

DECISION AND ORDER

Decision Issue Date Wednesday, February 19, 2020

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): Yanan Wang

Applicant: Alex Boros

Property Address/Description: 38 Lorraine Dr

Committee of Adjustment Case File Number: 19 121264 NNY 18 MV (A0168/19NY)

TLAB Case File Number: 19 161165 S45 18 TLAB

Hearing date: Friday, February 14, 2020 -

INTERIM DECISION DELIVERED BY S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Yanan Wang
Appellant's Legal Rep.	Simon Van Duffelen
Owner	Lo Wong
Applicant	Alex Boros
City of Toronto	Jason Davidson

INTRODUCTION AND BACKGROUND

In the first quarter of 2019, the Appellants applied for variances to the Committee of Adjustment (COA) to legalize their as built driveway, and were refused permission, resulting in an Appeal to the Toronto Local Appeal Body (TLAB) . The City of Toronto (the City) put forward a Motion requesting for Party status, after the expiry of the deadline to elect for such status, and was accorded the same by way of a Decision

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna
TLAB Case File Number: 19 161165 S45 18 TLAB**

issued by Member Ted Yao on July 15, 2019. On August 14, 2019, I issued an Interim Decision on this file, approving Motions from the Parties who stated that they were involved in ongoing Settlement discussions, and requested extra time to file Witness Statements with the TLAB.

The Appellants and the City reached a Settlement, which required the Appellants to give new notice in the Neighbourhood, resulting in an adjournment of the Hearing scheduled for September 30, 2019, to December 18, 2019.

When asked what evidence the Appellants would rely upon on to make their case, I was informed that the Appellants wanted to restrict themselves to discussing “similar” examples of COA decisions. I explained the importance of submitting an Expert Witness Statement that outlined the Appellants’ case orally to the Parties, and follow up with a presentation that would help demonstrate between the proposal, and relevant Sections of the Planning Act. .

As noted earlier, the Hearing was adjourned to December 18, 2019 for reasons related to Notice; I followed up with a written Interim Order and Decision on **October 18, 2019**, wherein I asked the Appellants to submit an Expert Witness Statement by November 27, 2019. An Expert Witness Statement was submitted by November 27, 2019, where a brief history of the application was presented, followed by a two sentence planning rationale, where the first sentence asserted compliance with the four rules under Section 45.1 of the Planning Act, and the second sentence briefly stated the aforementioned tests, and reiterated compliance.

On December 18, 2019, I was forced to adjourn the Hearing yet again, after I learnt that the Appellants were not planning to substantially expand on their so-called Witness Statement, as described in the previous paragraph..

Before adjourning the Hearing, I stated my disappointment with the quality of the Expert Witness Statement, and again explained to the Appellants that I expected to see an Expert Witness Statement that substantively spoke to relevant sections of the Planning Act, and that evidence would have to be presented at the next Hearing, about how the proposal complied with the aforementioned sections.

I emphasized to the Appellants that the standard of proof remained identical for contested proceedings, and Settlements, and that they should not assume that the Settlement would be rubber stamped by the TLAB, in the absence of adequate evidence. I followed up with a written email on December 19, 2019, providing the Appellants with a deadline of January 31, 2020, to submit the updated Expert Witness Statement. Given that the Appellants had gone through two rounds of submissions without producing a satisfactory Witness Statement, and that the Parties had settled, I asked Mr. Jason Davidson, the City’s lawyer on this file, to review the Expert Witness Statement before submission, for quality, and completeness, and provide feedback to the Appellants, where appropriate.

On January 31, 2020, the TLAB received no Expert Witness Statement from the Appellants, but the City submitted a Motion to dismiss the case without a Hearing. A Response from the Appellants was received on the dates of February 4, 2019, 2019, and February 5, 2019, consisting of an Affidavit sworn by Mr. Boros, an Affidavit sworn by Ms. Deanne Black, the assistant to Mr. Van Duffelen, and a Motion. In addition, an Expert Witness Statement, as well as a completed Experts Duty form were submitted by the Appellants. A Reply was furnished by the City of February 6, 2020, and the Appellants submitted a Reply on February 14, 2020.

JURISDICTION

The TLAB's Rules of Practice and Procedure, (Rules) are relied upon for the purposes of Decision making. The City's Motion relies on Rules 2.11, 2.12, and 9.1 in support of their position. The Appellants do not make reference to any of the TLAB Rules in support of their Response and Cross-Motion.

The main question is whether the case should be dismissed without a Hearing. In other words, will the teleconference scheduled for 1:00 PM on February 21, 2020 proceed, as planned?

