Toronto Local Appeal Body

40 Orchard View Blvd, Suite 253
Toronto, Ontario M4R 1B9

Telephone: 416-392-4697
Fax: 416-696-4307
Email: tlab@toronto.ca
Website: www.toronto.ca/tlab

DECISION AND ORDER

Decision Issue Date Monday, September 10, 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): KIMBERLY FAWCETT SMITH

Applicant: SUSTAINABLE TO

Property Address/Description: 7 BROOKLAWN AVE

Committee of Adjustment Case File Number: 17 233310 ESC 36 MV

TLAB Case File Number: 17 279307 S45 36 TLAB

Motion Hearing date: Thursday, September 06, 2018

DECISION DELIVERED BY L. MCPHERSON

INTRODUCTION

This is a Motion for costs arising out of a hearing granting minor variances for 7 Brooklawn Ave. The variances permit a one-storey rear addition, a covered rear deck, a front garage addition, and a covered front porch. The alterations are for accessibility purposes. The Committee of Adjustment refused the application on November 8, 2017.

BACKGROUND

On July 12, 2018, the Toronto Local Appeal Body (TLAB) approved the minor variance application with two conditions:

1. The owner shall build substantially in accordance with the Site Plan and Elevations prepared by Sustainable TO and dated February 12, 2018 and attached hereto,
2. The owner shall, prior to the issuance of a building permit, plant an effective and continuous tree screen (except where prohibited by an existing utility or accessory structure), not less than 1.5 m high, along the rear (east) property line of the subject site

(in addition to any other fencing or landscaping improvements determined by the owner)

On August 13, 2018, Ms. D. Koev, on behalf of Kimberly and Curtis Smith the owners of 7 Brooklawn Ave (the Appellants), filed a Motion for costs in the amount of $15,212.63 to be paid by Alan Burt, Wendy Hooker, Patrick Henry, Denise Hodgson and Doug Colby, the Opposing Parties in the original Hearing.

MATTERS IN ISSUE

The matter in issue on this Motion is whether costs should be awarded and, if so, in what amount.

JURISDICTION

The TLAB has authority to order costs subject to the Rules of Practice and Procedure 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.

EVIDENCE

The Appellants, in bringing this Motion for costs submit that the amount of $15,212,63 represents the amount of additional legal expenses incurred by the Appellants as a direct result of the Opposing Parties unreasonable, frivolous and vexatious conduct in the proceedings. The Appellants submit that the Opposing Parties conduct surpasses the Rule 28.7 threshold for the reasons as set out below.

i. The Opposing Parties failed to comply with the TLAB Rules and failed to act in a timely manner to rectify that failure (Rule 28.6 c and d).

The issue relates to the failure of the Opposing Parties and/or Mr. Burt to provide requisite notice advising of the appointment of a representative, Mr. Brown to represent the Appellants. Thomson, Rogers subsequently contacted Mr. Brown to express their client's concerns and requested Mr. Brown to demonstrate his legal authority to act on behalf of Mr. Burt. Neither Mr. Brown nor the Opposing Parties responded. The Appellants expressed their concerns to the TLAB. Mr. Brown replied that he would respond to the claim at the beginning of the hearing if required to do so by the TLAB member. When the TLAB asked Mr. Brown for his response at the Hearing, he requested an adjournment. The Opposing Parties did not attempt to address the Appellant's concerns prior to the hearing.

ii) The Opposing Parties caused unnecessary delay, including through their failure to adequately prepare for the hearing, which resulted in the adjournment of the hearing (Rule 28.6 e).

This concern relates to the submission that the there was unnecessary time expended to deal with Mr. Brown's eligibility. In addition, it was submitted that the Opposing Parties had not properly prepared for the hearing and that Mr. Rendl's cross-examination took over 1 hour.

iii) The Opposing Parties failed to make reasonable efforts to combine their individual evidence, notwithstanding the fact that they were all addressing identical or virtually identical issues (Rule 28.6 g). The concern relates to the fact that the Opposing Parties represent 3 households and evidence was given on a per person as opposed to per household basis. Further, it

is submitted that the Appellants "reluctantly agreed" to the exchange of written submissions because they were concerned about additional delay. The Opposing Parties presented false and misleading evidence on a number of occasions, and also continued to present evidence and deal with issues that this Member had determined to be irrelevant (Rule 28.6 f and i).

The submission argues that the evidence was not accurate or was misstated and that the Opposing Parties raised the issue of previous variances more than once.

iv) The Opposing Parties acted in an improper, unreasonable and disrespectful manner towards the Appellant, Kimberly Fawcett throughout the proceeding (Rule 28.6 f and h).

