

DECISION AND ORDER

Decision Issue Date Friday, April 30, 2021

PROCEEDING COMMENCED UNDER Section 53, subsection 53(19), Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended (the "Act")

Appellant(s): REZA SEDIGHFAR

Applicant(s): CULTIVATE GROUP

Property Address/Description: 75 THIRTY EIGHTH ST

Committee of Adjustment File

Number(s): 19 259142 WET 03 CO (B0073/19EYK), 19 259147 WET 03 MV(A0647/19EYK), 19 259148 WET 03 MV (A0648/19EYK)

TLAB Case File Number(s): 20 194385 S53 03 TLAB, 20 194386 S45 03 TLAB, 20 194388 S45 03 TLAB

Hearing date: 14 April 2021 (in writing)

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY S. GOPIKRISHNA

REGISTERED PARTIES AND PARTICIPANTS

Applicant	CULTIVATE GROUP
Appellant	REZA SEDIGHFAR
Appellant's Legal Rep.	IAN FLETT
Party	City of Toronto
Party's Legal Rep.	DERIN ABIMBOLA

Party GAUTAM MUKHERJEE

Party LONG BRANCH NEIGHBOURHOOD

INTRODUCTION AND BACKGROUND

Reza Sedighfar is the owner of 75 Thirty Eight Street, located in Ward 3 (Etobicoke-Lakeshore) of the City of Toronto. He applied to the Committee of Adjustment (COA) to obtain consent to sever the existing lot into two undersized residential lots, and build a house on each of the two lots. The COA heard the application on August 27, 2020, and refused the Application in its entirety. On September 16, 2020, Mr. Sedighfar appealed the COA's decision to the Toronto Local Appeal Body (TLAB). The following individuals and organizations elected for Party Status

- The Long Branch Neighbourhood Association (LBNA),
- Mr. Gautam Mukherjee, the neighbour who resides at 71 Thirty Eight Street,
- The City of Toronto.

A number of other community members elected for Participant status.

A Hearing notice was issued by the TLAB on December 1, 2020. In this Hearing Notice, Witness Statements had to be submitted by February 1, 2021. On or around February 1, 2021, Mr. David Godley, a resident of the Long Branch community, filed a Statement, stating that he would be testifying on behalf of The Long Branch Neighbourhood Association (LBNA), as a "Local Knowledge Expert Urban Planning, specializing in Urban Design. At some subsequent point in time, he indicated to the LBNA that he would not be able to attend on May 12, 2021 to give evidence. LBNA and Mr. Mukherjee made the decision to retain an Expert in urban design to give evidence on their behalf.

As a result, LBNA and Party Mukherjee brought forward a Motion on March 30, 2021 to "jointly retain an expert in Urban Design" after the expiry of the deadline to file an Expert Witness Statement. The content of the Notice of the Motion states that it would be "fair" for the LBNA to bring in a Witness Statement on the basis that the TLAB has "*has allowed additional evidence through a new expert witness as long as one hundred and forty-six days late in order to allow all relevant evidence to be heard provided the opposing parties have an opportunity to review the evidence and respond to it*". They also state they will "*submit the Document Disclosure and the Expert Witness Statement from the urban design witness to TLAB and the other Parties no later than 30 days prior to the Hearing scheduled for May 12, 2021*". The Parties relied on "*Rules 2.2, 2.3, 17.1, 17.3, 17.6, 17.7, 24.1, 24.5 and 24.11 of the TLAB Rules*".

On March 30, 2021, Counsel for the City of Toronto, Ms. Aderinsola Abimbola filed a Response stating that the City would not object to the Motion put forward by LBNA, but reminded the latter of the need to disclose all material at least 30 days before the Hearing, including the Witness Statement from the Urban Design Expert that they had retained.

On April 6, 2021, Mr. Robert Freedman, an Urban Design planner, filed an Expert Witness Statement, including his CV, Acknowledgement of Expert's Duty, and a discussion of his Retainer, where he states that he was formally retained on February 26, 2021 to provide evidence on behalf of the Opposition in the area of Urban Design.

