

DECISION AND ORDER

Decision Issue Date Wednesday, June 30, 2021

PROCEEDINGS COMMENCED UNDER section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13, as amended

Appellant(s): WENDY ORBACH
Property Address/Description: 85 ALBERTUS AVE
Committee of Adjustment File
Number(s): 20 143461 NNY 08 MV

TLAB Case File Number(s): 20 185509 S45 08 TLAB

Hearing date: Wednesday April 20th, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANTS

Owner PAUL JOSEPH MACEROLLO
Appellant WENDY ORBACH
Party FRANK MILLER
Party PAUL JOSEPH MACEROLLO
Party's Legal Rep. ANDY MARGARITIS

**Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna
TLAB Case File Number: 20 185509 S45 08 TLAB**

Participant	CHRISOULA LUCAS
Expert Witness	MICHAEL BARTON
Expert Witness	TJ CIECUIRA

INTRODUCTION AND BACKGROUND

The Introduction and Background respecting this Decision appear in my Decision dated May 28, 2021. Consequently, this information is not repeated here.

On June 2, 2021, the Appellant, Ms. Orbach sent a letter to the TLAB, asking for clarifications on some issues, as well as asking some parts of the Interim Order, dated May 28, 2021, be changed. She also enclosed three photographs along with her letter. Mr. Margaritis, Counsel for the Applicant, sent a response to Ms. Orbach's letter, dated June . Mr. Dennis Miller, another registered Party, (and the husband of Ms. Orbach) send in another letter in reply to Mr. Margaritis' email , on June 8, 2021.

On June 11, 2021, I directed the TLAB staff to send out an email to the Parties to acknowledge receipt of the three communications listed above, and informed them that I would send out a second Interim Decision to clarify issues, and make decisions where necessary. I also informed them that it would be necessary to submit a formal Motion.

I will highlight the concerns, and requests expressed in the three communications:

In her letter dated June 2, 2021, Ms. Orbach acknowledges receipt of my Interim Order dated May 28, 2021, and states that the "Chair has the power to control the hearing process per Section 27 of the TLAB Rules", and refers to the fact that the "SPPA applies to TLAB proceedings which requires adherence to the rules of procedural fairness". She raises the following issues:

- 1. Removing the Right of Reply:** Ms. Orbach states that as the Appellant, she should have "typically" been given the opportunity to present her evidence first, and consequently deserves the right to "reply".

She adds that "in the spirit of cooperation", she did not object to my directing the Applicant to present first, but says that the Applicant should not be given the Right to Reply, specifically "it is inappropriate for Mr. Ciecura, the respondent's planning witness, to be given any right of reply, as he is the witness, not the respondent's counsel."

Ms. Orbach asks that "this provision of my Order be eliminated".

- 2. Who presents their case first when the Applicant is not the Appellant- the Applicant or the Appellant**

Ms. Orbach notes that my Order, " does not allow any time for final submissions by either party". "Given that time was given for a "reply"", she assumes that "this is an oversight", since a "reply" necessarily relates to a reply to final submissions, and asks

that both Parties make final submissions to the Board in writing, with deadlines set for Mr. Margaritis and her to file on the same day.

Ms. Orbach suggests that eliminating the Right for Reply “will eliminate 20 mins from the time needed to complete the proceedings”.

3. Requesting the Chair’s indulgence for extra time to present evidence

This Section points out that my Order, issued on May 28, 2021, does not take into account that “Mr. Margaritis led Mr. Ciecuiira, his expert witness, in chief from 10:00 am to 3:05 pm (including breaks), nearly 4 hours in total”. It is stated that “ We are prepared to agree to the time allocated to us in the TLAB May 28, 2021 order, but given that Mr. Margaritis was not curtailed in time and took nearly four hours to lead his witness, and to ensure fairness between the parties we ask that the Member grant us an indulgence in additional time if unforeseen issues arise”

4. Introducing three new photos onto the record

This section states that the Appellants put forward photos to Mr. Ciecuiira in cross-examination on the basis that this had been permitted in other TLAB cases. The Appellants then state that they “did not appreciate that the photos could not be used in this way, nor did we realize that we had a right to argue for their inclusion when Mr. Margaritis requested an Order excluding them”. Ms. Orbach’s letter asks that “this portion of the Order be reconsidered” “because the pictures have probative value”. It also points out “Mr. Ciecuiira provided in his evidence photo of the front view of the houses at 159 Albertus and 33 Craighurst. The rear view of these houses are equally important and would be of assistance to the Board”.