The submission relates to both the written and the oral evidence regarding Ms. Fawcet Smith's disability.

In summary, the Appellants indicate that they incurred a total of $15,212,63 in additional legal expenses in order to address Mr. Brown's ineligibility and to finish the hearing by way of written submissions. They submit that these costs were completely unnecessary and incurred as a direct result of the above-noted unreasonable, frivolous and vexatious conduct of the Opposing Parties. Further, the Appellant's submit that the Opposing Parties' conduct meets 7 of the 9 grounds set out in Rule 28.6.

The Respondents (Opposing Neighbours) filed a Reply to Costs Submissions of the Appellants on August 29, 2018 through their Solicitor, Mr. R. Kanter of MACDONALD SAGER MANIS LLP. The Opposing Neighbours request that the TLAB deny the request for costs brought by the Appellants, the reasons set out below (numbering added).

i) Opposing Neighbours' conduct does not approach the Threshold for Costs in Rule 28

The submission referred to Rule 28.6 as referenced above and submitted that if costs are awarded, it would be a deterrent to being a Party in future TLAB proceedings. Rule 28.7 is referenced and the submission indicates that the Record, including material filed with the TLAB and the Decision, confirms that the Opposing Neighbours was reasonable, serious, well-meaning and in good faith. The submission references a number of passages from the Decision to support their claims with respect to the reasonable and relevant contributions that all Parties made, including cross-examination:

"the TLAB appreciates the Parties efforts to participate fully in the Hearing in a timely and organized manner" (pg. 5)

'The TLAB appreciates the sincere concerns of the neighbours that the addition will have significant impact on their views, privacy and enjoyment of their properties '(pg. 18)

'In cross examination by Ms. Hooker, Mr. Rendl acknowledged that none of the variances in his table "matched" the range of variances proposed' (pg. 13)

'With respect to the front yard variances, it is accepted that there will be some impact to the north facing view of 5 Brooklawn Ave' (pg. 19)

ii) Opposing Neighbours do not merit Consideration for a Cost Award

The submission states that Rule 28.6 sets out 9 criteria for determining whether to award costs. It is submitted that the Opposing Neighbours complied with the great majority of the criteria and where they did not comply, their non-compliance was technical, inadvertent or inconsequential to the process and result. In this regard, the submission noted that the Opposing Parties:

- Attended the hearing and participated fully
- Co-operated in staying past the usual closing hour and agree to make written rather than oral submissions
- Understood that the issue with Mr. Brown's representation would be dealt with at the beginning of the hearing
- Complied with most rules, and inadvertently omitted the Appellants when submitting a Notice of Representation (which was posted on the TLAB website)
- Were surprised when Mr. Brown was disqualified and continued to represent themselves without delay when their request for adjournment was not granted
- Presented evidence of the impact on different properties and of different concerns. The determination of improper questions by the member is a normal process of an administrative hearing and not grounds for awarding costs
- Expressed concern for the Applicant and reference to alternative options would relate to the scale of the variances requested. They addressed the use not the user
- Did not intentionally present false or misleading evidence, the error of Mr. Burt was inadvertent and the result of unfamiliarity with architectural drawings of a small scale.

iii) Inadequate Submission for costs provided by the Appellants

The submission states that the Appellants have not provided information on a number of items dealing with the extra preparation or Hearing time.

The submission refers to the only other cost award by the TLAB – *Spence v. Sendrowicz,* TLAB 17 208355 S 45 13 TLAB and indicates that the behaviour of the objecting neighbour is readily distinguishable from the current case. In addition, two OMB cases were referenced and included: *Kimvar Enterprises v. Innisfil*, [2009] OMBD

No. 33 and *161161 Ontario Inc. v. Mississauga* [2009] OMBD No. 217, in which the OMB did not award costs.

In summary, the submission states that the Opposing Residents acted reasonably and the TLAB should deny the request for costs.

ANALYSIS, FINDINGS, REASONS

The TLAB is a relatively new body with rules and procedures that differ from the OMB. It is expected that residents, who are likely participating in a TLAB hearing for the first time, would not have in-depth knowledge of the Rules of Practice and Procedure. It is common in TLAB hearings for the member to make decisions based on late filings and non-compliance with the Rules. In this case, I am mindful that in awarding costs, the TLAB is "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".

