

INTERIM DECISION AND ORDER

Decision Issue Date Monday, January 24, 2022

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: JANUARY 6, 2022

DECISION DELIVERED BY S. GOPIKRISHNA

REGISTERED PARTIES, PARTICIPANTS AND REPRESENTATIVES

| | | |
|-------------|---------------------------|---------------------|
| Appellant | REZA SEDIGHFAR | IAN FLETT |
| Party | City of Toronto | ADERINSOLA ABIMBOLA |
| Party | GAUTAM MUKHERJEE | |
| Party | LONG BRANCH NEIGHBOURHOOD | JUDY GIBSON |
| Participant | ALEXANDER DONALD | |
| Participant | ESTER GOMEZ | |
| Participant | RANDY MCWATTERS | |
| Participant | RONALD JAMIESON | |
| Participant | CHRISTINE MERCADO | |
| Participant | JOHN MACDONALD | |

INTRODUCTION AND BACKGROUND

The owner of the property at 75 Thirty Eighth Street, Mr. Reza Sedighfar, applied to the Committee of Adjustment (COA) to sever this parcel of land, and build a house on each of the resulting lots. The COA refused the application on August 27, 2020, resulting in an Appeal to the Toronto Local Appeal Body (TLAB), which scheduled a Hearing, to be held by videoconference on May 12, 2021. However, at the beginning of the proceeding held on May 12, 2021, Mr. Ian Flett, Counsel for the Applicant, advised the Parties that his client wanted to amend the Appeal by removing the consent to sever, and instead construct a single house on the existing lot. The Hearing adjourned with the understanding that the Parties would continue to have discussions, and attempt to arrive at a Settlement, after the circulation of the updated Plans.

Despite numerous requests from the other Parties to the Applicant for sharing the Plans and Elevations of the new proposal, the latter did not share anything more than “conceptual plans”. At the Hearing held on August 10, 2021, the Applicants took the position that they had made a major concession by “taking the severance off the table”, added that “the Opposition cannot elevate compliance with the LBNA design guidelines to a formal test”, and that a circulation of “conceptual plans would be adequate”. I disagreed with the Applicants, and directed the Applicants to circulate plans that accurately reflected single the dwelling they wanted to build on the Site.

To ensure that the Tribunal’s directions and intentions were crystal-clear, I issued two Interim Decisions and Orders, dated September 30, 2021 and October 5, 2021 respectively. The second Interim Decision was specifically issued to address a concern from the Applicant about the impossibility of providing Notice in what they claimed to be a very short period of time. Consequently, the second Interim Decision gave the Applicants time to provide Notice for a two week period, ending on October 26, 2021. I also set November 15, 2021, as a deadline for receipt of Witness Statements, as well as other deadlines for Responding Witness Statements.

On October 26, 2021, the TLAB received an email from Ms. Aderinsola Abimbola, Counsel for the City, stating that the directions provided in both the aforementioned Interim Orders and Decisions, had not been complied with by the Applicant, and that as a result, the deadlines for submission of Witness Statements could not be complied with by the City. Ms. Abimbola also requested the TLAB to meet with the Parties to discuss next steps.

The TLAB scheduled a videoconference, held by way of Webex, for the afternoon of January 6, 2022, to discuss next steps. This videoconference was attended by Mr. Ian Flett, Counsel for the Applicant, Ms. Aderinsola Abimbola, Counsel for the City of Toronto, Mr. Gautam Mukherjee representing himself, and Ms. Judy Gibson representing the Long Branch Neighbourhood Association (LBNA).

At the beginning of the videoconference, Mr. Flett confirmed that no Notice had been circulated, and advised that his client wanted to amend the Application one more time, and contemplated going back to ask for a Severance of the Lot, but with “smaller variances” than before.

Decision of Toronto Local Appeal Body Panel Member: S. Gopikrishna
TLAB Case File Number: 20 194385 S53 03 TLAB, 20 194386 S45 03 TLAB, 20
194388 S45 03 TLAB

When I asked the Parties if they were aware of the Applicant's plans to modify the Appeal, as stated by Mr. Flett, the answer given by all the Parties that they were "not aware of any such plans". The Parties vocalized their frustration and unhappiness with the Applicant's plans to amend the plans one again, and the lack of communication about their intentions.

Mr. Flett opined that the TLAB could not compel the Appellant to proceed with the Plans involving the construction of a single dwelling at the Lot, as directed per the Interim Decisions and Orders, because his client had not provided Notice. I stated my disappointment over the lack of communication from the Applicant, as well as what I saw as clever procedural maneuvering to rationalize their avoidance of following the TLAB's Orders. I characterized my perception of their approach as an "attempt to legally corner" the TLAB and other Parties, to which one of the Parties in Opposition stated that they had been "legally conned" by the Applicant.