EVIDENCE

The City's Submission, dated January 31, 2020, brings forward a Motion to dismiss the matter without a Hearing, with a submission made by Mr. Davidson, the City's lawyer, attached to an Affidavit sworn by Ms. Khan, the City's planner on this file. The submissions point out that the Appellants had missed the deadline to file their Witness Statement, as stated in my email dated December 19, 2019, and allege this to demonstrate the Appellants' general indifference to the process, and reluctance to comply with the rules, and undertaken in bad faith.

In support of these allegations, the City's Affidavit provides a narrative that refers to three different applications filed by the Appellant, to the COA with respect to this property – the first application (for which no date is provided) sought seven variances which were approved, albeit with a condition to build in compliance with the Site plan attached to the decision. The Appellant allegedly built a wider driveway than indicated in the Site Plan, resulting in two more applications to the COA to legalize the driveway width.

The second and third applications date to January 2019, and April 2019 respectively; they restricted themselves to asking for variances respecting the driveway width, and the soft landscaping, notwithstanding the Planning Department's advice that all the seven variances originally approved by the COA, had to be resubmitted as part of the new application. As stated earlier, the refusal of the third application to the COA, resulted in the Appeal to the TLAB.

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna
TLAB Case File Number: 19 161165 S45 18 TLAB**

The Appellants' response to the aforementioned Motion, was submitted on February 4, 2020, and consisted of Affidavits sworn by Deanne Black,(the assistant to Simon Van Duffelen, the lawyer for the Appellants), and Mr. Alex. Boros, the Expert Witness. A submission was made by Mr. Van Duffelen, the lawyer for the Appellants. As a separate submission, the Expert Witness statement of Mr. Boros, and a completed Expert Witness' Duty dated February 4, 2020, were also filed.

By way of editorial comment, some of the comments reproduced below may be construed as constituting Settlement discussions, are without prejudice, and should not form part of the public record. However, it is difficult to complete this Section without delving into the discussion, since part of those discussions go to the crux of the Motions in front of me.

The sum and substances of the Appellants' submissions was that Mr. Boros submitted a draft Witness Statement to Mr. Van Duffelen, who then forwarded to Mr. Davidson on January 24, 2020. Apparently Mr. Davidson replied on the same day, advising the Appellants that the draft Statement, as submitted to him, was inadequate because it did not speak to what the TLAB had asked of the Appellants.

Mr. Davidson apparently forwarded a "100 plus page" Witness Statement from a different Hearing, which in the Appellants' submissions is referred to as a "template", or a "model". The remainder of their submission focuses on the difficulties of completing the Expert Witness Statement, along the lines of the aforementioned "model" by the deadline of January 31, 2020, while attending to other work related duties. The challenges faced by the Appellants in complying with the deadline, include Mr. Boros' having a "busy practice, and a part time assistant", and Mr. Van Duffelen's not being able to submit the Witness Statement until February 4, 2020, because he had to attend to a trial on February 3, 2020.

The Appellants' submissions also ask a few interesting questions, of a technical nature including the appropriateness of the City bringing forward the Motion to dismiss the case at 5:10 PM on January 31, 2020, "barely ten minutes past the deadline", and "arguably even before the deadline of January 31, 2020" before questioning the very applicability of the deadline, because there was " no formal Order issued by the Chair" . The Appellants also assert that no prejudice was caused to the City, or the TLAB, as a result of the late submission of the Expert Witness Statement, on February 4, 2020.

In his Reply, dated February 6, 2020, Mr. Davidson expresses concern about the Appellants' effectively disclosing the details of discussions, conducted without prejudice, which should not have been disclosed to the TLAB, or the public at large. He also points out that personal opinions should not be included in an affidavit. By way of editorial comment, I have not repeated the speculation related paragraphs from the Appellants' submissions, since I concur with Mr. Davidson's observations.

The Reply from the City also questions the Expert Witness' ability to adhere to his stated duty to be impartial, in view of the "biased" statements made in his Affidavit, which question the City's intentions, in addition to the actions.

On February 14, 2020, the Appellants filed a Reply to the Reply from the City which reiterated that the Appellants were not aware of any prejudice to the City after the Settlement, and that an email from the TLAB stating a deadline did not have the force of a formal Order. It concludes with a Motion, "filed with an abundance of caution", which requests that the late submission be allowed.

ANALYSIS, FINDINGS, REASONS

The submissions and the Affidavit filed by the City provide an interesting insight about how this application meandered through various City departments, before being appealed to the TLAB. It also demonstrates, without being contradicted by the Appellants, that significant effort was invested in Settlement discussions by the City, due to protracted discussions, stretching across three different COA hearings, followed by the Appeal to the TLAB.

The submissions clearly illustrate the depth of Mr. Davidson' frustration, caused by the ostensible failure of the Appellants to follow up, replying to his questions, and a recurring pattern of not adhering to deadlines.

