

# DECISION AND ORDER

**Decision Issue Date**      Wednesday, August 07, 2019

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 Jarman

Applicant: Andrew Deane

Property Address/Description: 59 Bernard Ave

Committee of Adjustment Case File Number: 18 133259 STE 20 MV (A0312/18TEY)

TLAB Case File Number: 18 233517 S45 20 TLAB

**Hearing date:**      Wednesday, July 10, 2019

**DECISION DELIVERED BY S. Talukder**

## REGISTERED PARTIES AND PARTICIPANTS

Appellant	David Jarman
Party	Sondra Fink
Party	Paul Rosenberg
Party	Joan Gilmour
Party's Legal Rep.	David Bronskill

## INTRODUCTION

1. This is a Motion in writing for costs. This motion arose out of a hearing granting minor variances for 59 Bernard Avenue. The variances permit the construction of a new three-storey detached dwelling and a rear detached garage. The Committee of Adjustment (COA) approved the application on September 20, 2018.

2. The COA's decision was appealed by Mr. David Jarman to the Toronto Local Appeal Body (TLAB). Ms. Sondra Fink was party opposing the proposed development at 59 Bernard Avenue.
3. I heard the matter on March 18, 2019 and had requested the parties to provide their closing submissions in writing.
4. On May 30, 2019, the TLAB approved the minor variances and upheld the decision of the COA.
5. The Applicants, Joan Gilmour and Paul Rosenberg, filed a motion for costs in the amount of \$8,413.33 to be paid by Mr. Jarman and Ms. Fink, jointly and severally.
6. I have been made aware that Ms. Fink had filed a request of the Review of the TLAB decision dated May 30, 2019 (Review). The Review process has not been completed and is on hold pending this decision on costs.

## **MATTERS IN ISSUE**

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

## **JURISDICTION**

8. 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 TLAB.

#### **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 17.4 all submissions for a request for costs shall be made by written Motion and Served on all Parties and Filed with the TLAB, unless a Party satisfies the TLAB 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 TLAB's broad jurisdiction to award costs the TLAB 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 TLAB 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 TLAB notice;
- b) whether a Party failed to co-operate with others or the TLAB, 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 TLAB'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 TLAB 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.

9. As I had chaired the Proceeding for 59 Bernard Avenue, Rule 28.3 grants me the authority to issue a decision on this motion for costs. A “Proceeding” is defined under Rule 1.2 as a matter at any stage before the TLAB. The Proceeding refers to the whole process of the hearing, from the beginning of filing of the appeal, document disclosure, to the actual hearing date and the issuance of the final decision. In this case, the Proceeding at this point does not include the Review request initiated by Ms. Fink after the final decision was issued. The Review is an independent process under Rule 31 which is conducted by another TLAB panel member. As I will not be conducting the Review, I cannot make a decision regarding costs by taking into account any submissions on the Review.
10. There are policy reasons as to why the Review should not be part of this Proceeding at this time. The Review is an independent method to determine whether the grounds of review as stated in Rule 31.25 applies to the final decision. The decision-maker for the final decision should not be involved in the Review process – to do so would undermine the independent nature of the Review. A decision on the cost award that includes any consideration of the Review may appear to compromise the independence of the Review process.
11. Accordingly, for the reasons referred in the preceding paragraphs, I did not consider any evidence on the Review initiated by Ms. Fink. Therefore, I have excluded and not considered the following from the motion materials:
  - a. Paragraphs 10 and 11 of the Notice of Motion filed by the Applications;
  - b. Paragraph 29 of the Affidavit of Mr. Jarman dated July 8, 2019;
  - c. All documents/materials filed by Ms. Fink as part of the Review request which are attached to her Notice of Response to Motion Form; and,
  - d. Part 3 of the Notice of Response to Motion Form filed by Ms. Fink as it relates to the Review.

**EVIDENCE**

12. In their motion materials, the Applicants state that Mr. Jarman, as the Appellant, had an obligation to act diligently and with due care to fulfill his obligations and comply with the requirements under the TLAB Rules. Ms. Fink, as a party, also

had the same obligations. The Applicants state that Mr. Jarman and Ms. Fink failed their obligations as they did not provide witness statements that outlined the evidence they would present and that they did not provide a proper and full disclosure of documents. As a result, the Applicants' counsel had to respond "on the fly" to their testimonies which negatively affected his cross-examination.