The Appellants also argue that the prejudice of introducing these new pictures close to two months before the next Hearing would be eliminated if Mr. Margaritis and Mr. Ciecuiira were given an opportunity to discuss these pictures, and would not “object” to a discussion between the two about these pictures.

RESPONSE FROM MR. MARGARITIS

In an email dated June 4, 2021, Mr. Margaritis responded to the letter from Ms. Orbach, and disagreed with her submissions, by stating that “notwithstanding that there was no direction for a Response from any of the Parties in response to my Interim Decision, he was being “forced to reply to the attached letter from Ms. Orbach’s (the “Letter”) at my clients expense”. He then states that “based on a misunderstanding of a court procedure”, Ms. Orbach suggests” that the order of evidence was inappropriate”, and then asserts that the procedure followed is no different from what has been followed by other proceedings before the TLAB.

Mr. Margaritis also points out that Mr. Barton, the planner for Parties Orbach and Miller, had agreed that two hours was sufficient for him to provide his direct evidence. He then argues that “Even with breaks, there is sufficient time for each Party to make oral closing submissions”. He further states that in his experience, he has never had to “file

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written closing submissions – no less with the appellant being granted a right to further respond”.

Mr. Margaritis then objects to the introduction of the three pictures sent in by Ms. Orbach into the record, because “no ability to review same with my clients land use planner who has been held in Ms. Orbach’s cross examination which has already exceeded 2 hours”. He also points that notwithstanding my specifically excluding the picture taken from Ms. Lucas’ rooftop at the Hearing, the Appellant is attempting to introduce the same photo onto the record., and that this is “in direct contravention” of my Ruling and Order

Mr. Margaritis ends his email by stating that “the actions of Ms. Orbach are beginning to cross into the realm of frivolous, vexatious and unreasonable”, and that his “clients simply want to proceed with the Hearing and do not want to engage further with the Appellant”.

On June 8, 2021, Mr. Frank Miller, one of the Parties involved in this matter, replied to Mr. Margaritis’ email by way of a letter, where he refuted the points made in the latter’s email dated June 4, 2021. He commented on, and clarified some of the issues originally raised in Ms. Orbach’s letter dated June 2, 2021. He states that it is not entirely clear whether the reference to “reply” in my Decision means “reply evidence” or “reply to final argument”.

He also points out that “Mr. Margaritis did not address the issue of a right of reply in his response, which is the real issue of concern”

On the issue of Final submissions, Mr. Miller points out that the TLAB has heard Oral Argument by way of written submissions, as exemplified by 79 Brentcliffe, 40 Harwood, and 183 Cortleigh, and provides reasons for his favoured option of completing Argument by way of written submissions. He states that Argument would have to reflect the outcomes of what may be established by way of cross examination on Day 2 of the Hearing.

He also disputes Mr. Margaritis’ assertion about the length of the Cross-Examination on Day 1, and asserts that it took 73 minutes, instead of the “two hours” asserted by Mr. Margaritis.

Mr. Miller reiterates the lack of prejudice to the Appellant if the pictures sent by Ms. Orbach were introduced into the Record, and states that he and Ms. Orbach would not object if the TLAB permitted discussions between Mr. Margaritis, and Mr. Cieicuiria on this single issue, notwithstanding the latter’s being in Cross-Examination.

