was attached. The original Party Witness Statement, was also attached to the submission.

Mr. Farber asks that the City's Motion dated August 19, 2019, be dismissed, which would effectively allow the Reply Witness Statement filed by Mr. Meffe, to be admitted in its entirety. It also asked that the Motion be heard orally, after the completion of Ms. Flood's examination-in-chief, on November 19, 2019.

Mr. Farber recounts how the City had called Ms. Kristen Flood, and Mr. Tony Lieu to give supporting evidence for denying the minor variance, followed by an explanation of why he believed that the evidence given by the City's witnesses was not disclosed to the Appellant, nor their counsel in advance of the hearing.

Mr. Farber relies on the 2009 Ontario Superior Court decision of "***Springer v. Aird & Berlis LLP****",* which quotes from the legal textbook *The Law of Evidence in Canada,*

"*At the close of the defendant's case, the plaintiff or Crown has the right to adduce rebuttal evidence to contradict or qualify new fact issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded*."

According to Mr. Farber, Ms. Flood's evidence addressing the heritage merits of the proposal, had not been disclosed to the Appellant, before the July Hearing.

Mr. Farber also states that the Appellants were not informed in advance of the Hearing that Mr. Tony Lieu intended to give evidence that the Appellant's Natural Heritage Impact Assessment (NHIA) had not been submitted to the City of Toronto, as part of the original site plan application. Likewise, Mr. Lieu's suggestion that an Official Plan Amendment, related to the ravine setback would be required, for an "as of right" building, was also not disclosed to the Appellant before the July Hearing.

Mr. Farber notes that the City's Motion stated at Paragraph 6, "There are well-established principles of common law that reply evidence is reserved for new issues that the party could not have anticipated.". He links the concerns mentioned in the previous paragraph i.e:

(a) the submission of the Appellant's Natural Heritage Impact Assessment ("**NHIA**")

(b) the need for an Official Plan Amendment for the ravine setback for the proposed building location.

to Mr. Meffe's submissions of August 1, 2019, and asserts that the Participant Witness Statement, wholly and completely, pertains to Ms. Flood and Mr. Lieu's "new evidence"

According to Mr. Farber, the Appellant would be able to demonstrate that a NHIA had been submitted to the City as part of their original application.

In response to Mr. Lieu's evidence that an Official Plan Amendment was required relating the ravine setback on the Property, the Appellant says that they have rebuttal evidence demonstrating that they received an applicable law notice from the Toronto Building Department, informing them that the ravine setback does not require an Official Plan Amendment, and objects to the City's attempts to deny this evidence via "this Motion".

Mr. Farber's Response also asks for the Motion to be heard in person, at the end of the City's Examination in Chief, when the Hearing resumes on November 19, 2019.

In their Reply to the Response, dated September 11, 2019, the City urges the TLAB to hear the Motion in writing, or in the alternative, asks that a separate day of Hearing be set aside to hear the Motion.

One of the important points in the City's Reply is a clarification of their request in the original Motion- the City does not ask to exclude Documents 2, 3 and 4 from Mr. Meffe's submission to the TLAB dated August 1, 2019, from the evidence before the TLAB. The City explains that the exclusion request is specific to Document 1, (i.e. the Heritage Impact Assessment (HIA)), and clarifies that their request is restricted to exclusion of oral evidence in support of Points 1, 2 and 3 of the Party Witness Statement.

The City's Reply disputes the Appellants' position, as stated in the latter's Response, with respect to the issue of reasonable notice on the statements made by Ms. Flood, during her testimony on July 26, 2019. The City reiterates how Ms. Flood had emphasized the need for an HIA, to determine the ability of the requested variances, to uphold the general purpose and intent of the Official Plan's heritage policies (the "OP Test"). This is followed by a reference to how Ms. Flood explained the City's inability to accept the HIA submitted by the Appellant in support of the Application for Site Plan Approval, a process "which was subsequently closed". Lastly, the City emphasizes that the statements made by Ms. Flood pertaining to the HIA, were made in response to the conclusions drawn by the Appellants' witness, Mr. Litavski.

ANALYSIS, FINDINGS, REASONS

It is constructive for me to come to a conclusion on whether the Motion should be heard in writing, or whether it needs to be argued in person, at the next Hearing scheduled for November 19, 2019.

It makes sense to make an expeditious Decision on a Motion, involving submission of new documents for evidentiary purposes, so that the Parties know in advance what documents can be referenced, so that they can prepare accordingly for the Hearing. However, the need to issue an expeditious Decision must be balanced against the complexity of the Motion, to determine if the decision maker would benefit through the elucidation of complex issues through an in-person Hearing.

