

DECISION AND ORDER

Decision Issue Date Thursday, December 02, 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): ALEXANDER BASSO

Applicant(s): MICHAEL FLYNN

Property Address/Description: 98 SUPERIOR AVE

Committee of Adjustment File

Number(s): 20 151053 WET 03 MV (A0188/20EYK)

TLAB Case File Number(s): 21 170110 S45 03 TLAB

Hearing date: October 14, 2021

Deadline Date for Closing Submissions/Undertakings:

DECISION DELIVERED BY TLAB Panel Member S. Gopikrishna

REGISTERED PARTIES AND PARTICIPANT

Appellant	Alexander Basso
Appellant's Legal Rep.	David Tang
Applicant	Michael Flynn
Party	Charlotte Sheasby-Coleman
Participant	Barbara Radecki
Participant	Arcana Restoration Ltd
Participant	Zeph Williams
Participant	Hugh Thaddeus Ranalli

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Participant	Charles Howard Honeyman
Participant	Jim Farrell
Participant	Scott Hunter
Participant	Craig Goodman
Participant	Kenneth Froese
Expert Witness	TJ Cieciora
Witness	Yaroslav Medwidsky
Witness	William Johnston
Witness	Isabell Vongphakdy

INTRODUCTION AND BACKGROUND

Alexander Blasso is the owner of 98 Superior Avenue, located in Municipal Ward 3 (Etobicoke- Lakeshore) of the City. He applied to the Committee of Adjustment (COA) to convert the existing dwelling into a triplex. The COA heard the application on May 25, 2021, and refused the application in its entirety. Mr. Blasso then appealed the decision made by the COA to the Toronto Local Appeal Body (TLAB). The TLAB scheduled a Hearing for October 14, 2021.

By way of an editorial note, the positions of the Parties involved in this Hearing, as summarized below, reflect a combination of written, and oral submissions.

It is also important to note that the demolition of a previously existing house at 98 Superior Avenue, was the subject of controversy in 2020. Notwithstanding an application before the Toronto Preservation Board to designate the house as a “Heritage Site”, the pre-existing house was demolished on the morning of November 20, 2020, the same day on which the Preservation Board was to hear the application in question. I understand that quite a few of the community members were vehemently opposed to the demolition of the house, but were unable to prevent its demolition.

Ms. Charlotte Sheasby-Coleman elected for Party status, and completed the paperwork to summons Mr. William Johnston (Chief Building Officer), and Ms. Isabell Vongphakdy (Plan Examiner, Toronto Building) and Mr. Yaroslav Medwidsky (Project Manager, Urban Forestry) The summons were granted by the TLAB. On October 1, 2021, Mr. Jason Davidson, a lawyer with the City of Toronto, brought forward a Motion to quash the summonses, stating that the summonsed witnesses could not contribute to a discussion focusing on the planning matters before the Tribunal. Mr. Davidson

specifically stated that Mr. Johnston “did not know about individual projects” by virtue of being the Chief Building Official (CBO). According to Mr. Davidson, Ms. Vongphakdy, a Plumbing and Mechanical signs on HVAC plans for the purposes of applying for a demolition permit, and is not a Zoning Examiner, who can speak to the variances. Mr. Medwidsky is a Supervisor - Urban Forestry Ravine & Natural Feature Protection, who not issue a stop work order on his visit to the site, was not responsible for Urban Forestry's review of the Application, and has no knowledge of the planning, or forestry aspects of the application before the TLAB.

Mr. Davidson argued that “in the alternative”, the Board restrict questioning of each Witness to one hour, and that the City should be allowed to “send “substitute witnesses” , where appropriate. He questioned the motives of the Moving Party in summoning the witnesses, and asked why they had not sought relief from the Ontario Superior Court, to address the demolition of the building. When asked how he had determined that an hour would be adequate time to interview each Witness, Mr. Davidson said that he himself had spoken to each of the three interviewees, and was sure that the process of obtaining information could be completed in “ten minutes” in each case. He added that the one hour was being suggested with an abundance of caution.

Ms. Sheasby-Coleman disagreed with the City’s perspective, and recited from Chapter 363 of the Toronto Municipal Code, to demonstrate that the Chief Building Official (CBO) had to sign off on each demolition, and could therefore be expected to have had knowledge of the demolition permit issued for 98 Superior. However, she was willing to accept for a substitution for Mr. Johnston. In the case of Ms. Vongphakdy, Ms. Sheasby –Coleman recited the following from Page 1, of the Permit:

The extent of construction authorized under this permit is limited to the description contained herein as follows: Proposal to demolish existing single family dwelling (SFD) and construct a SFD.