In their Notice of Response dated April 7, 2021, Mr. Ian Flett, Counsel for the Appellant, pointed out that the Opposition had filed Mr. Freedman's Expert Witness' Statement "*64 days after such Statements were due, and 35 days before the Hearing in this matter*". He requested for extra time to file a Response till April 7, 2021 from the deadline of April 6, 2021 because the Moving Parties "*emailed the 167 page Witness Statement of Mr. Freedman at 11:14 PM on April 6, 2021, three quarters of an hour before the deadline for this responding submission.*"

The Appellant asserts that there was no indication that the Moving Parties intended to call expert opinion evidence in the area of Urban Design, "*other than those opinions provided in the witness statement of Mr. Godley on February 1, 2021*". He described the Moving Parties' conduct to be "*unconscionable, rises to the level of dealing in bad faith or is in the very least unreasonable*", based on following sequence of events:

- a. *The Moving Parties did not contact Mr. Freedman until February 4th, 2021 when witness statements were due on February 1st of 2021;*
- b. *The Moving Parties actively withheld any indication of their intentions to call another witness until March 29, 2021, a full month after confirming a retainer with Mr. Freedman and 53 days after their initial contact with him;*
- c. *The Moving Parties omitted the identity of their witness in the motion material when they knew who he was, nor did they provide a will-say, précis or any other indication of Mr. Freedman's anticipated opinion before or on March 29, 2021;*
- d. *The Moving Parties filed the statement of Mr. Freedman on April 6, 2021 at 11:14 PM on the day this response was originally due and 35 days before the hearing of this matter; and*
- e. *The Moving Parties had the benefit of reviewing Mr. Manett's Witness Statement for their instructions to Mr. Freedman, and it is plausible but not known if Mr. Freedman had the benefit of reviewing Mr. Manett's witness statement in the preparation of his own statement.*

The Appellant then argued that "*if the Motion were granted, the Appellant will be required to review the statement of Mr. Freedman and determine whether it is necessary to retain an urban designer of his own to draft and submit a responding expert's statement*"

The Appellant characterized the Witness Statement filed by Mr. Godley as "*questionable*", "*notwithstanding his allegation of expertise in the area of urban design*". However, in the next paragraph, he added that Mr. Godley's alleged unavailability is

immaterial to the request put forward by the LBNA because “*Where issues of witness availability arise, such as where a bone fide planner is unavailable for one legitimate reason or another, it is not uncommon for the statements of like witnesses to be allowed if the replacing witness agrees to adopt the opinions of the replaced witness*”. After comparing the Statements of Mr. Godley, and Mr. Freedman, Mr. Flett opined that the cumulative impact of granting the Motion would be the same as seeking to introduce a new Witness.

The Appellant then questioned if the impact of the granting the Motion would require them to ask for “*adjournment of the hearing to retain an urban designer who would be available on such short notice*.” He then opined that “*Even if an adjournment was not required, the timeliness of this request, under these circumstances, runs afoul of relevant statutory provisions, the Appeal Body’s rules and common decency*”.

The Appellant emphasized that “*Section 1.1 of the Planning Act, which provides that a purpose of the Act is: “...to provide for planning processes that are fair by making them open, accessible, timely and efficient”*”. (his emphasis). He then relates the aforementioned Section to the TLAB’s own Rules 2.1 and 2.2, which provide that the Appeal Body “*...is committed to fixed and definite dates*”, and that the interpretation of the rules should “*...secure the just, most expeditious and cost-effective determination of every Proceeding on its merits*”.

The Appellant also asserted that there is no evidence from the Opposition “*that they were unable to find an urban design witness in advance of the date for the exchange of experts’ witness statements*”, and that “*there is no evidence or indication that the Moving Parties had taken affirmative steps to retain such an expert in advance of the February exchange date*”. He then points out that “*three days after the filing of Expert Witness Statements they made contact with a potential expert witness*”, and that “*No explanation is provided in their motion material for how or why the timing is as it is*”, and in the absence of such information , “*invites*” the TLAB to “*infer that the Moving Parties have timed this motion and filing for their own tactical benefit and to the prejudice of the Appellant*”

In their Reply dated April 13, 2021, LBNA responded to the issues raised by the Appellant by stating that there would be no prejudice to the Appellant, because the latter would have an opportunity to respond to the additional Expert Witness Statement, and cross-examine Mr. Freedman after the latter presented his evidence at the Hearing. LBNA stated that they had sought advice from from the TLAB about timelines to bring forward a Motion, and how the TLAB’s advice adhered to in their Motion. They also emphasized that notwithstanding their submitting Mr. Freedman’s Statement on April 6, 2021, the Appellant would still have 14 days, till April 20, 2021, to file their Response, the significance being that April 20, 2021 is still 21 days prior to the Hearing date of May 12, 2021. LBNA also argued that Hearings regarding severances in the Long Branch area typically required 2-3 days for completion, on the basis of which they suggested that the Appellants’ expert on Urban Design (if one were to be retained), may not have to give evidence May 12, 2021.