The desire to provide clarity to the Parties about the admission of the documents, and the ability to provide evidence on them at the upcoming Hearing on November 19, 2019, supports my finding that hearing the Motion in writing would be appropriate. I believe that issuing an Interim Order would allowing for a decision to be made such that the Hearing can be completed efficiently, without prejudice to the Parties' ability to argue their case, to their satisfaction. Where it comes to determining the complexity of the questions in the Motion, and whether they can be heard in writing, the proof is proverbially in the pudding. I would have to test the information from the Parties to see if it is sufficient for me to arrive at a Decision, failing which I would have to allow the Parties to argue the Motion in person, at the upcoming Hearing.

The jurisprudence cited by Appellants and the City, essentially arrives at the same conclusions, namely:

- A case cannot be "Split". Splitting includes reinforcing points made in the examination in chief through reiteration.
- However, rebuttal, or reply is permitted by the Appellants, to respond to unanticipated evidence brought up by the Respondents, when presenting their case. Additionally, there is an emphasis on restricting reply to "what cannot be possibly anticipated".

The City's Motion seeks to exclude the Heritage Impact Assessment document, and oral evidence, based on the following documents:

2. Demolition Permit Application for 1982 Islington Building dated 22 December 1992 (1 page)

3. Transmittal of submission to the City & TRCA of 2 hard copies of NHIS dated 23 December 2015 (1 page)

4. Email of revised NHIS submission to the City & TRCA dated 13 June 2016 (1 page)

The City reiterates both in its Motion, and the Response, that its Heritage Witness, Ms. Flood had emphasized the need for a HIA, both in her Witness Statement, dated October 26, 2018, as well as her oral evidence on July 26, 2019. It also asserts that Ms. Flood's evidence of July 26, 2019, responded to statements about the HIA made by Mr. Litavski, in his Witness Statement, as well as his oral evidence.

Before proceeding further, it is important to note that the City's submissions do not dispute the Appellants' assertions that it had no prior notice that the City's planning Witness, Mr. Tony Lieu, would argue that an amendment to the Official Plan would be required for the ravine setback, with respect to the proposed building location. Likewise, the City has not disputed the Appellant's raising the comments about the lack of submissions about the HIA. I interpret the lack of a specific response to an assertion, to imply tacit agreement with the position of the other Party (i.e. Party which making the allegation).

As noted earlier in the "Introduction" Section, Mr. Lieu did not provide a statement independently signed by him, notwithstanding my Order dated May 30, 2019. While Mr. Lieu had said that he would adopt Ms. Covello's Statement, it is not evident if he wanted to add any conclusions of his own, in addition to adopting her Statement. The resulting lacuna makes me conclude that it would be prudent to err on the side of caution, and provide the Appellants an opportunity to offer oral evidence to respond to Mr. Lieu's conclusions.

Given the above conclusions, I find it reasonable to provide the Appellant with an opportunity to discuss Documents 2, 3 and 4 to refute Mr. Lieu's conclusions.

I herewith address the question of Document 1 i.e. (HIA Report dated February 4, 2019), and whether it can be admitted for evidentiary purposes.

The City's submissions, as well as a perusal of Ms. Flood's Expert Witness Statement, make it clear that she (i.e. Ms. Flood) missed no opportunity to underscore the importance of an HIA, to determine whether the proposal can satisfy the OP test under

Section 45.1. It may be noted that while no HIA was available in December 2018, when Mr. Litavski gave evidence to the TLAB, it was available on, or after February 4, 2019. However, the Appellants did not seek to introduce this HIA report into evidence on July 26, 2019.

A comparison of the Witness Statements of Ms. Flood dated 2018, and the additional Statement submitted after the Hearing on July 26, 2019, demonstrates a major difference- namely, while the first emphasizes the importance of an HIA, the second witness statement (and the basis of her evidence on July 26, 2019) questions the proposal's ability to satisfy the OP test, even (my emphasis) without any reference to a HIA, as seen below**,** in Paragraph 27:

While a satisfactory HIA was not provided that adequately assesses the potential impacts of the proposed 4-storey building on the listed heritage property, I have identified some potential impacts that are of concern. The proposed construction may pose a physical risk to the heritage building due to the close proximity of the two structures – this risk would be exacerbated by any excavation. The 4-storey office building would likely obstruct views to the listed building due to its location in relation to the shared driveway. The design of the office building should be more compatible with the heritage building in terms of massing, materials, design, datum lines, and interface. It is unclear from the drawings submitted how the two buildings would relate. In addition, the significant landscaped setting of the building, which is identified in the Reasons for Listing, would likely be compromised through the development of a new building in close proximity.

