Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue: Date August 7, 2018

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): ALAN SPENCE

Applicant: KATARZYNA SENDROWICZ

Property Address/Description: 15 NELLES AVE

Committee of Adjustment Case File Number: 17 147628 WET 13 MV

TLAB Case File Number: **17 208355 S45 13 TLAB**

Appearances

Andrew Biggart for the Applicant

Ian Flett for the Appellant

Motion Hearing date: Wednesday, July 25, 2018

DECISION DELIVERED BY S. MAKUCH

INTRODUCTION

This is a motion for costs arising out of a hearing granting minor variances for 15 Nelles Ave. The variances permit a second floor front balcony and a third floor addition, dormer. A terrace is to be constructed behind the dormer. The Committee of Adjustment decision was mailed on July 21, 2018 .

BACKGROUND

My decision granting the variances sets out part of the background respecting this motion:

> "The appellant's counsel Mr. A. Chachula) informed the TLAB at the commencement of the hearing (on the merits) … that he would be calling no witnesses, not even the appellant, and that the only issue for the appellant was the rear third floor terrace because of a privacy concern…

> The appellant's home at 14 Weatherell St., is to the south, south west and his property and does not abut the applicant's property.
>
> The only matter in issue raised by counsel for the appellant was that the terrace should have a 1.5 metre set back on all sides and, in particular, a setback of 1.5 metre set back from the south wall of the second floor and include a green roof which should be installed and maintained within that set back. Moreover, the appellant wanted a hedge, natural or artificial, at least five feet high along the south border of the terrace.
>
> The appellant, as stated, provided no evidence against the variances and, indeed, no evidence in favour of the screening his counsel requested.
>
> The evidence of the applicant's planner, whom I qualified to give expert planning evidence, was clear: the variances individually and cumulatively meet the four tests of s. 45 of the Planning Act and are consistent with the PPS and conformed with the Growth Plan. Moreover, his evidence was that the terrace could be constructed without the variances and no screening on the south side of the terrace was necessary.…
>
> With respect to the third floor terrace, the appellants' planner gave clear and uncontradicted evidence that the variances were not necessary for it to be constructed. It was therefore unrelated to the variances and could be built as of right. His evidence was further that …there was no need for additional screening for the appellant's house which was 88 feet away, screened by trees along the property line, not directly in line with the applicant's property, and partially hidden by garages. Furthermore, his evidence was that a 1.5 metre setback on the terrace, as required by the appellant, would make the terrace unusable."

The variances were granted without the screening as requested by the appellant. Limited screening of the terrace was recommended by City Staff for the properties abutting the applicant's property to the east and west and consented to by the applicant and was a condition of approval of the variances.

MATTERS IN ISSUE

The only matter in issue on this motion is whether, in this case, costs should be awarded to the applicant.

JURISDICTION

TLAB has authority to order costs and in doing so must take into account its Rules as set out below.

28. COSTS

Who May Request an order for Costs

28.1 Only a Party or a Person who has brought a Motion in the Proceeding may seek an award of costs.

28.2 A request for costs may be made at any stage in a Proceeding but in all cases shall be made no later than 30 Days after a written decision is issued by the Local Appeal Body.

Member Seized to Consider Costs Order

28.3 The Member who conducts or conducted the Proceeding in which a request for costs is made shall make the decision regarding costs.

Submissions Respecting Costs

28.4 Notwithstanding Rule 17.3 All submissions for a request for costs shall be made by Motion by Written Hearing and served on all Parties and Filed with the Local Appeal Body, unless a Party satisfies the Local Appeal Body that to do so is likely to cause the Party significant prejudice.

28.5 Submissions for a request for costs shall address:

a) the reasons for the request and the amount requested;

b) an estimate of any extra preparation or Hearing time, and a breakdown of all associated rates, fees and disbursements, caused by the conduct alleged to attract costs and specifically any of those matters outlined in Rule 28.6;

c) copies of supporting invoices for expenses claimed or an Affidavit of a Person responsible for payment of those expenses verifying the expenses were properly incurred; and

d) attach an Affidavit in which the Party swears the costs claimed were incurred directly and necessarily.