Lastly, Mr. Miller discusses concerns with the Filing of a formal Motion, which is not recited here, because I have already made a ruling that a formal Motion will not be required. The reasons for this ruling are explained in the Analysis, Findings, Reasons Section.

MATTERS IN ISSUE.

The questions to be answered are listed in the Analysis, Findings and Reasons Section, followed by the answers.

JURISDICTION

The TLAB relies on its Rules of Practice and Procedure to make decisions on administrative questions.

ANALYSIS, FINDINGS, REASONS

The reason for my willingness to write this Decision without the submission of a formal Motion is to reduce effort, and expenditure for the Parties, when the Motion adds nothing new by way of content, especially in the context of a tight time. However, this Ruling may not be construed as a precedent, because bringing forward Motions is the recommended and proper procedure, even it involves expenditure to the Parties. The issue of how much weight can be accorded to concerns about expenditure is discussed in the Answer to Question No 4 in this Section.

I will now address the questions listed in the “Matters in Issue” Section, beginning with Question 2, followed by Question 1

2) Who presents their case first when the Applicant is not the Appellant- the Applicant or the Appellant?

My understanding of the argument put forward by Ms. Orbach and Mr. Miller is that they should have been allowed to present first, as well be given the Right to Reply by virtue of being the “Appellants”. According to Ms. Orbach, the Applicants should not be given the right to Reply, because they are not the Appellants. Mr. Margaritis distinguishes between the Practice in the Courts,(where the Appellants present their case first, followed by other Parties), and the TLAB, where the Applicants have traditionally presented their case, even if they are not the Appellants.

I note that Ms. Orbach’s letter focuses on Reply Evidence, while Mr. Miller’s letter focuses more on Reply in Oral Argument.

It is important to point out every Proceeding before the TLAB is a Hearing *de novo* i.e. from the beginning, irrespective of whether the Applicants are the Appellants, or not. What this means is that the TLAB does not take into consideration the evidence given to the Committee of Adjustment, and begins anew to hear the evidence. Given that the onus of proving their case is on the Applicant, it makes sense to hear the Applicant, followed by the Appellant.

This feature of a Hearing *de novo* has a significant impact on the question respecting the Right to Reply, as explained below.

1) Removing the Right to Reply

The argument to allow the Applicant the right to Reply is to recognize that they may not necessarily know, or fully comprehend the Opposition's perspective, when presenting evidence in their Examination-in-Chief.

The Appellants have not drawn my attention to any Rule in the TLAB's Rules, the Planning Act, or the SPPA, which demonstrates that the TLAB has the jurisdiction to deprive the Applicants of the right to Reply by way of evidence.

Consequently, the Applicant's right to Reply will not be rescinded, as requested by the Appellant

The issue regarding the right to Reply in Oral Argument, is addressed in Question 4 below.

3) Requesting for the Chair's indulgence with presentation time

There is a dispute between the Applicants and Appellants on the length of time taken by the Applicants to make their case on Day 1; the consequence of this is that the Appellants feel that they can be given more time than the two hours for the Examination-in-Chief allocated to them in my first Interim Decision to make their case, and request for the Chair's "indulgence" if they happened to take more time.

I concur with Mr. Margaritis that the quality of evidence clinches the case in ways that the quantity of evidence cannot, and note that quantity of evidence does not, or by itself, automatically result in quality. Given the importance accorded to the quality, the discussion in the letters and emails submitted by the Parties about who spent how much time in their Examination-in-chief, and Cross Examination is moot.

I note that Ms. Orbach asks for "indulgence" if "unforeseen circumstances arise". I realize that the processes of Examination-in-chief, and Cross-Examination may not work like clock-work, and that unforeseen circumstances may arise- however, it is important that the Parties do their utmost to respect the timelines set in the original Interim Decision.

4) Will Oral Argument be heard in writing or by way of oral submissions?