Had the City's position been confined to insisting that no conclusions could be drawn without the benefit of an HIA, and the Appellants introduced the HIA of their free volition after the completion of Ms. Flood's evidence, it would have been fair to conclude that the case was being "split". However, Ms. Flood's arguing that the proposal could have significant adverse impact as a result of the excavation , introduces numerous shades of grey into the aforementioned scenario, even without the benefit of the HIA. It may be pertinent to let the Appellant explain how the HIA (i.e. Document 1) answers the concerns raised by the City, including the excavation impact- I find that this is a new question, where the Appellants must be given a reasonable opportunity to address the matter.

I have also relied on the principle of interpreting Rules liberally to give the Parties a fair opportunity to argue their case, rather than a strict interpretation of the Rules, which can, however inadvertently, result in undue evidentiary restrictions.

Before I discuss my findings, I think that it is pertinent to thanks Ms. Penner for the lucidity of her submission, and her linking various submissions, and evidence, to the questions before me. Notwithstanding her ably argued submissions, I find that it would be reasonable to allow the Appellant to rely on Documents 2, 3 and 4, for the sole purpose of rebutting the conclusions drawn by the City's Witnesses on July 26, 2019. I emphasize that Mr. Meffe would have to restrict himself exclusively to a discussion of the following questions:

a) that the Appellant's Natural Heritage Impact Assessment ("**NHIA**") was never submitted to the City; and,
b) that an Official Plan Amendment was required for the ravine setback for the proposed building location regardless of the variances before the TLAB

I reiterate that the Heritage Impact Assessment, dated February 4, 2019, may be relied upon for evidentiary purposes by the Appellant.

Lastly, it is important to understand in what capacity Mr. Meffe would be giving testimony. I note that while the City has raised this issue both in its original Motion, and in its Reply, the Appellants have not responded specifically, in their Response, to whether Mr. Meffe intends to be an Expert Witness. While Mr. Meffe's submission makes no reference to being recognized as an Expert Witness, I have also noted the lack of a precise reference to be recognized as a potential Witness in his Reply Witness Statement, in my earlier comments. Mr. Meffe's desire to be a Witness is a conclusion that has been inferred from the submissions.

Given the lack of clarity about his intention, I think that it may be important to reinforce the obvious, and briefly discuss the difference between a Witness, and being qualified as an Expert Witness.

The onus is clearly on the Appellants to demonstrate that Mr. Meffe has the requisite combination of education, qualifications and experience to be recognized as an Expert Witness, should that be his desire. It is then, the prerogative of the presiding TLAB Panel Member to qualify that Witness to give professional opinion evidence in their specific area of expertise.

Expert evidence normally requires a qualified expert, with demonstrable qualifications and experience in a given subject, to arrive at conclusions, through independent research, which may then be presented through oral evidence. I emphasize that a witness, without specific expertise in a given subject, cannot be recognized as an expert, even if they have "adopted" the statement of an expert.

In view of the above clarification, the Appellant is given time till the end of day on November 5, 2019, to make any additional submissions, solely in support of Mr. Meffe's being recognized as an Expert Witness, if necessary.

With respec to my earlier question of whether the complexity of the questions would allow for the Motion to be heard in writing, I conclude that, as the above analysis demonstrates, there is sufficient material and clarity in the submissions that it can be heard in writing, and does not need to be argued in person.

MOTION DECISION AND ORDER

1) The Motion put forward by the City through its Motion dated August 19, 2019, is allowed in part, and will be heard in writing.

2) Mr. Dominic Meffe, the Appellant, can provide oral evidence, after the completion of the City's evidence, at the next Hearing, scheduled for November 19, 2019. He may focus on responding to the following issues:

a) that the Appellant's Natural Heritage Impact Assessment ("**NHIA**") was never submitted to the City; and,

b) an Official Plan Amendment was required for the ravine setback for the proposed building location regardless of the variances before the TLAB

3) The Heritage Impact Assessment, listed as Document 1 in Mr. Meffe's submission of August 1, 2019, is admissible for evidentiary purposes, and may be relied upon by the Appellant.

4) The TLAB's Rules of Process and Procedure, may be adhered to for guidance, for the purposes of disclosure and qualifications, should he want to be recognized as an Expert Witness. The Appellant is given till the end of day, November 5, 2019, to make any additional submissions, to have Mr. Meffe qualified as an Expert Witness, if necessary.

5)

So orders the Toronto Local Appeal Body

X