Considerations for Costs Award

28.6 Notwithstanding the Local Appeal Body's broad jurisdiction to award costs the Local Appeal Body is committed to an approach to awarding costs that does not act as a deterrent to Persons contemplating becoming a Party or continuing to be a Party to a Proceeding. In determining whether to award costs against a Party the Local Appeal Body may consider the following:

a) whether a Party failed to attend a Proceeding or to send a Representative when properly given notice, without giving the Local Appeal Body notice;

b) whether a Party failed to co-operate with others or the Local Appeal Body, changed a position without notice or introduced an issue or evidence not previously disclosed;

c) whether a Party failed to act in a timely manner;

d) whether a Party failed to comply with the Local Appeal Body's Rules or procedural orders;

e) whether a Party caused unnecessary adjournments, delays or failed to adequately prepare for a Proceeding;

f) whether a Party failed to present evidence, continued to deal with irrelevant issues, or a Party asked questions or acted in a manner that the Local Appeal Body determined to be improper;

g) whether a Party failed to make reasonable efforts to combine submissions with another Party with similar or identical issues;

h) whether a Party acted disrespectfully or maligned the character of another Party or Participant; or

i) whether a Party presented false or misleading evidence.

Threshold relating to Costs

28.7 In all cases a Member shall not order costs unless the Member is satisfied that the Party against whom costs are claimed has engaged in conduct, or a course of conduct, which is unreasonable, frivolous, vexatious or in bad faith.

Interest on Award of Costs

28.8 Costs bear interest at the same rate as provided in the Courts of Justice Act.

All decisions respecting he Rules must also take into account the following Rule:

2.2 These Rules shall be liberally interpreted to secure the just, most expeditious and cost-effective determination of every Proceeding on its merits.

EVIDENCE

In addition to the evidence set out in the decision on the merits, Mr. Biggart, counsel for the applicant, relies on the following additional evidence produced in this proceeding:

The appellant's failure to file and serve documents in accordance with the Rules, resulting in a motion respecting the late and inadequate filing of documents.

The appellant's subsequent late filing, without notice, of a revised expert witness statement, after the formal filing of an expert witness statement.

That late and improper filing, by the appellant's expert witness, resulted in the applicant having to bring a motion for permission to file a revised witness statement and to delay the hearing; which motion was granted.

The revised expert witness statement filed by the appellant's expert witness specifically included reference to the "FSI and GFA variances.

Immediately prior to the hearing on May 10, 2018, Mr. Chachula informed Mr. Biggart that the appellant did not bring his planner to the hearing and would not be calling any evidence but would proceed by cross examination. Moreover the appellant, himself, although at the hearing, would not testify.

The total expenses incurred by applicant are $22,510.20.

Mr. Flett, the appellant's counsel, does not dispute the above facts but notes the following:

The notice of the variances refer to the terrace and City staff recommended screening for the neighbours abutting to the east and west.

TLAB, in issuing orders, pursuant to the motions prior to the hearing, made no orders as to costs.

After the revised expert witness statement, the applicants retained a planner.

The appellants' total expenses were $15,220.00.

ANALYSIS FINDINGS REASONS

This is not an easy case to decide.

I am required by the TLAB's Rules of Practice and Procedure to be "committed to an approach in awarding costs that does not act as a deterrent to Persons contemplating becoming a Party or continuing to be a Party to a proceeding". While meeting that commitment, as the TLAB Rules state, I can examine, whether the party against whom costs are sought "engaged in conduct, or a course of conduct, which is unreasonable, frivolous, vexatious or in bad faith" and further I can take into account whether the party engaged in conduct such as: change a position without notice; fail to act in a timely manner; causing unnecessary adjournments, or delays; fail to adequately prepare for a Proceeding; fail to present evidence; and continue to deal with irrelevant issues.

The first of these obligations is perhaps the most difficult. It appears to be an obligation in the abstract - a "commitment" not to award costs in this case if such an award would deter others from undertaking or continuing in an appeal. It does not recognize that a decision not to award costs can deter parties from appealing or

defending an appeal depending on the circumstances. For example, applicants may be deterred from making an application given their relationship with their neighbours and the belief that those neighbours can undertake an appeal with virtual impunity given this commitment. On the other hand, in all cases, possible appellants may fear initiating an appeal knowing that applicants can recover costs. Therefore, on its face the "commitment" alone is difficult to apply on a case by case basis as it amounts to a virtual prohibition against awarding costs. An example of this can be seen in the case of Goldstein v Toronto (City of) [2015] O.M.B.D.1217 where, without analysis of the conduct of the party in question, the Board refused costs. I believe this is contrary to the purposes for which a costs award can be granted by this tribunal: (1) to deter certain conduct and/or (2) to compensate parties for the need to respond to the inappropriate conduct of an opposing party.