LBNA relied on Rules 2.2 and 2.6 to emphasize that they understood that there could be no “ambush” at a Hearing, and that there was nothing “tactical” about the timing for submitting Mr. Freedman’s Witness Statement, as alleged by the Appellants. LBNA also explained its paucity of resources, and how they were notified of a possible donation on Feb 1, 2021, enabling them to retain an Urban Design Witness. They reiterated that they had made it clear that they intended to canvass Urban Design issues through the introduction of Mr. Godley’s Witness Statement on February 1, 2001, and noted that the Appellant did not comment about the introduction of the Witness Statement, nor did they file a Response.

LBNA concluded that the Appellant’s “*perceived position of prejudice is unfounded*”, and reiterated their request for admitting Mr. Freedman’s Witness Statement on the record, and allow him to testify on their behalf.

MATTERS IN ISSUE

The questions to be answered in this Decision are:

- Whether the TLAB should approve, or refuse the Motion allowing the Witness Statement of Mr. Freedman, who has been retained by the LBNA and Party Mukherjee to give evidence about Urban Design matters
- Whether relief from the Rules should be given to the Appellant to respond to the Motion put forward by Parties LBNA and Mukherjee.

JURISDICTION

The TLAB relies on its Rules of Practice and Procedure (the Rules) to make decision on administrative matters.

ANALYSIS, FINDINGS, REASONS

The questions to be answered are listed in the “**Matters in Issue**” Section above.

I will answer the second question first- Mr. Flett provides very reasonable and comprehensible reasons for requesting time till the end of day on April 7, 2021 to file a Response to the Motion filed by the Moving Party. I also note that the Opposition/Mover of the Motion did not object to the Appellant’s filing their Response on April 7, 2001. Consequently, I agree that the Appellants can be granted time till the end of April 7, 2021, to respond to the Motion put forward by the Moving Parties.

On the issue of the acceptance of Mr. Freedman’s Witness Statement, the key allegation made by the Appellant is that they were taken by surprise by the Moving Party’s intention to introduce evidence on Urban Design, and would be consequently prejudiced, because they may need to retain an Expert Witness in the area of Urban

Design. They also question whether Mr. Freedman (the Expert Witness the Moving Parties, wish to put forward) formulated his opinions by reading Mr. Mannett's Witness Statement (the Planning Witness retained by the Opposition), and whether the Moving Parties acted in good faith.

I agree with the Appellant's interpretation of Rules 2.1 and 2.2 that the process should be expeditious, and cost-effective; however, this cannot come at the cost of the stated objective, namely "***secure the just, most expeditious and cost-effective determination of every Proceeding on its merits***" (my emphasis). The merits include collecting the best corpus of evidence, both from a quality and quantity perspective, which would facilitate the formulation of a well-informed, fair and just Decision. In other words, collecting and compiling evidence is the end to which "just, expeditious and cost-effective determination" is the means-the latter cannot become the former's master.

I am not persuaded by the Appellant that there was an element of surprise in the Moving Party's intention to bring forward an Urban Design Expert- I agree with the Opposition that they had signalled as early as February 1, 2021, that they would be canvassing Urban Design issues at the Hearing. It is undisputed that Mr. David Godley, a self-described "local knowledge expert witness" put forward a Witness Statement discussing Urban Design issues, on behalf of the Opposition. Even if the Appellant did not attach much weight to Mr. Godley's Statement, it would have been evident to them that Urban Design issues would be canvassed at the Hearing.

Notwithstanding the Appellant's providing a number of explanations and perspectives about what the Moving Parties could have done differently to signal that they would be retaining an Expert in Urban Design issues, I find that their intention, as of February 1, 2021 (the deadline to file Witness Statements) to discuss Urban Design issues was unquestionably crystal clear..

