

DECISION AND ORDER

Decision Issue Date Monday, November 26, 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): DAVID MATOC

Applicant: MARK DAVIDSON

Property Address/Description: 70 LABURNHAM AVE

Committee of Adjustment Case File: 18 158568 WET 06 MV

TLAB Case File Number: **18 205231 S45 06 TLAB**

Motion Hearing date: Wednesday, November 21, 2018

DECISION DELIVERED BY L. MCPHERSON

APPEARANCES

Name	Role	Representative
DAVID MATOC	Appellant	
MARK DAVIDSON	Owner/Applicant/Party	MARISA KEATING

INTRODUCTION AND BACKGROUND

On September 25, 2018, the TLAB heard a Motion to Dismiss an Appeal, on behalf of the Applicant, in relation to an Appeal by Mr. Matoc of the Committee of Adjustment decision to approve minor variances for 70 Laburnham Ave. On October 9, 2018, the TLAB issued a decision dismissing the Appeal. On October 31, 2018, Ms. Keating, on behalf of the Applicant, filed a Motion for Costs in accordance with Rule 28.1 and 28.2 of the TLAB's Rules of Practice and Procedure. The Motion was for:

1. Costs in the amount of \$25,651.57 for legal costs incurred by the Applicant against Mr. David Matoc (the "Appellant");
2. Interest on any award of costs in the manner prescribed by s. 129 of the Courts of Justice Act, in accordance with Rule 28.8 of the TLAB Rules; and
3. Such further and other relief as counsel may advise and the TLAB may

permit.

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

As set out in the Motion material, the Applicant is of the view that this case warrants an award of costs against the Appellant, as the conduct of the Appellant had been clearly unreasonable, vexatious and in bad faith. Paragraph 14 of the Motion states:

- “14. In its disposition, the TLAB questioned the motives behind the Appeal and was not convinced that the Appellant acted in good faith for the following reasons:
- the original letter to the Committee did not raise any planning concerns but was focused on the fact that the Applicant was part of a residents group that opposed other variances in the area
 - the Appellant does not live in close proximity to the site
 - the Appellant did not attend the Committee meeting. He advised the TLAB that he has summonsed the City planner because he had questions regarding their report while acknowledging that those questions may have been answered at the Committee meeting
 - the Appeal letter did not mention the planning issues now being raised in response to this Motion
 - the first ground for appeal simply states that the requested variances do not meet the tests without providing any reasons
 - the only issue raised in the Appeal is concerning the second floor platform which is not before the TLAB as it was not included in the variances that went before the Committee and is not included in the Notice of Decision – if the Committee decision were not appealed, the Applicant would not have a variance to permit the deck. It is not logical to appeal a decision for a variance that was not identified nor granted
 - the requests to summons 4 City staff were made 2 days after the Motion to dismiss was filed

...

The concerns regarding a deck were not before the Committee and would not be before the TLAB. The Participant who attended the Motion Hearing was particularly interested in the deck issue as well. An attempt to raise planning issues in a response to a Motion questions the motives and validity of the original Appeal and whether the Appeal is based on legitimate, authentic and sufficient land use planning grounds. [Emphasis added].”

Paragraph 17 of the Motion states:

- “17. If the Appellant did not act in good faith, then he could have only acted in bad faith, which demonstrates that the test under Rule 28.7 has clearly been met. Rule 28.7

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requires that conduct be unreasonable, frivolous or in bad faith. The test does not require that all of these factors be met. As the TLAB has already made a finding on the Appellant's conduct, it is the Applicant's view that costs are appropriate in this instance."

The Motion indicated that without the Appeal filed by the Appellant, no hearing of any type before the TLAB would be necessary and the Appeal forced to Applicant to expend significant resources to litigate its merits before the TLAB. The Motion further indicated that the Appeal was filed to cause "trouble or annoyance". Further, the Applicant sought legal representation before the TLAB to file the Motion to Dismiss. The Applicant considered the Appellant's conduct after the Motion to Dismiss Hearing to be unreasonable and irrational as he only agreed to engage in without prejudice discussions after the Motion Hearing when significant costs had already been incurred by the Applicant despite attempts by the Applicant to resolve concerns prior to the Hearing.

The Motion referred to the TLAB decision of Member Makuch in *Sendrowicz*, where the TLAB found the Appellant's conduct to be unreasonable given his concerns were with respect to a terrace which could be built as of right; not because the variances impacted him in any way. The Motion indicated that "Ultimately, the TLAB found that the Appeal was being used to seek a result unrelated to it and therefore was unreasonable and brought in bad faith. The TLAB concluded that this was a case in which costs should be awarded." The Applicant views the Laburnham case as analogous to the *Sendrowicz* case in that the Appeal was used to seek a result that was entirely unrelated to land use planning.

It was the Applicant's submission that the Appellant's unreasonable, vexatious and bad faith conduct has resulted in unnecessary costs for which the Applicant should be compensated.