When asked how the TLAB could prevent such maneuvering on a go forward basis, Mr. Flett suggested that a "peremptory" Order could be issued, and added that the Applicant could be "censured" if they didn't follow through on instructions. When asked how long would it take for the Applicants to get a Zoning Notice issued with the details of the "smaller" variances proposed as part of the new proposal, Mr. Flett said that "it could take some time" due to reasons beyond the control of the Applicants. I directed Mr. Flett to inform the TLAB by January 28, 2022, how long would it take to hear from the Zoning Examiner about the new variances.

Ms. Abimbola said that it would be "difficult" for her to obtain opinions from various city departments on the new proposal, "within a short period of time", and pointed about the challenges of her getting a new Expert Witness on Urban Forestry, because the previous Witness for the City had gone on leave. When Mr. Mukherjee asked if the Appellant could be directed to follow through on the "Settlement" offer, Mr. Flett stated that he was "legally obligated" to draw his client's attention to any "Settlement" offers, and that he would certainly draw his client's attention to any "full-fledged Settlement offer drawn up by the Opposition, on a "without prejudice" basis".

Responding to the remarks made by the Opposition, Mr. Flett said that under Section 18.1 of the Planning Act, "***the Tribunal may make a decision on an application which has been amended from the original application if, before issuing its order***", in the case of an Appeal. In response to allegation about the ostensible lack of good faith, he said that it was important to establish "motive" to demonstrate that the changes were being carried out in bad faith. He characterized the Opposition's usage of the expression "legally conned" as being neither accurate, nor fair, and stated that there was "no tactical advantage to this client as a result of all the delays".

At this juncture, Ms. Gibson asked if the Appeal could be dismissed because the Applicant had not followed through on the direction provided by way of the aforementioned Interim Orders. She also pointed out that while the Planning Act allowed for an "amendment" to the Plans, the proposed amendment to this Application was being attempted "well after the deadlines, almost a year later", and stated that the Long Branch Neighbourhood Association (LBNA) would object to the introduction of new plans by the Applicant

Ms. Abimbola drew attention to Rule 9.1 of the TLAB's Rules, which is reproduced below:

In the case of an Appeal under subsection 45(12) of the Planning Act the TLAB may propose to, or upon Motion, dismiss all or part of a Proceeding without a Hearing on the grounds that:

b) the Proceeding is frivolous, vexatious or not commenced in good faith;

d) the Appellant has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;

and said that she did not understand the actions taken by the Applicant, notwithstanding the explanations provided by Mr. Flett. She suggested that the Application be dismissed as a result of non-compliance with Rule 9.1.

The Parties in Opposition complained about how the constant change of plans made it impossible for them to proceed, and how they had no recourse to react to the constant changes. I drew the attention of the Parties to Section 2.12 of the Rules, as stated below, to inform them about their rights under the Rules:

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

I then listed the three choices available to the TLAB, about how the issue could be addressed:

- Dismiss the Appeal
- Proceed with the Consent to sever the property, with the original variances
- Proceed with the Consent to sever the property, with new variances. I emphasized the importance of the Applicant needs to inform the TLAB by January 28, 2022, about when the Zoning Notice will be made available, with the new variances

Mr. Mukherjee asked if I could not dismiss the Appeal at the Hearing, given how the Applicant had not followed through on two Interim Orders, to which I stated that it would be important for the TLAB to patiently reflect on the Options, and determine how to move ahead.

I reiterated that the Opposition could explore the possibility of arriving at a Settlement with the Applicant, and see if the earlier proposal about constructing a single dwelling at

the Site could be resuscitated. I also encouraged the Parties to brainstorm, and see if any other solutions could be identified, about how the Appeal could be processed on a go forward basis.

I also asked to meet with the Parties by way of a video-conference in March 2022, so that a decision could be made about how this Appeal should proceed forward.

MATTERS IN ISSUE

The question before the TLAB is how to proceed with the Appeal respecting 75 Thirty Eighth Street, taking into account, the Applicant's newly expressed preference for a severance, with dwellings where the "variances will be smaller" than before.

ANALYSIS, FINDINGS, REASONS

I begin by acknowledging the astonishment, and the disappointment, of the Opposition, when informed that the Applicant wanted to change their application one more time, and re-introduce the severance, albeit with "smaller" variances. Their frustration and disapproval was verbalized in no uncertain terms.

As I explained to Mr. Flett during the course of the Hearing, the Applicants' lack of action and articulation between Hearings, juxtaposed on their uncanny ability to spring a surprise at the beginning of every Hearing, had effectively ground the Appeal to a halt, irrespective of their intentions to act in good faith. My perception of this Proceeding was, and continues to be, that notwithstanding three Hearings over a seven month period, the Parties seem to be spinning their wheels, unsure of what they are journeying towards, because the destination seems to have morphed into a mirage.

I note that the Applicants' discussion of the impact of their amending their Appeal numerous times focused on "prejudice" to their interests, with no acknowledgement whatsoever of how the other Parties have been affected. Even if there has been "no tactical advantage" to the Applicant, as stated by Mr. Flett, the resulting disadvantage to the Parties in Opposition was stated, repeated, iterated and reiterated by the latter in no uncertain terms- it is impossible to ignore their sense of being disadvantaged by the repeated amendments.