Stated work and use must be in accordance with the plans, specifications, building permit notes, and other information issued with this building permit. Changes to any documents submitted are not to be made unless prior authorization is obtained from the Chief Building Official or designated. False information may be grounds for revoking of building permit.

Ms. Sheasby-Coleman stated that when Ms. Vongphakdy reviewed the plans, “they were stamped as “reviewed as a single family dwelling” “, and that Ms. Vongphakdy had made a number of changes to the plans, including one that “removed the kitchen on the second floor, writing: No cooking facilities permitted per zoning notice on DWG A4”. Ms. Sheasby-Coleman pointed out that these plans were signed off on November 30, 2021, which is when the demolition took place, “and five days after the permit was issued”.

In the case of Mr. Medwidsky, Ms. Sheasby-Coleman referenced her revised summons, which stated that he (i.e. Mr. Medwidsky) was in attendance at 98 Superior

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Avenue “as the on-call Urban Forestry Representative” on November 28, 2020, before asking for notes on a number of issues, of which the following are important to note:

- Any evidence or notes to acknowledge that during that visit of the subject property on 28 November, he allegedly observed a large bulldozer allegedly within the trees protection zone of the trees in the front yard.
- Additionally any notes/evidence to acknowledge there was inadequate protection around the two mature front yard trees, and allegedly there was a lack of protection around the mature tree in the rear yard.

Ms. Sheasby-Coleman further asserts that Mr. Medwidsky was the only City Employee to “attend at 98 Superior” from November 28, 2020, until the demolition on November 30, 2020, and had also stated to her that a “Stop Work order” could be issued should the bulldozer be put into motion again because there was no adequate tree protection in place which was necessary prior to a demolition. Ms. Sheasby-Coleman then asks that Mr. Medwidsky produce the relevant *Stop Work Order and Contravention Inspection Form*. In her oral submissions, Ms. Sheasby-Coleman also discussed the possibility of her introducing video-evidence from the COA hearing, to explain the planning issues from the perspective of the opposition.

Lastly, Ms. Sheasby-Coleman talks about the inappropriateness of the “demolition of a property, by disingenuously altering their plans to obtain that permit (with the full intention of then reverting to the unapproved triplex plans that stood in the way of that demolition) is not a loophole from the City to lie.” She opines that “this is antithetical to the true spirit of good planning and these facts are therefore pertinent to the current application and to this appeal of the COA refusal”.

Mr. Tang, Counsel for the Applicant, stated that they supported the City’s request to quash the three summonses. In the alternative, he asked that if the summons were not quashed, there should be a further order that the “Requestor must not cross examine the Witnesses, and that the direct examination of the Witnesses solely on the question(s), or issue(s) set out in the Request for Summons Form 11 for that Witness” (Mr. Tang’s emphasis).

Mr. Tang also points out that the TLAB has no jurisdiction to adjudicate demolition issues under the *Ontario Heritage Act*, or the *City of Toronto Act, 2006*. After analyzing the questions listed in the Request for Summons, he concludes that “irrelevant evidence” is being sought from Witnesses, and asserts that the questions raised by the Requestor have no relevance to whether the four tests found in Section 45 of the *Planning Act* are met. He states that the Requestor focuses on

- Whether the demolition was carried out with the accordance with the requirements of the demolition permit (whether there was encroachment into any mandatory tree protection contrary to the demolition permit’s provisions).
- Whether Mr. Medwidsky had to be on the Site during demolition and had to issue a stop work order for demolition

Mr. Tang next discussed how the “Summonses issued” don’t conform to the TLAB Rules, with specific reference to Rules 25.1, and 25.3 of the Rules of Practice.

Lastly, Mr. Tang asked that “fishing” for information, “be prohibited”. He specifically asks that the Requestors’ questions be restricted to the questions identified in the applicable Request for Summons Form 11, consistent with the Rules, that the Parties be required to identify at the very outset the matters, which a summonsed witness will be required to testify about, and only after the Board has determined these specific issues, or questions are indeed relevant to the “issues in dispute.” He designates any information that does not adhere to the information and criteria, set above, as being a “fishing expedition”. He also points out that the Board’s Rules permit to request on an Order for Discovery (Rule 18), and points out that the Requestor has not brought such a Motion, and should consecutively, not be allowed to ask questions on matters, outside of what was identified in the Request for Summons.

