

DECISION AND ORDER

Decision Issue Date Wednesday, January 27, 2021

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): YOUNGHEE MIDDLETON
Applicant(s): AMBIENT DESIGN LTD
Subject(s): 45(1)
Property Address/Description: 95-97 FORTIETH ST
Committee of Adjustment File
Number(s): 19 224770 WET 03 MV / 19 224771 WET 03 MV

TLAB Case File Number(s): 20 127187 S45 03 TLAB, 20 127188 S45 03 TLAB

Hearing date: Thursday, March 25, 2021

DECISION DELIVERED BY A. Bassios

APPEARANCES

| NAME | ROLE | REPRESENTATIVE |
|---------------------|-----------|----------------|
| AMBIENT DESIGNS LTD | APPLICANT | |
| YOUNGHEE MIDDLETON | APPELLANT | |
| LONG BRANCH | PARTY | |
| NEIGHBOURHOOD LTD | | |

| | | |
|----------------------------|-----------------------|--------------------------|
| 2713949 ONTARIO INC | PARTY | RUSSELL CHEESEMAN |
| CHRISTINE MERCADO | PARTICIPANT | |
| ALEXANDER DONALD | PARTICIPANT | |
| JOHN MACDONALD | PARTICIPANT | |
| RUTH WEINER | PARTICIPANT | |
| RANDY MCWATTERS | PARTICIPANT | |
| LIZ EDWARDS | PARTICIPANT | |
| STEVEN VELLA | PARTICIPANT | |
| BRITTANY MONTEMURRO | PARTICIPANT | |
| DAVID GODLEY | EXPERT WITNESS | |
| ALEXANDER DONALD | EXPERT WITNESS | |

INTRODUCTION AND BACKGROUND

This matter arises by way of a Motion from the Long Branch Neighbourhood Association (LBNA) seeking relief from Toronto Local Appeal Body (TLAB) Rules of Practice and Procedure (Rules) 17.1, 17.4, and 17.6 and seeking an Order from the TLAB to add Ruth Weiner and Alexander Donald as co-appellants to the TLAB Appeal for 95-97 Fortieth St, and in the alternative, an Order of the TLAB to change Ruth Weiner from a Participant to the Appellant to the Appellant, and change Yonghee Middleton from the Appellant to a Participant.

The Motion was heard as an electronic Hearing (via WebEx) on January 11, 2020. In attendance were: Russel Cheeseman for the Applicant/ Owners, Judy Gibson representing the Long Branch Neighbourhood Association, David Godley and Alexander Donald, local expert witnesses, and Brittany Montemurro, John MacDonald, Liz Edwards, Randy McWatters, Ruth Weiner, Seven Vella, all of whom elected Participant status. Also in attendance was Younghee Middleton, the Appellant.

On February 27, 2020, the Etobicoke York Panel of the Committee of Adjustment (COA) issued its decision approving, with conditions, variances to construct two new detached dwellings at 95 and 97 Fortieth Street, (subject properties).

The subject properties are located in the Village of Long Branch in Etobicoke.

Younghee Middleton, (Appellant) filed a Notice of Appeal of the Variance Decision on March 18, 2020 to the (TLAB) and a Hearing date of March 25, 2021 has been set to hear the appeal.

Also heard before the TLAB on January 11, 2021 was a Motion from Mr. Russel Cheeseman, Representative for 2713949 Ontario Inc. and 2173948 Ontario Inc., Party to this Appeal. On December 21, 2020, Mr. Cheeseman filed a *Notice of Motion*, (Motion to Dismiss), seeking an Order from the TLAB that:

- Younghee Middleton (the Appellant) is not a person who has an interest in the matter, as is set out in Section 45(12) of the *Planning Act*,
- there is no valid appeal in the within matter; and
- the Appeal of YoungHee Middleton (the “Appellant”) be dismissed without holding a full hearing pursuant to Section 45(17) of the *Planning Act*.

The Motion from Mr. Cheeseman is the subject of a separate Decision and Order of the TLAB, dated January 25, 2021, which refused the requested relief.

MATTERS IN ISSUE

There are two matters at issue. First, does the LBNA have standing to bring a Motion, and if so, are they able to file a Motion to request the substitution of persons other than themselves as the Appellant or Co-Appellants in this matter? The second matter is whether the TLBA will allow the substitution of another person or persons as the Appellant or Co-Appellants in this matter.