The lack of follow through on the Interim Decisions dated September 30, 2021, and October 5, 2021, is unprecedented in my experience, and more importantly, not appreciated in the absence of a sound explanation. I am not sure of how to interpret the message to the Tribunal by asking for extra time to give Notice, obtaining the same, and then not following through on the direction.

I thank the Applicants for revealing to me that the panacea to the hitherto experienced inaction is the use of the keywords "peremptory", and "censure" in future Decisions. As can be seen in the concluding "Interim Order and Decision" Section, I have harnessed

the power of these small, but mighty words, and look forward to experiencing the turnaround by way of proactive action.

The Parties agreed to another teleconference in the " month of March", and herewith direct the TLAB Staff to contact the Parties to arrange a videoconference in March 2022, if possible, and no later than April 2022, to make a decision on next Steps, which were identified at the Hearing, and are reiterated below. The reference to meeting in April 2022 is being offered with an abundance of caution, due to the complexities of scheduling to ensure that all the Parties, are available. The Participants are welcome to attend the videoconference where possible, though the Parties can proceed in the absence of the former.

It is important to reiterate the choices available to the TLAB, which will be explored at the upcoming videoconference, to identify how this Hearing may proceed forward

a) Dismissal of the Appeal, on the grounds that the TLAB's Interim Decisions or Orders, past and present, were not followed through, or are not being followed through, and/or the Applicant's not adhering to the timelines for amendments.

b) Consideration of the original Appeal, as presented to the COA, with the severance, and associated variances, followed by obtaining evidence, to make a Decision.

c) Consideration of the new proposal, reflecting a severance, and the new, "reduced" variances, *in lieu* of the existing proposal, followed by obtaining evidence, to make a Decision.

I also acknowledge that there was some discussion about a Settlement Offer on the basis that a single house would be constructed at the Site, without a severance. Should such a Settlement be arrived at as a result of discussions between the Parties, it is important that the Applicants inform the TLAB promptly, enabling the latter to provide instructions about how to proceed, where appropriate.

Lastly, it is important to answer one of the questions asked of me at the Hearing- "***Why can't the Appeal be dismissed now, when the Applicant has not followed through on the TLAB's Interim Orders, and wants to amend the Application, well after (possibly a year) after the deadline for doing so?***"

To state the obvious, the TLAB has to act thoughtfully, and tread carefully with making decisions, even in instances where the Parties' actions come across as nonchalant noncooperation- the TLAB cannot act impulsively as a reaction to the Parties acting indifferently. The TLAB needs to model the mantra of "no trial by ambush"- its actions and intentions need to be transparent; advance notice needs to be provided of any contemplated action, so that the Parties can come prepared to argue in favour of their preferred position, and make appropriate submissions.

This Decision provides clear notice of how the TLAB intends to proceed with this Appeal, and asks the Parties to make submissions, define and refine their positions where appropriate, and bring forward authorities in support of their positions, at the upcoming videoconference- it is recognized that this process may result in a repetition

of positions articulated at the previous Hearing. However, I find that the Parties will have an opportunity to make cogent and comprehensive submissions, with the inclusion of authorities to be relied on, in support of their positions, resulting in an informed Decision on my part.

Should any Party wish to discuss a position different from the three listed in this Section, they have to provide a minimum of 3 (three) weeks of written Notice to other Parties, and the TLAB.

To reiterate, should a Settlement be reached between the Applicant, and one or more of the other Parties, the TLAB needs to be informed by the Applicants as soon as possible, so that instructions can be provided about how to proceed at the scheduled videoconference. Parties who don't adhere to these steps and processes may be censured, including dismissal of the Application without further Hearings.

INTERIM DECISION AND ORDER

1. The Applicant has to provide an update to the TLAB by the end of the day on January 28, 2022, about when the Zoning Notice for the new proposal will be issued; the stated date for contacting the TLAB to provide updates is peremptory.
2. The TLAB staff are directed to reach out to the Parties to schedule a videoconference preferably in March 2022, but no later than April 2022. The purpose of this videoconference is to give the Parties an opportunity to address the following options:
 - a) Should the Appeal be dismissed?
 - b) Should the TLAB restore the original Appeal reflecting the Severance, and variances for the two dwellings to be constructed, as submitted to the Committee of Adjustment, and refused on August 27, 2020?
 - c) Should the TLAB allow the Appeal to be amended, and consider the new proposal, with the severance, and "reduced" variances for the dwellings to be constructed on each of the lots?
3. Should any Party want to canvass a different option from the ones listed in (2) above, they need to provide 3(three) weeks written notice to the TLAB, and other Parties.
4. Should a Settlement be reached with one or more of the Parties in Opposition, the Applicant needs to inform the TLAB, as soon as possible, in order to enable the latter to issue further instructions, where appropriate.

The Orders above are peremptory; non-adherence to these Orders will result in censure, including dismissal of the Appeal without further Notice.

So orders the Toronto Local Appeal Body



X

S. Gopikrishna
Panel Chair, Toronto Local Appeal Body