RE: OLT-21-001728, Response to Mr. Vacca

Rocky Vacca <rvacca@sullivan-mahoney.com>
Wed 3/15/2023 8:27 AM

To:Kenneth Westhues <kwesthues@uwaterloo.ca>;Zwarycz, Tamara (MAG) <Tamara.Zwarycz@ontario.ca>
Cc:Tom Halinski <thalinski@airdberlis.com>;Naomi Mares <nmares@airdberlis.com>;dljacksonjones1@gmail.com <dljacksonjones1@gmail.com>;writeon@sympatico.ca <writeon@sympatico.ca>;John Garrett <j.garrett@sympatico.ca>

Dear Ms. Zwarycz,

Respectfully I was not making further submissions but was simply replying to Mr. Halinski's email as Mr. Westhues has already done.

I agree with Mr. Westhues that factual evidence is admissible and necessary to be applied to the land use planning analysis. However, all factual evidence must be relevant to the issues before the Tribunal. Although I was not involved in the prior Tribunal matter involving Member Douglas detailed below by Mr. Westhues, I assume that was the point made by Member Douglas to Mr. Westhues in that matter. In other words, Mr. Westhues knows or ought to know that any evidence must be relevant to the issues before the Tribunal in order for it to be admissible.

A Procedural Order has been issued that includes a List of Issues. All parties agreed upon the List of Issues.

Any factual evidence that Mr. Westhues, or any other party for that matter, intends to call must be relevant to the issues.

I see absolutely no relevance in the factual evidence that Mr. Westhues intends to call through Mr. Herlovich detailed below in relation to the authorization of the application, alleged falsification of ownership and alleged acts of perjury requiring intervention by a Crown Attorney, amongst many other statements in his witness list. These alleged "facts" have absolutely no relevance to the issues contained in the List of Issues, are defamatory and, it is submitted, are deliberately being brought forward to impugn the Applicant's character before the Tribunal. It is noted that the Applicant is not being called as a witness. I would caution Mr. Westhues to only introduce evidence that is relevant to the List of Issues and not evidence solely designed to defame and impugn the Applicant's character.

Again, I wish to put Mr. Westhues on notice that I intend to object to any evidence that he intends to give that is not relevant to the issues and/or is being brought forward to impugn the Applicant's character.

Finally, I reiterate my position that the parties ought to work towards the completion of the hearing in one day. In my opinion, this is very much achievable in the circumstance where Mr. Westhues is not calling any expert land use planning evidence on the land use planning issues and where the factual evidence brought forward by all parties is relevant to the List of Issues. That is the direction I will be seeking from the presiding member at the commencement of the hearing.

Regards,

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From: Kenneth Westhues <kwesthues@uwaterloo.ca>
Sent: March 14, 2023 11:54 PM
To: Zwarycz, Tamara (MAG) <Tamara.Zwarycz@ontario.ca>
Cc: Rocky Vacca <rvacca@sullivan-mahoney.com>; Tom Halinski <thalinski@airdberlis.com>; Naomi Mares <nmares@airdberlis.com>; dljacksonjones1@gmail.com; writeon@sympatico.ca; John Garrett <j.garrett@sympatico.ca>
Subject: OLT-21-001728, Response to Mr. Vacca

Dear Ms. Zwarycz:

I was not expecting Mr. Vacca to make a further submission to the Tribunal in advance of the hearing set to begin on 30 March, but since he has done so, I feel obliged to respond. Like Ms. Mares, he wants the Tribunal at this late date to reduce the time set aside for the hearing from two days to one. Further, he says he will ask the Tribunal to exclude all or nearly all the evidence in the Witness Statements I have filed.

Response to Mr. Vacca's argument

Mr. Vacca argues (email pasted in below) that an "appeal before this Tribunal is, for all intents and purposes, a contest of land use planning experts," and that since I am not such an expert, my factual evidence is not admissible.

I can find no support for Mr. Vacca's argument in the *OLT Act*, the *Planning Act*, the *OLT Rules of Practice and Procedure, the OLT Appeals Guide*, or the *OLT Code of Conduct for Members*.

I did, however, hear the same argument from John Douglas, a former member of the Tribunal, in 2020. I was so shocked I asked the OLT Registrar for an authoritative clarification of OLT policy in this regard. She referred my request to Marie Hubbard, at that time head of the Tribunal. I received in due course a response from Scott Morrison, Executive Advisor to Ms. Hubbard.