Before I analyze the Appellants' Response, I will reiterate my concurring with the City's Reply about the importance of not speculating about the other Party's motives, or thinking process, when filing an Affidavit.

I am intrigued by the Appellants' submissions, which make the curious case, that the non-adherence to the stated deadline of January 31, 2020, was a result of their "busy" schedule, and the difficulties faced in understand, analyze and follow a "100+ page" Witness Statement, forwarded to them by Mr. Davidson, because they had the option of not following the Witness Statement forwarded to them.

It would be sufficient to state that in my considered opinion, the Appellants' attempts to connect the non-compliance with deadlines to their "busy" schedules, does not rise to the level of a reason. I will not comment on the 100+ page Statement since I don't have access to the same, but will make the general observation that the average Witness Statements, which may be expected to include various excerpts from the Official Plan, and the Zoning By-Laws, as well as other information in the public realm, can be expected to become, what may be colloquially described as "bulky"

I am confused by the inherent contradiction in the Appellants' submissions, where they began by confidently asserting that my email of December 19, does not have the force of an Order, but then submitted a Motion on February 14, 2020 (with an "abundance of caution") asking that relief be granted from the Rules to permit the late submission of a Witness Statement. My preference would have been for the abundance

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna
TLAB Case File Number: 19 161165 S45 18 TLAB**

of caution to apply to timely submissions, as opposed to a late submission, followed by an even later Motion requesting that the late submission be accepted.

While the Appellants may be technically accurate in characterizing my email of December 19, 2019, as not being an "Order", I must point out that ignoring the direction provided in the email is not a wise, nor a recommended course of action, because it provides direction to the Parties.

In any case, I am not impressed by the attempt to latch onto a technicality, when the Appellants themselves did not follow due process in addressing earlier Motions, a matter that I specifically commented on in my Decision dated August 14, 2019. I also point that in response to a very specific Order, in my Decision dated October 18, 2019, about the submission of Witness Statements by November 27, 2019, I was provided with a Statement where the planning rationale consisted of two sentences, as stated earlier.

Given all of the above, the attempt to justify non-adherence to direction from the TLAB, on the ground that it does not constitute a formal Order, comes across as being too clever by half.

As for the Appellants' asserting that neither the City, nor the TLAB is prejudiced as a result of the late submission, perusing Mr. Davidson's Motion, and Response, makes me conclude that he does not concur with the conclusions of the Appellants. The TLAB cannot assert prejudice to itself in a matter where it is the decision maker.

I revert to the original Motion put forward by the City about dismissing the case without a Hearing, because of the Appellants' not demonstrating sincerity nor seriousness. I can understand the reasoning behind the Motion, but would rather concentrate on the significant amount of work done by the City, and focus on the greater public interest, in arriving at a decision about whether the case should be dismissed without an oral Hearing.

In light of the City's contention that that a significant effort has been invested by the City, the public interest is best protected by ensuring that the considerable resources already spent by the City come to fruition through the completion of an oral Hearing, as opposed to an abrupt termination of the process, at this stage, which would nullify all the hard work put in to arrive at a Settlement.

In order to ensure that the efforts, and tax payer dollars spent on the Settlement process will not go to waste, I would rather that we endure short term pain in the hope of long term gain from a public interest perspective, and let the case culminate in an oral Hearing, where the Appellants will be given a final opportunity to make their case. Therefore, I direct that the matter proceed to a Hearing, by way of teleconference, scheduled earlier at 1:00 PM on February 21, 2020.

Given this conclusion, it is not important to address questions raised in the Cross-Motions.

I herewith reiterate what has been said many times in this Hearing- the TLAB cannot be expected to rubber stamp a Settlement between Parties, and that the threshold of evidence to be met for approval by the TLAB, is no different for a Settlement that it is in a contested proceeding.

The Parties are advised that notwithstanding the Settlement reached, the Appellants must come to the February 21, 2020 teleconference, prepared to make a presentation on how the proposal satisfies relevant Sections in the Planning Act. The onus is on the Appellants to demonstrate why their Appeal should be allowed.

I can only hope that as we proceed towards the proverbial light at the end of tunnel, what will emerge is the fruition of all the hard work put into arriving at a Settlement, and not the recurring image of an elusive mirage, which in this case, has always made us land on the penultimate step, instead of the last step.

DECISION AND ORDER

- 1) The Appeal respecting 38 Lorraine will not be dismissed without an oral Hearing.
- 2) The Hearing, to make a final determination on the Appeal respecting 38 Lorraine Dr., will continue, as planned, at 1:00 PM on February 21, 2020, by way of teleconference.

So orders the Toronto Local Appeal Body



X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body