JURISDICTION

TLAB Rules

- 2.2 These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits.
- 2.3 The TLAB may exercise any of its powers under these Rules or applicable law, on its own initiative or at the request of any Person.
- 2.4 Where any of these Rules or any order issued by the TLAB conflicts with any statute or regulation, the provision of the statute or regulation prevail.
- 2.6 Where procedures are not provided for in these Rules, the TLAB may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner.
- 2.10 Substantial compliance with the requirements of these Rules is sufficient.
- 2.11 The TLAB may grant all necessary exceptions to these Rules, or grant other relief as it considers appropriate, to enable it to effectively and completely adjudicate matters before it in a just, expeditious and cost-effective manner.

2.12 Where a Party or Participant to a Proceeding has not complied with a requirement of these Rules or a procedural order, the TLAB may:

- a) grant all necessary relief, including amending or granting relief from any procedural order on such conditions as the TLAB considers appropriate;
- b) adjourn the Proceeding until the TLAB is satisfied that there is compliance;
- c) order the payment of costs; or
- d) refuse to grant the relief in part or whole.

EVIDENCE

The LBNA provided Motion materials to the TLAB which included the sworn Affidavit of Christine Mercado, Chair of the LBNA.

At the Hearing, Ms. Judy Gibson attended on behalf of the LBNA and relied on the Affidavit of Ms. Mercado. The Affidavit of Ms. Mercado sets out a chronology of the participation of various persons in the COA process and Public Hearing regarding application on the subject properties. The involvement of each of the Participants, and some who have elected not to be Participants in the TLAB Appeal, is documented.

March 18, 2020 was the last day an Appeal could have been filed under the COA's first *Notice of Decision* (later re-issued with extended timelines due to the COVID – 19 Emergency Order). It is also the day Ms. Middleton filed the Appeal. The Affidavit states that Mr. Alexander Donald, on or about that date, contacted Ms. Mercado and offered to pay for half the Appeal costs. Mr. Donald lives in the broader neighbourhood but has an interest in this matter as he has been impacted by "aggressive severance activity" on his street, including a proposal right next door to him with what is said to be a built form with almost identical variances, and which also involved a shared driveway.

The Affidavit states that Ms. Ruth Weiner, who lives one block west of the subject properties, contacted Ms. Mercado on March 20, 2020 offering to contribute \$200 towards the Appeal costs. The Affidavit states that a number of residents contributed financially towards the costs associated with the Appeal.

It is noted that the TLAB Form 1, by means of which an Appeal is filed, only has space for one person's name.

On June 4, 2020, Ms. Middleton advised the LBNA Chair that she had accepted an offer on her house and said that she had spoken to City Staff and was advised that she could still hold the Appeal despite selling her home. I note that no email, notes or record of the name of the person at the City that Ms. Middleton spoke to was provided as evidence.

Some time in late November, Ms. Middleton inquired of the LBNA if it would make sense for someone else from the group of neighbours concerned with the development on the subject property be the named Appellant instead of herself. The LBNA on December 1, 2020 contacted the TLAB to inquire how to change the name of an Appellant on a file. Ms. Weiner and Mr. Donald both agreed to be Co-Appellants. Email correspondence from the LBNA requesting information on how to change the Appellant resulted in advice from the Chair of the TLAB that a Motion would have to be brought to have the matter properly addressed.

The LBNA have cited the 19 Talwood Decision of then-Chair Ian Lord which allowed multiple appellants without the necessity of additional Forms or fee payment.

Mr. Cheeseman, in his response, contends that the LBNA do not have standing to bring the Motion and that the LBNA are not the representative of anyone whom they are requesting the TLAB to add as a co-appellant. He further asserts that no evidence had been provided as to why none of the persons named in the *Notice of Motion* failed to file a *Notice of Appeal*, even though they had an extended period of time to do so.

ANALYSIS, FINDINGS, REASONS

Standing to bring Motion.

On the first contention raised by Mr. Cheeseman, that the LBNA do not have standing to bring the Motion, I find that the LBNA are within their mandate as Party to the Proceeding to fully participate and to bring a Motion as per TLAB Rule 12.6 a).

12.6 a) A Party to a Proceeding before the TLAB may participate fully in the Proceeding and this includes the following: bring, Serve and File Motions;

Mr. Cheeseman previously argued that there was no Proceeding for the LBNA to be Party to, and that filing a *Notice of Intention to be a Party* does not automatically confer Party status before the TLAB. Mr. Cheeseman's Motion to Dismiss has been denied via a separate Decision and Order, this matter will go to a full Hearing, and therefore there are valid Proceedings for the LBNA to be Party to. The TLAB's procedures are such that a person or party who has filed a *Notice of Intention to be a Party* is regarded as such unless a decision is made to deny them status, which in this case has not happened.