In my view, there are specific situations to which the "commitment" set out in the Rule 28.6 should be directed and this can be done under Rule 2.2 which directs that the Rules, including Rule 28.6, shall be interpreted to achieve the "just … and most … cost-effective determination" of whether costs can be awarded. In my opinion this Rule requires the consideration not only of deterrence but the need for compensation. In considering the latter, the equality of bargaining power between the parties should be taken into account. Whether one party has considerable wealth, knowledge and experience and, in particular, is in the development business and the other party does not have such characteristics and is not in "business" is a relevant consideration. In that kind of situation costs should not be awarded if they will likely deter the weaker party who is at a disadvantage, from a monetary, experience or knowledge perspective.

Indeed, for situations of unequal bargaining power such as these, consideration needs to be given to a rule on costs, that not only does not deter participation, but compensates those in a weaker position. Costs payable to a weaker party can be seen as part of the cost of doing business.

Nevertheless, in my view, in cases of relatively equal economic strength between or among the parties, there may or may not be a clear interest in deterring persons from becoming a party or continuing as a party.

I, therefore, need to consider whether the "commitment", should apply in this case and if so, what specific conduct justifies an award of costs. With respect to these latter issues the Rules are much more helpful. Rule 28.7 refers to general types of conduct (unreasonable etc.) and specific types of conduct(examples such as failures, delay etc.) are found under Rule 28.6 (a) - (i).

Turning to the case at hand, the parties appear to be of equal bargaining power. There is no evidence suggesting that the applicant is developing the properties in question for commercial gain and thus should take the business risk of dealing with a committed opponent who will go to any lengths to stop a development. Both parties are living on the properties in question. There is also no suggestion that the appellant is in the development business). The variances and terrace were being sought to make the dwelling more suitable for the applicant's family's personal use. The applicant retained professional advice because of the appellant's action. The appellant was simply opposed to the terrace). In brief, this is a situation of two neighbours disagreeing.)

In such a situation I believe costs may be awarded to deter persons from acting unreasonably etc. As a result, in my opinion, in order to achieve a "just" and "cost-effective" result the "commitment" in Rule 28.6 should not apply in this case.

The question, therefore, is whether the appellant acted in a manner which was unreasonable, frivolous, or vexatious and in particular, whether he engaged in any of the conduct specified in s. 28.6 (a) - (i).

Mr. Biggart argued that the appellant's conduct was unreasonable in that he appealed the variances, not because the variances impacted on him negatively in any way, but because he was concerned about a terrace which was being built as of right and had no impact. The terrace, as stated above, was 88 feet away, buffered by trees and garages, was not directly in line with the appellant's property, and the screening the appellant wanted would make the terrace unusable. He further argued that his appeal of the variances was in bad faith, because Mr. Flett conceded that the only concern of the appellant was the terrace. The variances did not affect him, and he used the variance appeal to try to force the screening of the terrace which could be constructed as of right. Moreover Mr. Biggart pointed to specific conduct under Rule 28.6 (a)-(i) on the part of the appellant: the failure to file and serve documents in accordance with TLAB's Rules, failing to act in a timely manner, causing an unnecessary adjournment, failing to adequately prepare for the hearing, failing to present evidence at the hearing, continuing to deal with irrelevant issues, all culminating in the failure to bring any evidence at all or even testify himself at the hearing. In his argument, Mr. Biggart focussed on the fact that the appellant filed a revised witness statement raising issues regarding the variances and then failed to bring any evidence respecting them or the terrace and gave no significant notice before the hearing of his decision to not call any evidence. Mr. Biggart also pointed out that by not withdrawing the appeal, the appellant forced the applicant to prepare for a hearing and have his planner give evidence at the hearing as the applicant was obligated, as long as there was an appeal in existence, to prove that the variances met the four tests and conformed with provincial requirements. It was further argued that the applicant bore substantial additional costs for which the applicant should be compensated.