As noted in the submission of the Appellant, there was no time frame provided for Oral Argument, in my first Interim Decision. This Decision was made deliberately to introduce an element of fluidity to respond to the very issue that the Appellants brought up in Question 3 above. The issue with indicating time lines for Oral Argument would have eliminated slippage by way of time, to address the very "unforeseen circumstances" alluded to in Ms. Orbach's letter.

I am sensitive to the points made by Mr. Miller about having to reflect on what happened before submitting their oral argument, while I also recognize the points made by Mr. Margaritis favouring an oral argument in person. While I would prefer the latter because it allows me to ask questions of the submissions, I understand the fact that Ms. Orbach

and Mr. Miller may need extra time to reflect on the Proceedings, after the completion of Evidence, to make submissions.

I acknowledge Mr. Margaritis' concern about possible extra costs to his clients, should Oral Argument be heard by way of written submission. I understand the concern, and have tried to limit the expenditure, where possible, by relieving the Parties of the need to submit a formal Motion to address the issues raised in their letter.

However, litigation, by its very nature, is stressful materially, monetarily and mentally- the acts of commencing, or responding to litigation are deliberate choices made by the Parties. For the purposes of making meaningful decisions, collecting a comprehensive corpus of evidence is a higher priority to the TLAB than issue of financial expenditure to the Parties, though the accuracy of the latter is not in question.

Given the above, I am not opposed to the idea of hearing Argument by way of written submissions. However, this issue can be resolved on the basis of the time available to complete the Proceeding after completing the more important process of collecting evidence, and the readiness of the Parties for Oral Argument - this bridge is best crossed after the collection of evidence has been completed.

5) Can the photographs be introduced onto the record for evidentiary purposes

I begin by drawing attention to a possible misunderstanding on the part of the Appellant about my Ruling at the Hearing, as well as the first Interim Decision- I did not, at any stage, suggest that photographs could not be used for Cross-Examination purposes. At the Hearing, I stated that any submissions made before April 20, 2021, could be used for evidentiary purposes, and specifically ruled out no new photographs could be introduced. When I made this Ruling, what I had in mind were the pictures of the Subject Property, taken by Ms. Lucas and Ms. Orbach from their houses

Of the pictures accompanying Ms. Orbach's letter, I agree with Mr. Margaritis that the third picture, by way of sequence (i.e. the picture of the taken from the roof top of Ms. Lucas' house) was brought up at the Hearing, and has been addressed in my Ruling- I don't see any reason to revisit my Decision on this matter.

Regarding the other pictures submitted by Ms. Orbach, **the Rear view of 159 Albertus**" (which I refer to as Picture 1) and the "**Rear View of 33 Craighurst Avenue** (from 35 Craighurst)" (which I refer to as Picture 2), the Appellant makes an interesting point about their probative value. I am prepared to hear brief submissions at the beginning of Day 2, where I can weigh the asserted prejudice to the Appellant, versus the probative value of these pictures, and arrive at a Decision on the admissibility of Pictures 1 and 2.

Given the need for extra discussion as outlined in this Order, we will rise at 5 PM at the Hearing on July 26, 2021.

Lastly, I note that it is unusual for an Adjudicator to issue an Interim Decision providing commentary, on an earlier Interim Decision- the only reason for my reluctant willingness to issue this Interim Decision is to eliminate extra pressure on the tight timelines we

have on Day 2 of this Proceeding. I specifically ask that there be no further submissions made, or Rulings sought by the Parties, till the day of the next Hearing (i.e. July 26, 2021).

INTERIM DECISION AND ORDER

1) The Applicant's right to Reply, by way of Reply Evidence, will not be rescinded or interfered with, in any shape or fashion.

2) Submissions will be heard at the beginning of the Hearing on July 26, 2021, about the admissibility of Photographs 1 and 2, before a Decision is made on their admissibility. Photograph 3 will not be admitted onto the Record.

3) No further submissions will be entertained by way of email, or Motions, till the next Hearing, to be held on July 26, 2021

So rules the Toronto Local Appeal Body

X



S. Gopikrishna
Panel Chair, Toronto Local Appeal Body