He concluded by asking that the Summons be quashed, or alternative relief be granted, which agreed with the City’s request, subject to the extra condition that the Requestor “not cross-examine the witnesses summonsed”, and that the direct examination of the witnesses be restricted to a direct examination “solely on the questions, or issues, set out in the Request for Summons Form 11 for that witness”.

I thanked the Parties for their submissions, before stating that I would adjourn the Hearing because of the following reasons:

- After reading the Witness Statements submitted by multiple members of the opposition, there was no demonstrable nexus, between planning reasons, the proposal before me and the “Witness Statements”, which expressed more than a palpable outrage at the destruction of the house that existed previously. I informed the Parties and Participants that their outrage regarding the demolition, singularly or cumulatively, did not constitute a planning ground, that was relevant to the proposal. I therefore wanted to give the opposition an opportunity to submit witness statements which discussed the planning issues involved in the Appeal (my emphasis). I then expressed my agreement with Mr. Tang’s concern about “fishing” for information that may have been relevant to the demolition, but not relevant to the Appeal before me, before advising the Parties that no more than three individuals would be allowed to speak on behalf of the opposition, including the “principal witness” (Ms. Sheasby-Coleman, or a different individual who could speak to the planning issues).
- It was important to address the issue of what could be relied upon at the Hearing on an *a priori* basis. I addressed Ms. Sheasby-Coleman’s comments about introducing video evidence from the COA Hearing, and stated that *prima facie*, there was no need to review video evidence from the COA Hearing, because of the *de novo* nature of the Appeal before the TLAB. I stated that I was prepared to hear a Motion at the beginning of the Hearing about the admission of videographic evidence from the COA, because it is important to address administrative issues such as what evidence can be relied on before the

beginning of the Hearing, rather than addressing such issues half way through the same.

I then asked the Parties for advice regarding how many days of Hearing were recommended to complete this Proceeding; Mr. Tang stated that 3.5 days would be ideal to complete the Hearing, including half a day to address “any wrangling” at the beginning of the Hearing .

MATTERS IN ISSUE

The following issues need to be addressed:

- Whether the Summons granted in the cases of Mr. Johnston, Ms. Vongphakdy, and Mr. Medwidsky will be quashed, or will alternative relief be granted, as requested by the City.
- How many days of Hearing are required to complete this Proceeding, given the number of witnesses who will potentially give evidence
- A suggested timetable for the Hearing.

ANALYSIS, FINDINGS, REASONS

I begin by noting that on the basis of the written and oral submissions, there is a paucity of information about the nexus between the demolition, and the Appeal in front of me. The City, and the Applicants asserted repeatedly that the Summoned Witnesses cannot speak to the planning issues respecting the Appeal before me, while the Respondent drew attention to how the Summoned Witnesses were involved with the demolition. I find that there is a lacuna of information about the relationship between the demolished house, and the plans and elevations, of the triplex before me. While it is tempting to assume that there is no relationship between a *demolished* (my emphasis) house, and the new triplex, none of the submissions made orally, or in writing, explicitly addressed this question. Consequently, I have to make findings in the absence of an answer to a key question, whose answer could have clinched the issue of whether or not the summons could be quashed.

I also respect the Respondent’s motivation to request for the Summoning of the Witnesses, in the process of opposing the Appeal: *“I have not filed the Request to Summons and gone through the time, and expense associated with service, unless it was my firm belief that the evidence requested is relevant, to the TLAB Appeal of the COA refusal for 98 Superior”*.

Consequently, I have erred on the side of caution, while coming to findings, regarding the Motion to quash the Summons.

1) Quashing of the Summons

Given that the job specifications, and the duties of the three individuals who have been summonsed are different, it is important to address the quashing of the summons separately, on a case by case basis. In the case of Mr. Johnston, the City's position is that the Chief Building Official (CBO), does not review individual requests for demolition or building permits, under the Building Code Act. In her Response, the Respondent specifically refers to Chapter 363 of the *Toronto Municipal Code*, and quotes pertinent sections to demonstrate that the CBO "*shall issue the demolition permit*". Given that the connection between the issuance of the demolition permit, and the Appeal before me is unclear, I am persuaded that the CBO has the authority to issue the demolition permit. Given the mandate and scope of the CBO's position, I am also cognizant that Mr. Johnston may not be in a position to recall the details of every demolition permit issued, and discuss its details.