His full email is pasted in below. Mr. Morrison said that "it is important for all the relevant facts to be presented and be available to the Adjudicator," that "the Tribunal does indeed wish to hear from all individuals that can contribute to the appeal at hand," that "self-represented individuals are welcome in the hearing process," and that expert witnesses " are not a requirement for the proceeding."

My appeal is premised on the assurances I received from Mr. Morrison. I made clear in my appeal documents in October 2021 that I am representing myself. I emphasized in an email to the Tribunal in May 2022 that I did not find expert witness testimony necessary for a fair resolution of this case. The Tribunal set a two-day hearing in September 2022. All three parties reaffirmed the need for two days in February 2023.

Fact vs. opinion: example

Mr. Vacca finds my quote from Justice Sopinka off the mark. On the contrary, the quote is just one formulation of a basic principle governing any judicial or quasi-judicial proceeding, that the first priority is on bringing the substance of the case to light, the *facts*, the true empirical story about who did what when and where. The adjudicator then issues a binding *opinion* about this evidence in light of relevant laws and legal principles.

In addition to factual evidence, the adjudicator may elect to hear opinion evidence, especially from experts like Mr. Butler or Mr. Bryce in the present case, as a possible aid in forming the adjudicator's own opinion, the one that counts. Opinion evidence, however, whether expert or lay, is secondary to the indispensable foundation of facts.

Let me give an example from the case at hand. My place as the appellant is to offer the Tribunal factual evidence pertaining to the OPA and ZBA under appeal. I will therefore document, *inter alia*, the basic facts about the falsification of ownership of the main subject property on the notarized OPA/ZBA application of 22 April 2021. The evidence I will introduce shows that the City was initially duped, that I uncovered the true information about ownership and informed Director of Planning Alex Herlovitch, that Mr. Herlovitch confirmed what I told him through the City's Legal Department, and that as a result the staff recommendation on the OPA/ZBA application was changed.

I will also call the Tribunal's attention to a provision of the City's By-law 2021-57 that states as grounds for refusing a B&B or vacation rental license that "the applicant or licensee has submitted an application or other documents to the City containing false statements, incorrect, incomplete, or misleading Information."

None of the above is opinion evidence. I'm just providing the Tribunal with information, leaving the Tribunal to form its own opinion in the matter. Here are possible opinions the Tribunal might form:

- The Applicant is correct in his email to City Council on 10 June 2021, that the Appellant is an anarchist who deserves censure for doing a title search of the property that the Applicant falsely claimed to be the owner of;
- Falsification of ownership of an inn in the OPA/ZBA application is of no concern, since the Applicant probably just forgot that his sale of the inn to another individual had closed six weeks earlier;
- That the Applicant falsified ownership of an inn on 22 April 2021 is irrelevant, since according to By-law 2021-57, a license to operate 5411 River Road as a vacation rental would be issued to the owner of the property, not to the party that leases it;
- Falsification of ownership on a notarized OPA/ZBA application recommends against approval of the OPA/ZBA, since even if later corrected, it casts doubt on the truthfulness of all the Applicant's submissions;
- This matter should be referred to the appropriate Crown Attorney for possible prosecution of the Applicant for perjury under the Canadian Criminal Code.

These opinions are just examples. The Tribunal might give some other opinion on this matter. Opinions are the Tribunal's prerogative and responsibility. My job is just to supply the Tribunal with facts.

Conclusion

By way of conclusion, in light of Mr. Vacca's email, let me ask the Tribunal to confirm as soon as convenient that two days, 30 and 31 March, continue to be set aside for the hearing of this appeal, so that all parties know what to expect – granting, of course, that the hearing plan may change as testimony proceeds and as the Tribunal directs.

Thanks, respect and kind regards to the Tribunal, also to the parties and participants.

Kenneth Westhues

Appellant

Morrison, Scott A. (MAG) <Scott.A.Morrison@ontario.ca> Tue 2/18/2020

Kenneth Westhues

Hello Mr. Westhues,

I apologies for the delay in getting back to you on your concerns.

For all appeals before the Local Planning Appeal Tribunal, it is important for all the relevant facts to be presented and be available to the Adjudicator to allow for the most appropriate decision to be rendered.

