Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Wednesday, March 31, 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): CARMELO PANTALONE
Applicant(s): ORGANICA STUDIO + INC

Property Address/Description: 283 MCROBERTS AVE
Committee of Adjustment File Number(s): 20 153959 STE 09 MV

TLAB Case File Number(s): 20 217565 S45 09 TLAB

Motion Hearing date: March 29, 2021

DECISION DELIVERED BY TED YAO

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Organica Studio Inc.	Applicant	
Nery Francisco Martinez, Jimena Martinez	Owner/Party	Marc Kemerer
Carmelo Pantalone	Appellant	Alissa Winicki
Julio Cifuentes	Expert Witness	

INTRODUCTION

Mr. Kemerer brings a motion to dismiss Mr. Pantalone's appeal without holding a hearing. Mr. Kemerer's client, Ms. Martinez, wishes to construct a second floor addition to enlarge one bedroom. The amount of exterior construction is minimal, as she intends only to enclose and existing balcony over a porch. However, in order to do so she

needs three variances as set out in Table 1. On October 21, 2020, the Committee of Adjustment granted the variances. Mr. Pantalone appealed and thus this matter comes before the TLAB.

Table 1. Variances sought for 283 McRoberts Ave			
		Required	Proposed
Variances from Zoning By-law 569-2013			
1	Front yard setback	4.42 m	2.16 m
2	Side yard setback	1.2 m	North 0.37 m; south 0.62 m
3	Roof eaves	Minimum side yard setback of 0.30 m	Only 0.07 m from north side lot line

MATTERS IN ISSUE

S. 45(17) of the *Planning Act* states:

Dismissal without hearing

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may, on its own initiative or on the motion of any party, dismiss all or part of an appeal without holding a hearing if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process. . . .

ANALYSIS FINDINGS, REASONS

After hearing submissions for both sides, I indicated to the parties that I would set an early hearing date but was inclined to dismiss the motion. I received assurance that neither party would object to my being seized of the hearing.

However, after studying the materials filed, and reviewing the transcript I have decided to allow Mr. Kemerer's motion without costs. I will go through the applicable grounds under the s. 45(17) of the *Planning Act.*

Branch (iii) – delay

This test requires that the appeal be **only** for the purpose of delay. There is no suggestion that Mr. Pantalone only desires delay. He has filed his disclosure in a timely manner; attended the motion hearing with his lawyer and instructed her to assent to an early hearing date.

Branch (ii) -frivolous and vexatious

. In my view, Mr. Pantalone is sincere in his concerns. However, I do not accept that water and drainage are matters that have to do with the four tests. I discuss this further below.

Branch (iv) "persistently and without reasonable grounds"

This is Mr. Pantalone's second TLAB appeal within a year, and also the second time he has been called upon to respond to a motion to dismiss. In the companion case, in October 2019, Mr. Pantalone appealed the Committee of Adjustment decision granting variances to his next door neighbour, Maria Vidinha. Mr. Pantalone, Ms. Vidinha and the Martinez family all live in the same block on McRoberts Avenue.

Ms. Vidinha sought to build a detached garage. Perhaps because this involved a slab or foundations, there might have been a greater possibility of drainage being a planning issue. Nonetheless, Ms. Stewart (Ms. Vindinha's lawyer) successfully argued that these were not an apparent land use planning ground, that is, that Mr. Pantalone's appeal failed the test under branch (i). TLAB Member Mr. Leung wrote:

> [Mr. Pantalone] contends that the proposed detached garage will contribute to prevailing stormwater and flooding issues of the area. . . .
>
> Mr. Pantalone inaccurately referenced that the provincial Ministry of Environment (MOE) is tasked to assess water issues for the area, when in fact this mandate would be carried out by City departments and the Toronto and Region Conservation Authority (TRCA). Upon cursory review of the TRCA mapping on regulated areas, or areas of significant environmental and floodwater concern, it is found that this property does not fall within such a regulated area. In assessing this mapping, it is further found that there are no streams or significant water flows traversing this area. It could thus be surmised that there is not a higher degree of floodwater risk which affects this area. . . .
>
> The tribunal recognizes that there can be water issues afflicting a variety of City neighbourhoods which is not atypical in large urban centres. These issues can, and should be addressed by relevant City departments, and not by the TLAB. Residents should engage such departments or their elected officials to ensure the proper response is provided. (TLAB decision, February 28, 2020)

In branch (iv), the actions of Mr. Pantalone have to be "persistent", without reasonable grounds, and constitute an abuse of process**. Mr. Leung did not dismiss Mr. Pantalone's appeal on this ground.** This is a high bar and even if one of these factors is not present then this branch of the test is not met.

Branch (i) whether the reasons disclose any apparent land use planning ground

In my view, it is usually very difficult to succeed on this branch because of the case *of Luigi Stornelli Ltd. and Centre City Capital Ltd.*[1]*,* which says that an appeal notice can be supplemented by additional reasons filed after the deadline. But here we have advanced beyond the *Stornelli* fact situation as Mr. Pantalone has told me of his intended evidence — the impact of alleged loss of light and water flow issues.