13. The Applicants also indicate that the lack of proper disclosure in the witness statements also limited the Expert Witness of the Applicants to fully develop his response to the opposing parties' testimonies.
14. When providing evidence, Mr. Jarman and Ms. Fink spoke at length about irrelevant issues and did not acknowledge erroneous statements they made during the proceeding. Reference was made to the front wall height being 7m and not 9.5m despite being presented with the By-law on cross-examination.
15. Mr. Jarman and Ms. Fink did not make any apparent effort to combine submissions on similar issues and each spoke at length regardless of whether the other had made the same point. The Applicants note that as a result of this conduct of Mr. Jarman and Ms. Fink, the hearing took more than eight and a half hours and the closing arguments were submitted in written format after another 10 days' delay.
16. Mr. Jarman, in his affidavit, stated that an award for cost will prevent neighbours and the public from using the TLAB as a forum to share their concerns on matters affecting their property. He stated that the timing of his disclosure was dealt with at the hearing and that he did not attempt to introduce any documents or testimony that would be inadmissible. However, he notes that the Applicants' counsel did attempt to introduce new evidence which was a complete ambush and considerable time was spent discussing this new evidence.
17. In response to the Applicants' claim that Mr. Jarman continued on asserting erroneous statements, such as the wall height limit under the Zoning By-law being 7m instead of 9.5m, Mr. Jarman referred to paragraph 7 of the decision which referred to the 7m main wall height as the maximum permitted under the by-law.
18. Mr. Jarman also stated that the Applicant's Expert Witness wasted time in discussing the nature of the neighbourhood, as he made errors in describing the neighbourhood. Mr. Jarman indicated that he and Ms. Fink spent significant time in trying to correct these errors which also resulted in extending the length of the hearing. Further, Mr. Jarman and Ms. Fink avoided repetition as much as possible in their testimonies and followed my instructions when I requested them to move on to other points.
19. Ms. Fink's motion materials related mostly to the Review request. She did not provide any relevant evidence or submission on the motion for costs.

## ANALYSIS, FINDINGS, REASONS

20. Before proceeding with an analysis of the cost award, I note two issues with the motion materials.
21. First, the Applicants and Mr. Jarman filed photographs of properties in the neighbourhood which attempt to substantiate or refute the claim by Mr. Jarman and Ms. Fink that no height variance was granted in the neighbourhood unless the neighbouring houses were already of the same height. I have not considered these photographs and the statements as they are not relevant to the cost award but relate to the minor variances at issue at the hearing. The motion for cost awards is not a forum for re-litigating the issues at the hearing or to introduce new evidence on the decision granting minor variances.
22. Second, I have concerns about some portions of the Mr. Jarman's affidavit is misleading, as summarized below:
- a. In paragraph 16 of his affidavit, Mr. Jarman states that paragraph 7 of the decision makes reference to a 7m main wall height. Mr. Jarman did not mention that paragraph 7 of my written decision refers to the list of variances that were before the COA. Mr. Jarman also did not mention paragraph 9 of my decision, which clarifies that an error was made and 9.5m should be the correct maximum main wall height.
  - b. In paragraphs 13 and paragraph 23 of his affidavit, Mr. Jarman states that there was a complete ambush by the Applicant's shocking introduction of a new variance report. I am assuming that Mr. Jarman is referring to the new Zoning Notice that was filed as an exhibit. A review of my decision and the Applicants' written closing arguments will clearly show that the new Zoning Notice was not considered because the variances in the old Zoning Notice were sufficient and overlapped with those in the New Zoning Notice. Time was spent to deal with Mr. Jarman's objections to this document throughout the hearing even when it was made clear to all parties that the variances before the COA were the ones that were being considered.
23. After considering the evidence in the written motion, I conclude that the motion for cost should be dismissed.
24. I may consider the criteria set out in Rule 28.6 to determine whether costs should be awarded. However, I am restricted by Rule 28.7, which clearly states that I shall not order costs unless I am 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. Mr. Jarman and Ms. Fink did not engage in any conduct, or a course of conduct, that can justify an award for costs. At most, their conduct at the hearing could have been the result of lack of preparation, but their conduct was not unreasonable, frivolous, vexatious or in bad faith. A

consequence of a party's lack of preparation or effort is that the party may not be successful at a hearing. This does not necessitate an award for costs.

25. Mr. Jarman and Ms. Fink provided deficient witness statements and document disclosure. As a result, I had asked the Applicants' counsel to take extra breaks after Mr. Jarman's and Ms. Fink's testimony to prepare for cross-examination. This had contributed to the hearing being longer than usual. In considering cost awards, I may consider whether the parties prepared for the proceeding complied with the TLAB Rules and whether they dealt with irrelevant issues (Rule 28.6). However, Mr. Jarman and Ms. Fink, even though they provided deficient disclosure, I do not find that they did so in bad faith. At a hearing, it is common to hear information from all parties that is not relevant. This is for various reasons, such as the parties not being aware of what is relevant. I agree with Mr. Jarman that both he and Ms. Fink followed my instructions during the hearing and tried their best not to repeat themselves in their testimony.
26. The TLAB is a forum where the public can raise their concerns about development in their neighbourhood. In many cases, members of the public are not represented by counsel and may not have the expertise to address the legal tests for approval of variances or understand the rules of evidence, including the relevance of evidence and disclosure. There is an expectation that any person appearing before the TLAB as a party or participant should be diligent in making themselves familiar with the TLAB Rules and its procedure, which is different than having an in-depth understanding of the legal tests for variances or consent.
27. If a person is unreasonable or acts in bad faith and does not follow the TLAB Rules, then a costs award can be considered, as the TLAB sees fit, based on the evidence provided in the motion for costs. However, this is different from a situation where a person testifies on what he believes to be relevant and, in the process, repeats himself or provides some irrelevant information.
28. It is a higher threshold for unreasonable, frivolous, vexatious or bad faith conduct to be made out. In this case, I do not find any conduct as such.

## **DECISION AND ORDER**

29. The request for an award of costs is denied.

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S. Talukder  
Panel Chair, Toronto Local Appeal Body  
Signed by: Shaheynoor Talukder