I have considered the omission of the residents to provide notice of the retention of Mr. Brown to be a representative "failing to act in a timely manner" or "failed to comply with the TLAB Rules or procedural orders". The Opposing Parties filed the information with the TLAB and it was available for view on the website. All other materials were filed in a timely manner and within the Rules. In this instance, I find the failure to notify the Applicant was an inadvertent mistake and not intended as a blatant disregard for the Rules. The TLAB has the authority to liberally interpret the Rules and strict compliance is not achieved in all cases.

With respect to the assertion that the Opposing Parties caused unnecessary delay related to the eligibility of Mr. Brown and were not properly prepared, I do not agree. The timing issue was recognized by the member and the Parties, and as a result, an abridged lunch break and afternoon break was agreed to by all Parties and all Parties agreed to continue until after normal hearing hours.

In terms of the preparedness of the Opposing Parties, as stated in the decision, this member found that the Parties participated in a timely and organized manner:

"The TLAB recognizes that the decision to disqualify Mr. Brown may have been unexpected by the Parties and the TLAB appreciates the Parties efforts to participate fully in the Hearing in a timely and organized manner." (pg. 5)

This statement was directed at the Opposing Parties who accepted the ruling and quickly organized themselves to appoint Ms. Hooker as their representative. This resulted in their participation, including cross-examination, being done in a time efficient manner.

It was not clear whether Mr. Brown was intended to represent all of the Opposing

Parties, or just Mr. Burt and Ms. Hooker; however, the Opposing Parties agreed to elect Ms. Hooker to act as their representative to coordinate and ask questions. Indeed, this is seen by this member as a time saving effort that assisted in completing Mr. Rendl's cross-examination in a time efficient manner. There were 5 Opposing Parties to the Hearing and each of them had the right under the Rules to cross examine the witness.

Similarly, I do not agree that the Opposing Parties caused unnecessary delay in presenting their evidence. As outlined in the Hearing decision, each resident provided evidence based on the impact to their property, and when two residents were from the same household, they specifically covered different areas of evidence. It is common in TLAB hearings that non-expert witnesses may overlap evidence. In this case, I do not find that there was undue overlap of issues.

I find that the Opposing Parties acted in good faith to participate in the Hearing in a timely and organized fashion despite not having an eligible representative. When the TLAB ruled there would be no adjournment granted for Mr. Brown or Mr. Burt, the residents quickly organized themselves over a break and were ready to proceed. As a result, I do not find that the actions noted above caused the Hearing to be adjourned to a written hearing for final arguments.

It is acknowledged, as noted in the Decision, that some of the evidence of the Opposing Parties was incorrect and inaccurate. It is common in TLAB hearings for residents to attempt to represent the anticipated visual impact of an adjacent development on their property. Such residents are not qualified as experts and are under no obligation to retain expert witnesses. The source of the evidence and the cross-examination of the evidence informs the panel as to the weight that the evidence should be given in the deliberations.

The issue is whether the evidence was intended to be "false, misleading and/or irrelevant" as identified in the Notice for Costs. I do not find in this case that the Opposing Parties intended to present false or misleading evidence. Time was taken to describe how the visuals were prepared and the information they were based on. In addition, some of the incorrect information related to the proposed setbacks. The Opposing Parties acknowledged under cross-examination that they had incorrectly read the plans. Residents cannot be expected to interpret site plans and elevations to a degree that an error is regarded as an attempt to mislead. With respect to the assertion that the Opposing Parties repeatedly led evidence regarding a previous variance, I do not find this to be true. The evidence was brief and when the Opposing Parties understood its lack of relevance in the proceedings, they tailored their evidence accordingly.

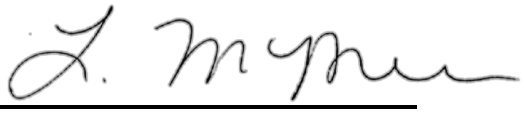
The final submission is that the Opposing Parties acted in an improper, unreasonable and disrespectful manner towards the Appellant throughout the proceeding. Firstly, I am not aware of any overt behavior in this regard during the Hearing. In terms of the evidence presented, I agree with the submissions of the Opposing Neighbours that the intent was to question the extent of the changes required to the dwelling that were

directly related to the variances that were of concern, and not an attempt to be improper, unreasonable or disrespectful to the Appellant.

Based on the above, I am not satisfied that the Opposing Parties against whom costs are claimed have engaged in conduct, or a course of conduct, which is unreasonable, frivolous, vexatious or in bad faith. Further, I find that imposing costs in this situation would be a deterrent to Persons contemplating becoming a Party or continuing to be a Party to a Proceeding.

DECISION AND ORDER

The request for an award of costs is denied.

X 

Laurie McPherson
Panel Chair, Toronto Local Appeal Body