With respect to the light issue, Ms. Winicki (Mr. Pantalone's lawyer) pointed to a photograph taken from a spot on Mr. Pantalone's lawn in the winter where the sun momentarily shines through the balcony to be enclosed. However, the Official Plan uses very measured language with respect to shadowing on neighbouring private properties[2]. I would not accept these photographs as an adequate shadow study that demonstrates that the new development offends these provisions of the Official Plan.

Mr. Pantalone said to me at the Webex meeting of March 29, 2021, in respect of his intended evidence:

> When I see residents building from property line to property line, and what I see with [my] eye, which is a sunburst [i.e., an overexposure on a photograph], on Blackthorne [Avenue], when I see that and look at the hill, that flow, where does the water go? And everything, we've got mandatory downspout and disconnect. Are we causing trouble for each other on the roads, they don't even know what they're doing and we, they all say, yes, they all [sounds like "die"].
>
> [They say] Mr. Pantalone is a bad person. They've been on me for forty years, I didn't know whether I was coming or going, if you really want to know.
>
> Yes, I'm finished. You can build. Build your house. Destroy. (unintelligible). At least you're going to do it (unintelligible). That's all I got to say.

Mr. Pantalone has also filed numerous documents, for example the 2002 drainage map of the area (next page) that make it clear that much of his intended argument is based

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[1] 50 O.R. (2d) 417. Unfortunately, this is a 1985 case and CanLII only makes available Divisional Court cases after 2002. Accordingly, I have reproduced it in an endnote to this decision.

[2] 3.1.2 New development will be massed and its exterior façade will be designed to fit harmoniously into its existing and planned context and will limits impact on neighbouring streets , parks open spaces and properties by providing adequate light and privacy by e) adequately limiting any resulting shadowing of . . neighbouring streets, properties and open spaces having regard for the varied nature of such areas

on the topography of the area and perhaps the issue of his view. I accept Mr. Kemerer's contention that there is no right to a view.

I recognize that Mr. Pantalone is a person concerned with property water flows and the appropriate planning of this neighbourhood. I recognize that as a former City of Toronto employee, he has some knowledge of those matters, and is anxious to make his voice known in a public forum. Nonetheless, as the filings indicate that he will be his only witness and he does not intend to be qualified as an expert in planning. It would be unfair for Ms. Martinez to have to defend all the recent planning decisions on McRoberts Street from a drainage viewpoint. Her second storey enclosure does not involve new foundations and thus does not engage the drainage issues Mr. Pantalone intends to raise.

Mr. Kemerer has indicated that he will seek costs for both the motion and the hearing. Costs are always discretionary, are not usually awarded, And do not necessarily follow the cause. I do not feel this motion is a proper case for costs because Mr. Kemerer has filed an affidavit by a second neighbour (not his clients, the Martinezes) who made remarks of a personal nature about Mr. Pantalone. I do not think this should be supported. In any event, there will be no hearing and no costs of a hearing.

DECISION AND ORDER

The motion to dismiss Mr. Pantalone's appeal without holding a hearing is granted. The appeal is dismissed without costs. The Committee of Adjustment decision of October 21, 2020 is thus final and binding. The TLAB hearing in this matter of May 27, 2021 and the expedited hearing date of April 16, 2021 that I discussed with the parties are both cancelled.

X

Ted Yao
Panel Chair, Toronto Local Appeal Body

Re Luigi Stornelli Ltd. and Centre City Capital Ltd.

50 O.R. (2d) 417
ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
OSLER, J. HOLLAND AND ROSENBERG JJ.
25TH APRIL 1985.

Planning -- Zoning -- Variance -- Appeal -- Statute requiring that notice of appeal set out reasons in support of objections -- Requirement directory only -- Planning Act, 1983 (Ont.), c. 1, s. 44(12).

Statutes -- Interpretation -- Mandatory and directory language -- Statute requiring that notice of appeal set out reasons in support of objections -- Requirement directory only -- Planning Act, 1983 (Ont.), c. 1, s. 44(12).

The applicant had objected to the granting of a minor variance to the respondent by a committee of adjustment. The applicant then filed a notice of appeal to the Ontario Municipal Board pursuant to s. 44(12) of the Planning Act, 1983 (Ont.), c. 1, which provides that the notice of appeal must set out the reasons for the objection. The notice of appeal did not contain such reasons and, for that reason, the appeal was

dismissed. The applicant brought an appeal by way of application to determine certain questions arising out of the board's decision.

Held, the notice of appeal was valid.

The language of s. 44(12) as regards the reasons in support of the objection, while mandatory in form, is directory only. The reasons can be supplied before or at the hearing.

APPEAL by way of application to determine certain questions arising out of a decision of the Ontario Municipal Board holding that a notice of appeal from a decision to grant a minor variance was invalid.

Howard v. Secretary of State for the Environment, [1974] 1 All E.R. 644, folld
Statutes referred to Planning Act, R.S.O. 1980, c. 379, s. 49(13) -- since repealed by s. 73(1) of, and replaced by 1983 (Ont.), c. 1, s. 44(12).