Mr. Matoc, the Appellant, filed a Response to Notice of Motion for Costs, received by the TLAB on November 15, 2018. While the Response was a late filing under the Rules, it appears that Mr. Matoc did not interpret the Rule 17.7 to include a time requirement for a Notice of Response in the case of a written hearing. The Applicant was afforded additional time to reply. The TLAB finds that the Notice of Motion for Costs met the requirements under Rule 28.1, 28.2 and 28.4.

Mr. Matoc requested that the Motion for Costs be denied, as, in his submission, the Appellant did not contravene any of the criteria in Rule 28.6. Further, in his view, if Section 45(17) of the Planning Act is going to be used as the standard for awarding costs, then all of the criteria should have been contravened.

In his view, a finding that the reasons for the Appeal don't meet a standard for a Hearing are a technical matter that places a lay person at a disadvantage and should not be the determining factor in a finding of costs.

In Mr. Matoc's opinion, the cost request is excessive and unreasonable and might be expected if the case proceeded to a full multi-day hearing. He noted there is not detailed accounting for any billed hours and hourly rates. Further, it is his view that an award of costs in this case would deter community involvement, contravening Rule 28.6, and

imply that a layperson should not proceed without expensive legal advice, defeating the purpose of the establishing the TLAB.

Mr. Matoc indicated that the Appeal was advanced in good faith and belief that there were valid planning reasons and grounds to deny or review the application including staff report from Urban Forestry and Transportation. Mr. Matoc advised that he has filed a Request for Review under Rule 31.8 of the TLAB decision.

Mr. Matoc included with his filings an OMB decision *Goldstein v Toronto* where the OMB denied the request for costs.

Mr. Matoc summarized that there were no findings of a frivolous, vexatious or unreasonable appeal and, in his opinion, the finding of the decision of “not in good faith” is not the same as “in bad faith” as cited in the Motion for Costs.

ANALYSIS, FINDINGS, REASONS

I have considered the submissions of the Applicant and the Appellant. Both Parties referred to without prejudice settlement discussions that happened after the Motion to Dismiss Hearing. Even if these discussions were relevant to the matter before me, which in my opinion they are not, settlement discussions are privileged and therefore shall not be considered or addressed in this Decision. Similarly, Mr. Matoc advised that he had filed a Review Request. As outlined in Rule 31.2, a request for review shall not operate as a stay, unless the TLAB orders otherwise.

Rule 28.6 provides guidance for the consideration of costs against a Party. As the matter did not proceed to a Hearing on the merits of the application, the consideration is in regard to the original Appeal and the conduct at the Motion Hearing. The Decision to allow the Motion to Dismiss, as noted, was based on a number of factors that, together, led to the decision. It was not based solely on one factor.

In addition, it is not unusual for Parties or Participants in opposition to a proposal to identify additional variances that they believe were ‘missed’ by the Zoning Examiner. In this case, there was a concern that a deck that was shown on the drawings required a variance. This concern was identified as a reason or ground in the Notice of Appeal. As the variance was not considered by the Committee and not before the TLAB, I found that this was not an appropriate land use planning ground for an Appeal. However, I believe that the Appellant considered this matter relevant until advised otherwise by the TLAB at the Motion Hearing. Once advised, Mr. Matoc did not continue to deal with the issue, which could have otherwise been a consideration under 28.6 f). As noted, the Participant in attendance was also specifically concerned about the potential deck.

I have reviewed the *Sendrowicz* decision. The case before me can be differentiated from the *Sendrowicz* decision which dealt with a terrace which was being built as of right and had no impact on the Appellant. The *Sendrowicz* cost request was subsequent to a Hearing on the Appeal in which the Appellant did not call any evidence. In the case before me, there was an acknowledgement by the Applicant in the Motion to Dismiss materials filed that there was an issue with the second floor platform and that the

remedy was to either reduce it in size or reapply to the Committee at a later date. Further, the Appellant indicated that he would be calling witnesses should the Appeal continue to a Hearing.

As a result of these considerations, I do not find that Mr. Matoc intentionally failed to comply with the provisions in 28.6 with respect to the issue of the second floor platform. Even if the circumstances of the cases were the same, the TLAB was offered no case law which would indicate I should be bound by member Makuch's decision.

Rule 28.7 under the heading "Threshold relating to Costs" states: "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".

The Appellant attended the Motion Hearing and was prepared and presented his case against the Motion. The Motion decision stated "I do not find that the grounds for the Appeal set out any valid land use planning grounds". While the decision noted that the member "was not convinced that the Appellant is acting in good faith" and "questioned the motives and validity" of the original appeal, neither of these statements conclusively satisfy Rule 28.7 requiring that the Member be satisfied that the Party engaged in conduct which is in bad faith.

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". In this case, I do not find that an award of costs is warranted, as I believe it could deter Persons contemplating becoming a Party or continuing to be a Party to a Proceeding, such as other residents. While the Motion to Dismiss was granted, it does not mean that the threshold for awarding costs has been met.

DECISION AND ORDER

The request for an award of costs is denied.

X 

Laurie McPherson

Panel Chair, Toronto Local Appeal Body