On the basis of this discussion, I find that it would be appropriate to permit a substitution of the CBO, by an individual in his office, who was involved with the issuance of the demolition permit for 98 Superior, and can provide relevant information, and evidence to the TLAB, rather than a quashing of the Summons issued by the TLAB.

In the case of Ms. Vongphakdy, the City's submission focuses on her "not being the zoning examiner responsible for reviewing the application", while the Respondent makes a specific reference to Permit No 20 213825 BLD 00 NH, and argues that the corresponding plans were stamped "reviewed as a single family dwelling, when" Ms. Vongphakdy reviewed the Plans. She then states that Ms. Vongphakdy made "changes to the plans", including removing the kitchen on the second floor, commenting "No cooking facilities permitted per zoning note on DWG A4." From the submissions, it is clear to me that while Ms. Vongphakdy was not the Zoning Examiner, it is not being disputed that she made changes to the "plans". Given the nebulousness of the nexus between the changes made by Ms. Vongphakdy, and the requested variances respecting 98 Superior Ave., I am willing to accept the Respondents's contention that Ms. Vongphakdy may have pertinent information. I also note, with some concern, the Respondent's observation that the "sign-off on the plans took place on November 30, which is the day the demolition took place."

It needs to be stated in crystal clear terms that the proceeding before the TLAB cannot be converted into a *post-mortem* about the demolished building.

I find that the summons issued in the case of Ms. Vongphakdy will not be quashed, and that she needs to be present before the TLAB to answer any questions, pertinent to the Appeal before the TLAB.

The fact that Mr. Medwidsky, who is a Supervisor with Urban Forestry, was present at the Site on November 28, 2020, has not been challenged. More importantly, the Respondent's submissions assert that he had made statements about the issuance of a stop work order. "*because there was no adequate tree protection which was necessary to a demolition*". The City, and the Applicant, have correctly stated in their

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submissions, that the TLAB has no jurisdiction to adjudicate demolition issues under the *Ontario Heritage Act*, or the *City of Toronto Act, 2006*. However, I note that the Urban Forestry department has the ability to recommend conditions, if proposals are approved. In this case, there is nothing in the submissions made regarding the Motion to quash the Summonses, regarding advice from the Urban Forestry department. In the absence of specific information about such recommendations, I find that there could be merit to the participation of Mr. Medwidsky in the Hearing, and will consequently not quash the summons.

I am also sensitive to the advice provided by the City, and the Appellants, about what information can be obtained from the Summonsed Witnesses, and impose the following conditions:

- The information to be obtained from the Summonsed Witnesses needs to be specific, and demonstrably linked to the requested variances, before the TLAB. It will be necessary for the TLAB to restrict questions on any other topic, with specific reference to the events culminating in the demolition of the house on November 20, 2020.
- The Summonsed Witnesses may not be cross-examined by any Party, because they are not present in a voluntary capacity on behalf of any other Party.
- The Respondent may question each of the Witnesses for no more than an hour. The schedule of when the Summonsed Witnesses may appear before the TLAB is discussed in the Interim Order and Decision.
- Counsel for the City will be given an opportunity to make submissions regarding any issue they deem important in terms of including the evidence of the Summonsed Witnesses, for decision making purposes, and the Appeal in front of me, after the Witnesses have completed giving evidence.

Lastly, it is important to reiterate that the onus is on Ms. Sheasby-Coleman to demonstrate that there is a pertinent connection between the TLAB's jurisdiction, the alteration to the "plans", and the Appeal in front of me. I am not persuaded by her argument that that the demolition of the property, "disingenuous" alteration of plans to obtain "that" permit, with the full intention of then reverting to the unapproved triplex plans" is "antithetical to the true spirit of good planning", are pertinent to the current application. The COA refusal, it may be noted, states that the proposal failed the four tests under Section 45.1, without any reference to the demolition.

I note that the Applicants have submitted their Witness Statements. The opposition is given until January 17, 2022, to submit updated witness statements, with an outline of why they disagree with the proposal, based on demonstrable planning rationale. It is not evident to me if Ms. Sheasby-Coleman plans to give evidence- , the opposition has the ability to bring forward an Expert Witness (e.g. a planner), or an alternative witness (e.g. a community member, including Ms. Sheasby Coleman) to speak to the planning issues .