To that end, the Tribunal does indeed wish to hear from all individuals that can contribute to the appeal at hand, as our Rules and the governing Legislation allow.

That being said, the governing legislation, The Planning Act, restricts participants to providing a written statement to the Tribunal. The Tribunal's Rule 7.7 speaks to the role and responsibility of a Participant.

Additionally, the Tribunal's Rule 8 speaks to the role and responsibility of a Party to the hearing. I have attached a link of the Tribunal's Rules of Procedure for your convenience.

The Tribunal does not require a Party to a proceeding to have representation; though they may elect to do so if they are not familiar with the process or do not feel comfortable acting before the Tribunal. Self-represented individuals are welcome in the hearing process, but are expected to fulfill the responsibilities of the standing they are granted; i.e. Party or Participant. Expert witness, qualified as such before the Tribunal, are not a requirement for the proceeding; though their evidence can include opinion evidence because of their expertise.

With respect to your comment regarding former Adjudicators Rossi and Wilkins: Mr. Rossi chose to resign his position last year and Mr. Wilkins's term expired in December of 2019. Both were welcome and respected members of the Tribunal.

I hope this addresses your concerns.

Sincerely,

Scott Morrison

Executive Advisor to the Associate Chair

Local Planning Appeal Tribunal

Rocky Vacca <rvacca@sullivan-mahoney.com> Mon 3/13/2023

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Good afternoon,

I apologize for the delay in responding but I have been away on holidays.

With respect to the matters referenced in the email exchange below, we share the same concerns as the City. We would appreciate the opportunity to address these concerns as a preliminary matter at the start of the hearing.

In particular, as we have expressed over and over, we are concerned that the evidence to be brought forward by the appellant as disclosed by the witness statements delivered by the appellant, for the most part, will not be relevant to the planning issues before the Tribunal nor will it be evidence given by an expert in land use planning. The appellant is entitled to his opinion but his evidence is not admissible as expert land use planning evidence. The appellant continues to quote Justice Sopinka from a civil court decision in 1994 that a trial is not to be a contest of experts. That may be the case in a civil matter before the court but the opposite is true in the context of appeals under the Planning Act. This Tribunal is specialized in dealing with land use planning appeals and is afforded deference from the court in said matters. An appeal before this Tribunal is, for all intents and purposes, a contest of land use planning experts who must sign an Acknowledgment that their evidence will be objective. The appellant intends not to call any expert evidence but has indicated in his unilaterally revised hearing plan that he will require nearly 3 hours for examination and re-examination of Mr. Herlovich and himself. Respectfully, this is excessive in the context where no expert land use planning evidence is being brought forward by the Appellant whatsoever. Any reference in the appellant's witness statement to, among other things, a prior hearing before the Tribunal in 2012 and any evidence relating to other residences on River Road which may theoretically be the subject of future applications under the Planning Act and licence applications as a vacation rental unit (VRUs) by the applicant or any other landowner are irrelevant. The City has firmly established a planning regime for VRUs through the approval of By-laws 2018-92 which was appealed and then approved by the Tribunal. The By-law clearly sets out the applicable test to be applied in these cases as was applied by the City's planning staff in its recommendation report in this case. Any evidence that the appellant intends to call relating to the time period prior to the approval of By-law 2018-92 has no relevancy to these proceedings and will only unnecessarily prolong the hearing into a 2 day hearing. We firmly believe that the hearing can be and ought to be completed in 1 day in these circumstances. Any additional minute of hearing time results in additional costs to all parties other than the appellant and ought to be prevented if possible.

Furthermore, we share the City's concern that the appellant intends to switch hats from advocate to witness throughout the hearing. We do not possibly see how the appellant can give his evidence and opinions in an objective manner when at the same time he will be acting as an advocate by providing opening an closing submissions and cross-examining the City's and the Applicant's expert planning witnesses. Again it is our intention to object to same at the commencement of the hearing.

In conclusion, it remains our intention to diligently pursue an expeditious hearing that can be completed in 1 day pursuant to the 1 day hearing plan that has been filed with the Tribunal which the appellant has not accepted. We believe this is very much possible provided that all parties present direct and relevant evidence relating solely to the land use planning issues before the Tribunal.

We look forward to addressing the above concerns at the commencement of the hearing.

Regards,

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