Mr. Flett in response argued that the applicant knew that the appellant was only concerned about the terrace and should, therefore, not have retained a planning consultant and gone to the expense of preparing for the hearing. Moreover, he argued that the applicant breached the purpose of the Rules, which is to give parties time to consider the cases for or against them and attempt to reach a settlement. The applicant, Mr. Flett argued, failed to do that. Indeed, in Mr. Flett's opinion, the applicant should have brought a motion to dismiss the appeal rather than allow matters to proceed to a hearing, as the appellant "laid his cards on the table" and made it clear he was only concerned about the terrace. In addition, he strongly argued that it is appropriate to appeal variances in order obtain conditions on the screening of an as-of-right terrace. He subsequently provided a number of cases in which variances were appealed and screening conditions were imposed on an as-of-right terrace. He also noted that screening conditions in this case were imposed respecting abutting neighbours, who did not appeal.

I have concluded that in this case costs should be awarded. Mr. Flett argued that the appeal was unrelated to the variances. It is a logical conclusion that the decision to

call no evidence was the result of there being no evidence to call in opposition to the variances and no evidence to call against the as-of-right terrace. There was, therefore, no real basis for filing or proceeding with the appeal. The appeal itself was being used to seek a result unrelated to it). Therefore the appeal was unreasonable and brought in bad faith. Assuming that Mr. Flett is correct that one of the purposes of the Rules is to provide breathing space for parties to consider their positions, the hiatus was not used by the appellant to consider whether he should continue with an appeal; the sole purpose of which was to challenge an as of right terrace. Mr. Flett argued that the applicants offered to meet the appellant to discuss the need for screening after the terrace was built and that such an offer was insufficient and therefore refused. In reality, since there was no basis for the appeal it was a neighbourly offer in my opinion.

The cases that Mr. Flett provided demonstrate a number of characteristics. One, they involved appeals of variances that appellants believed were inappropriate and about which the appellants brought evidence at the hearing, or the matters were settled. The placing of conditions on the terrace arose out of a reasonable appeal made in good faith or a settlement agreed to by the parties. In the cases presented by Mr. Flett, an appeal made in good faith appears to have provided a basis for the imposition of a condition(s) respecting the screening of a terrace. Such is not the case in this appeal. It is clear in this case that the terrace was permitted and the variances were not necessary for its construction. The imposed screening conditions in this case were agreed to on consent without an appeal. As a result, at this hearing the appellant did not bring any evidence. Secondly in a number of the submitted cases the decisions reveal that overlook is a condition to be expected in the urban environment of Toronto or is part of the urban fabric and is not a ground in and of itself for refusing an application. Yet this was, in reality, the sole ground for this appeal even though the overlook was distant and buffered. Given the multitude of cases on this point, surely, the appellant was made aware or should have been made aware of inappropriateness of an appeal solely on the grounds of an as of right terrace as he retained legal counsel shortly after he filed the appeal In addition it must be noted that a motion to dismiss would have been costly and in effect would have included the need to prove that the variances should be approved. Moreover, there has been no reasonable response by Mr. Flett to the specific grounds for costs: failing to file and serve disclosure documents in a timely matter; failing to follow the Rules with respect to filing and serving those documents; causing a delay in the hearing as a result of the late filing; failing to present evidence at the hearing without significant notice; dealing with the irrelevant issue of an as-of-right terrace without any basis to oppose the variances; presenting misleading evidence in a witness statement that the variances were in issue.

The appellant's pattern of behaviour in dealing with a neighbour who is attempting to improve his home for family reasons in my view is unreasonable and should not be encouraged. It resulted in significant additional and unnecessary costs for the applicant for which there should be some compensation. In my view neighbours should try to keep an open mind with respect to the needs neighbours and make amends when they have caused them inordinate expense).

While I am not certain how much of the appellant's conduct was the result of advice received from the professionals involved, I do believe the appellant had grounds for initiating an appeal and taking time to seek advice and evaluate the merits of an

appeal. I therefore am not prepared to award costs on a full indemnity basis. Moreover, such an large award could discourage others from engaging in the appeal process at all. I believe that partial indemnity costs of $6000.00 is appropriate, given that this a situation of a dispute between two neighbours where one acted unreasonably and breached specific criteria respecting costs set out in the TLAB Rules and caused his neighbour a significant expense as a result.

DECISION AND ORDER

The conduct of the appellant is unreasonable and in bad faith and he breached specific criteria justifying an award of costs. In short, the appellant did not deal with his neighbour as he would have his neighbour deal with him. Costs are, therefore, awarded in the amount of $6000.00, payable forthwith and in any event within sixty days. Costs shall bear interest at the same rate as under the Courts of Justice Act.

X 

S. Makuch
Panel Chair, Toronto Local Appeal