Motion relating to status of persons other than the Moving Party

Mr. Cheeseman contests the admissibility of the Motion on the grounds that the LBNA ought not to be making Motions on behalf of persons other than themselves. The LBNA is a separate Party, yet they are making this Motion on behalf of the Appellant and two of the Participants. The suggestion is that it is unorthodox for a Party to be making a Motion that does not pertain to their own status, but to those of Participants in

the Proceedings, who the TLAB's Rules preclude from bringing Motions. In reply at the Motion Hearing, both the Participants testified that they are members of the LBNA, further layering the complexity of roles, duties, responsibilities, and accountabilities of the persons involved in this matter.

I agree with Mr. Cheeseman that the distinctions between the Party, the Appellant and two of the Participants have blurred somewhat over the course of the filing and hearing of the three Motions already filed on this matter, and this is a challenging condition for the TLAB and for the other Party to this matter. Nonetheless, I am mindful that Mr. Cheeseman, too, filed a Motion that did not pertain to his own clients' status but to that of Ms. Middleton as the Appellant. On that basis and on the basis that the Appellant and the Participants named are in consent on the Motion relief requested, I find that the Motion is appropriate.

Substitution of another person or persons as the Appellant or Co-Appellants

I recognize that there are reasons why neither the LBNA nor any of the Participants filed separate Appeals on this matter. The LBNA is a representative body, part of whose mission is to "protect the physical character of the Village of Long Branch" and the LBNA plays a role in coordinating community response to development applications in their neighbourhood. The LBNA and the residents are reliant on their own personal (or fundraising) financial and human resources to participate in the COA and TLAB processes. Filing additional Appeals after their neighbour Ms. Middleton had already filed an Appeal would not likely have been considered necessary or financially advisable by a community group and residents acting in concert, given limited community resources. I recognize that there seem to be a significant number of development applications in which the LBNA and their membership are currently engaged, further dividing their attention and resources.

It is true that the TLAB sometimes relies on organizations such as the LBNA to coordinate the participation of residents and filing of materials so as to facilitate more efficient Proceedings. Nonetheless, as former TLAB Chair Ian Lord noted, in an Adjudicative Screening Decision (18 Talwood Ave), above cited, "the drafting of the Rules and Forms, read as a whole, intends the protection of *individual* rights", (my emphasis).

Different roles, responsibilities and accountabilities accrue to the status of an Appellant, a Party, and a Participant in the TLAB process. The overlapping of roles introduces less clarity in terms of these roles, duties, and accountabilities. The overlapping of individual responsibilities in the proposed "Co-Appellant" request is in my opinion, a further challenge to clear lines of accountability. In most cases before the TLAB where there are multiple Appellants in concert on a matter, the Appellants file individually and often hire legal counsel in common, but importantly, they retain their independence from each other in their conduct of their decisions and direction. I find this model to be preferable in that the question of standing to come to a settlement, withdraw the Appeal,

or even to bear whatever costs might be awarded is not burdened by a potential conflict between “co-appellants”.

I recognize that there are circumstances where more than one natural person speaks with a single voice, such as the LBNA which is an incorporated entity, or co-owners of a property. There is no structured relationship of this kind between Mr. Donald, Ms. Weiner and Ms. Middleton and I therefore find that a “co-appellant” arrangement should not be allowed. In addition, at this stage of the Proceedings multiplying the number of Appellants is, from a perspective of procedural fairness and natural justice, not without effect on the Applicant. I find that Mr. Donald and Ms. Weiner should not be added as “co-appellants” in this matter.

I am mindful that the LBNA and some of the named Participants have acted in concert throughout the consideration of this development application, responding to the COA and jointly funding the Appeal costs. If it is Ms. Middleton’s preference to relinquish the status of Appellant to one of the neighbours who have helped her financially and in the execution of the Appeal, and that she become a Participant instead, then under these very specific circumstances I agree that either Ms. Weiner, or Mr. Donald, or the LBNA as an incorporated entity, may assume the role of single Appellant.

Under TLAB Rules 2.2, 2.3, 2.4, 2.6, 2.10, 2.11 and 2.12 reproduced above, I grant the relief requested to change Ruth Weiner from a Participant to the Appeal to the Appellant and change Yonghee Middleton from the Appellant to a Participant.

DECISION AND ORDER

In the matter of the Appeals for 95 and 97 Fortieth St, that Ruth Weiner’s status be changed to that of the Appellant and that Yonghee Middleton’s status be changed to that of a Participant.

X 

Ana Bassios
Panel Chair, Toronto Local Appeal Body