The Appellant suggests that if the Motion were granted, there will be "cascading prejudice" as a result of the possibility of their having to retain an Expert Witness in the area of Urban Design. I disagree with this concern, because every Party has the right to prosecute their case as they deem appropriate- the choice of who to bring forward as a Witness, rests with the Appellant, and the Appellant alone. The Appellant's chief concern, as glimpsed through their dismissive characterization of Mr. Godley, is that the latter is taken more seriously- in other words, it is the differential in the reactions to the two individuals that causes them concern, rather than the topic of Urban Design itself. I find that the differential in their internal reaction to the expertise of two Witness does not constitute prejudice, because the latter is caused through an external change, as opposed to internal reactions.

I find that there is no prejudice caused to the Appellant if Mr. Freedman were allowed to testify on behalf of the Moving Parties. I therefore allow Mr. Freedman's Witness Statement to become part of the Official Record, on the basis of which he may give evidence at the Proceeding, and be cross examined by the Appellant. Mr. Godley's

Statement needs to be struck off the Official Record since he will not testify at the Hearing.

The Appellant also states that there is a "*lack of clarity on whether Mr. Freedman based his opinion on Mr. Mannett's Expert Witness Statement*", and questions whether this move was done by LBNA in good faith, or as a tactical issue, and "*invites*" the TLAB to draw a negative inference. In its defence, LBNA denied the allegations, and discussed their limited resources precluded from acting as promptly as they ought to have, and how an unexpected "grant" helped them retain an Expert in the area of Urban Design.

To answer the Appellant's allegations, I rely on the golden legal principle that everybody is innocent, until proven guilty. When this perspective is juxtaposed on the fact that Mr. Freedman is a qualified professional, who is aware of his duties and responsibilities as is evident from his Acknowledgement of Expert's Duty, I conclude that his opinions would reflect his independent research and thoughts, as opposed to relying on Mr. Manett's Witness Statement. Likewise, there is nothing in front of me to support the accusation that LBNA may be acting in bad faith, for reasons stated in the previous paragraph. I am opposed to the morphing of assumption into presumption, and am disinclined to accept invitations to make a finding of malafide intentions on behalf of any Party, based on nothing more than mere allegation. Consequently, I find that the Moving Parties did not act in bad faith, when making the Motion, and that Mr. Freedman relied on his own research to formulate his opinion.

Another interesting procedural issue raised by the Appellant is the possibility of an adjournment to the Hearing scheduled for May 12, 2021 should the Motion be granted, since they may not have an Urban Design Expert to testify on the day. I hasten to reassure the Appellant that no order is being made about having to produce a Witness in the area of Urban Design, or even a Witness Statement, by May 12, 2021. I would like to provide the Appellant sufficient time to decide whether they want to retain an Expert in Urban Design issues, as well as provide an adequate opportunity to submit a Witness Statement, where appropriate. I ask the Appellant to advise the TLAB, and other Parties, at the beginning of the Hearing on May 12, 2021, about their decision to retain an Expert in the area of Urban Design, and then discuss when the Witness Statement will be submitted to the TLAB.

In terms of summarising my findings, I state that:

- Mr. Freedman's Witness Statement is allowed on the record, and Mr. Godley's Witness Statement will be struck off the Record.
- The Appellants are provide tile until May 12, 2021 (the day of the Hearing) to decide if they want to retain an Expert Witness in the area of Urban Design, and discuss next steps, including submission of Witness Statements.
- The Hearing scheduled for May 12, 2021, will not be adjourned, and will proceed as planned. It would be important for the Parties to discuss how much time would have to be set aside to complete the Hearing.

MOTION DECISION AND ORDER

- The Motion put forward by the Moving Parties is granted, and Mr. Freedman's Witness Statement in the area of Urban Design will be allowed on the record, and Mr. Godley's Witness Statement will be struck off the Record. Mr. Freedman's Witness Statement, may be relied upon for the purposes of providing evidence, as always as cross-examination.
- The Appellants are provided time until May 12, 2021 (the day of the Hearing) to decide if they want to retain an Expert Witness in the area of Urban Design, and discuss next steps, including submission of Witness Statements.
- The Hearing scheduled for May 12, 2021, will not be adjourned, and will proceed as planned

So orders the Toronto Local Appeal Body

X



S. Gopikrishna
Panel Chair, Toronto Local Appeal Body