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I would like to give an opportunity to no more than three members of the opposition (including an Expert Witness) to provide evidence in opposition to the proposal, and ask them to provide Witness Statements. The City needs to submit the name of the Witness who will substitute for Mr. Johnston, as well as submit documentation deemed pertinent to this case by January 24, 2021. I would appreciate the City's careful consideration of the various documents requested by Ms. Sheasby-Coleman, and submit the same.

The Applicants are then given time until January 24, 2022 to Reply to the witness statements submitted by the opposition.

The TLAB staff will canvass the Parties to identify three(3) Hearing dates from February 2022 to April 2022.

On Day 1 of the Hearing, the morning may be set aside to address any motions, and cross-motions pertinent to the Hearing- this time period corresponds to what Mr. Tang termed "administrative wrangling". The Expert Witness for the Applicants can finish his examination-in-chief in the afternoon within a two hour period.

The Summoned witnesses and Counsel do not have to be present on this day.

On Day 2 of the Hearing, the Summoned Witnesses may present themselves before the TLAB, from 9:30 AM to 1:00 PM (which includes three hours for the examination of three Witnesses, a fifteen minute break, and fifteen minutes for Counsel for the City to make any submissions). The cross-examination of the Applicant's Witness, and his Re-examination have to be completed within a total of two hours and fifteen minutes on the afternoon of Day 2- a maximum of two hours for the cross-examination, and fifteen minutes of re-examination is recommended.

On Day 3 of the Hearing, the Opposition may present its evidence, and be cross-examined by Counsel for the Applicants, followed by Reply from the Applicants- A maximum of two hours for the Examination-in-chief of their Expert Witness/Alternative Witness, and two hours for cross-examination is recommended. Each of the other two participants representing the community will be given twenty minutes each to present their case, followed by ten minutes of cross-examination each. Finally, the Applicants will be given fifteen minutes for Reply.

The issue of Oral Argument can be addressed at the end of Day 2, since it needs to reflect the corpus of evidence provided to the TLAB over the three day period.

DECISION AND ORDER

1. The Motion to quash the Summonses is refused, and alternative relief granted in the form of:

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A) Mr. Johnston may be substituted by a different Witness, who the City deems to be knowledgeable about planning issues pertinent to this Appeal, including questions raised in the Summons Request.

B) No substitutions are permitted in the case of Ms. Vongphakdy and Mr. Medwidsky.

2. The opposition is given time till January 17, 2022, to submit updated Witness statements, which illustrate the planning rationale behind their opposition to the proposal. Besides any Expert Witness or an alternative witness that the opposition can bring forward to address the planning issues respecting the Appeal, a maximum of two other Participants can speak in opposition to the Appeal. The Applicants are given time till January 24, 2022 to submit a Reply Witness Statement, to respond to the statements of the Opposition. The Opposition needs to restrict its questioning of the Summoned Witnesses to planning issues, pertinent to this Appeal.

3. The City is given time till January 24, 2022 to state who will substitute Mr. Johnston, and communicate the same to the TLAB, and other Parties. By January 24, 2022, the City is also required to submit documents deemed pertinent to the proposal before the TLAB, and are instructed to refer to the document list, prepared by the Requestor in her Request for Summons.

4. The TLAB staff are asked to canvass the Parties for a three day Hearing between February 15, 2022 and the end of April 2022, such that:

- On the morning of Day 1, Motions and cross-Motions regarding the Appeal will be heard. The Examination-in-chief of the Applicants' Expert Witness, needs to be completed within a two hour window on the afternoon of Day 1. It is not necessary for the City's Counsel, or summonsed witnesses to be present on this day
- On Day 2, the summonsed witness may provide their evidence in the morning, beginning at 9:30 AM- each of the witnesses may be examined for a maximum of one hour, and their Counsel will be given fifteen minutes to make any submissions on the nexus between the evidence given by the Applicants, and the Appeal before me. In the afternoon, the opposition can complete their cross-examination of the Applicant's Witness within a two hour period. The Applicants will be given fifteen minutes to re-examine their witness.
- On Day 3, the opposition can present their evidence- a maximum of two hours for the Examination-in-chief of any Expert Witness brought forward by the opposition, or an alternative witness, and two hours for cross-examination is recommended. Each of the two participants representing the community will be given a maximum of twenty minutes each to present their case, followed by ten minutes of cross-examination each. Lastly, the Applicant will be given fifteen minutes for Reply.

So orders the Toronto Local Appeal Body

X

A handwritten signature in black ink, appearing to read 'S. Gopikrishna', is written over a light gray rectangular background.

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body