D. H. Wood, for applicant.

J. E. Lewis, Q.C., for respondent.

The judgment of the court was delivered orally by

OSLER J.:-- This application raises once more the perennial question as to when statutory language, apparently mandatory, should be taken to be directory only. As it stood in 1982, s. 49(13) of the Planning Act, R.S.O. 1980, c. 379, provided that a person dissatisfied with a decision of a committee of adjustment might appeal to the Ontario Municipal Board by serving "notice of appeal accompanied by payment to the secretary-treasurer of the fee prescribed ...".

In 1983, the Act was replaced by a new statute, 1983 (Ont.), c. 1. Section 44(12) of that Act provides that an appeal is to be commenced by:

> 44(12) ... a notice of appeal setting out the objection to the decision and the reasons in support of the objection accompanied by payment to the secretary-treasurer of the fee prescribed ...

Following the granting of an application for variance by the respondent City Centre Capital Limited, Luigi Stornelli Limited whose neighbouring lands might be adversely affected by the variance, filed a notice of appeal. Such notice was timely and was accompanied by the prescribed fee but did not include "the reasons in support of the objection". A hearing was held by the board in the person of D. L. Santo but because of a purported notice of withdrawal, unauthorized, which had been given by

Mr. Stornelli's solicitor, the matter was not proceeded with on that day, January 25, 1984.

Despite the absence of "reasons" in his notice of appeal, the board stated that:

> ... after hearing submissions on the nature of the objection, the board is of the opinion that Mr. Stornelli has proper grounds for appeal and the right to a full hearing of the merits before this board.

The present applicant was represented by counsel on that occasion, as he had been when the matter was heard by the committee of adjustments on which occasion the objections of the present applicant had been fully stated. Such objections had already been set out in writing and forwarded to the present respondent.

An adjournment was granted by Miss Santo in these terms:

> Therefore the board must grant the adjournment but will only do so for a period of three months. Mr. Stornelli or his lawyer must advise the board within the three-month period of their intention to proceed otherwise the board will consider the matter abandoned and will dismiss the appeal.

Notwithstanding that no further communication is shown to have been received from Mr. Stornelli, the board on March 20, 1984, appointed a date "for the hearing of all persons who desire to be heard in support of or in opposition to the appeal" and sent out a notice to all parties.

When the matter came to be heard on April 25, 1984, the board, now constituted by D. S. Colbourne, reviewed the course the matter had taken and of his own motion the vice-chairman made the following observation:

> Despite the administrative meanderings of this board, it is very clear from the filings that "reasons in support of the objection" were not provided to the board on any occasion except on January 25, 1984, in the oral presentation of Mr. Stornelli, but such reasons, this panel notes, were not recorded on the file.

The board further stated as follows:

> The board does not agree that the lack of reasons for the objection is simply an irregularity or imperfect compliance. It is non-compliance with the requirements of the Act and those words are not ambiguous and were just recently placed in the statute to provide for clear comment.

The vice-chairman accordingly concluded:

> ... that the appeal filed on behalf of Mr. Stornelli, being nothing more than a notice of appeal, does not meet the notice requirements as set out in the Act. The board, therefore, dismisses the appeal.

It should perhaps be noted that the parties were present with their witnesses prepared to argue on the merits as instructed in the notice sent out in March. On this appeal, brought by leave of Mr. Justice Southey, we are limited to answering the following two questions:

(a) Did the Ontario Municipal Board err in holding that the applicant's failure to provide reasons in support of its appeal pursuant to s. 44(12) of the Planning Act, 1983 deprived the said board of jurisdiction to consider the applicant's appeal?

(b) Did the Ontario Municipal Board err in holding that the applicant's failure to provide reasons in support of its appeal pursuant to s. 44(12) of the Planning Act, 1983 was more than an irregularity or imperfect compliance with the said section of the Act?

The law in our view has been stated by Lord Denning M.R. in Howard v. Secretary of State for the Environment, [1974] 1 All E.R. 644. In that case, the relevant statute provided:

> 16(2) An appeal under this section shall be made by notice in writing to the Minister, which shall indicate the grounds of the appeal and state the facts on which it is based ...

Notice was given but no grounds were initially provided. An amending notice giving grounds was prepared but was through inadvertence not received in time. At p. 648 of the report Lord Denning made the following pronouncement:

> All things considered, it seems to me that the section, insofar as the "grounds" and "facts" are concerned, must be construed as directory only; that is, as desiring information to be given about them. It is not to be supposed that an appeal should fail altogether simply because the grounds are not indicated, or the facts stated. Even if it is wanting in not giving them, it is not fatal. The defects can be remedied later, either before or at the hearing of the appeal, so long as an opportunity is afforded of dealing with them.

We are not aware of any case which would prevent us from adopting that statement as the law in Ontario. Accordingly, the questions must be answered in the affirmative. The order of the board should be set aside and the matter remitted to the board to be dealt with in the light of these reasons. There will be no costs.

In fairness to the board and to Mr. Colbourne, it appears that Howard v. Secretary of State for the Environment, supra, was not brought to Mr. Colbourne's attention in argument.

Judgment accordingly.