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 Thursday, October 31, 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): John Peck

Applicant: David Small Designs

Property Address/Description: 92 Glenview Ave

Committee of Adjustment Case File Number: 19 146033 NNY 08 MV (A0294/19NY)

TLAB Case File Number: 19 185665 S45 08 TLAB

Hearing date: Friday, October 25, 2019

DECISION DELIVERED BY G. Burton

REGISTERED PARTIES AND PARTICIPANTS

Applicant	David Small Designs
Owner/Party	Jane Rachel Shantz
Party's Legal Rep.	Marc Kemerer
Appellant	John Peck
Party	Mounir El-Ayari

INTRODUCTION

This is a Motion filed October 2, 2019 for costs arising out of an Appeal to the Toronto Local Appeal Body (TLAB) by the adjacent neighbour to 92 Glenview Avenue, Mr. John Peck. The Committee of Adjustment (COA) had granted two minor variances on June 20, 2019 "to permit the construction of a new three storey dwelling" (as stated in the decision). However, these variances were only for FSI and the distance from the top of bank not on the lot. These variances were required by City zoning staff as a technical matter, even though an approval for the principal variances needed for the dwelling had already been granted by the COA almost two years earlier, on October 26, 2017. These had included both a GFA increase and a similar setback requirement. This more recent COA decision was then appealed by Mr. John Peck, owner of 94 Glenview Ave. next door.

By Order of August 26, 2019, the TLAB dismissed Mr. Peck's appeal without holding a hearing, as permitted by the Act and the TLAB's Rules. It was determined that the Appeal was unsupported by any planning rationale or relevant evidence.

As a result, the owners now seek an award of costs, as permitted under TLAB Rules. They are seeking costs in the total amount of $18,200 from Mr. Peck:

-$9,000, an indemnity award for legal fees incurred in preparation for and attendance at a Motion to Dismiss (although their lawyer Mr. Kemerer did not charge for his preparation time – affidavit of Mr. El- Ayari);

-$7,700 for the additional rent they incurred during the two-month delay in obtaining a building permit as a result of the Appeal; and

-$1,500 for the legal fees to prepare this submission for costs.

BACKGROUND

The Hearing of the Appeal had been set for November 1, 2019. However, Mr. Kemerer, counsel for the owners, brought a Motion on August 9, 2019 to dispense with a Hearing of the Appeal. For the reasons set out in its Decision of August 26, 2019, the TLAB granted the Motion and dismissed Mr. Peck's Appeal.

The facts were that Mr. Peck had both commented prior to and attended the first COA Hearing of this application, in 2017. However, before and after the 2017 Hearing, he had merely requested a copy of a soils report from the owners. [This was a report prepared by Coffey Geotechnics in May 2010, as referred to in the Toronto Region Conservation Authority (TRCA) letter to the COA of January 25th, 2017]. Mr. Peck expressed no concerns to the owners then about the planning merits of the proposal or the requested variances. He only mentioned possible construction impacts because of

the soil conditions. He did however make submissions at the 2017 COA hearing, rather unexpectedly for the owners. He expressed concerns about the size and height of the house. He continued to request the owners' soils report. The COA approved the requested variances at its hearing of October 26, 2017. Thus, the principal variances required to construct the proposed dwelling were already in force, well before this latest Appeal by Mr. Peck of the 2019 COA approval.

Mr. Peck had neither commented on nor participated in this 2019 hearing of the COA. As mentioned, this was held to consider ONLY the two technical variances subsequently required by the City, as a result of different measurements and interpretations of the applicable zoning provisions. Yet Mr. Peck appealed this positive decision in favour of the owners, and on irrelevant grounds, Mr. Kemerer alleged during the hearing of the Motion to Dismiss. He argued then and now that the TLAB has no jurisdiction over strictly construction issues. From the evidence in the Motion Hearing, this was Mr. Peck's only concern. There was no relevant planning evidence or merit to his Appeal. The TLAB then dismissed it without holding a Hearing. In this Motion for costs, dated October 3, 2019, the owners now seek reimbursement from Mr. Peck for expenditures incurred in preparing for the Appeal Hearing that did not take place, and for this Motion for Costs.

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 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

EVIDENCE

The owners, in bringing this Motion for costs, submit that the amount of $18,200 represents the amount of additional legal and other expenses incurred by the owners as a direct result of the Appellant Mr. Peck's conduct. They submit that the Appellant's conduct surpasses the Rule 28.7 threshold of unreasonable, frivolous and vexatious, for the reasons set out below.

In the Motion for costs, Mr. Kemerer stated the following:

1. Mr. Peck was aware that both the 2017 and the 2019 applications involved the same house plans. They were supported by the TRCA, based on the Coffey Geotechnics report and the plans submitted to them. He knew before the Motion to Dismiss that the TRCA had issued a permit for the construction of the house.

2. Mr. Peck had attended the 2017 COA hearing. In private, he repeated to Mr. Kemerer and the owners what he had stated in writing, that his only concern with the application was with the soil conditions. In the COA hearing itself, however, he stated that the proposed house was too big and would result in shadow impacts. This was disingenuous, in Mr. Kemerer's view.

3. He did not appeal the 2017 COA decision to approve the required variances. The plans were therefore approved, and those variances are now in effect. The recent 2019 application was based only on a technicality. Mr. Peck again asked privately for a copy of the soils report. *He did not write to the COA, or appear at the 2019 COA hearing.*

4. Despite giving no planning objection, he appealed the latest decision at the last minute. His Appeal was vague, based on hearsay, and did not include any identifiable planning grounds, in Mr. Kemerer's view. Mr. Kemerer stated that there were two grounds of appeal put forward by Mr. Peck:

> 1. The proposed house was excessive and out of character. Because Mr. Peck raised this as an issue, the owners were forced to obtain an affidavit from designer Peter Giordano to address the issues of urban design and neighbourhood character. This added time and expense to prepare for and argue the Motion to Dismiss; and
>
> 2. The ravine context presented issues that needed to be addressed. He did not say what that context or those issues were.

5. Mr. Peck had retained a planner, Mr. Terry Mills, prior to filing the Appeal. Mr. Mills did not take issue with the size or character of the house, so that this

ground of appeal should not have been included. Mr. Mills conceded at the Motion Hearing that construction issues are not within the jurisdiction of the TLAB, but are the responsibility of the City and the TRCA. Mr. Kemerer argued that the ravine and soil issues thus should not have been included in the Appeal.

6. Mr. Mills, as Mr. Peck's planning witness, was unreasonable in his evidence before the TLAB at the Motion. For example, he argued that the City/TRCA could not be trusted to review the building permit plans. He resisted the principle that the City and the TRCA are the agencies with jurisdiction over the construction issues. He would not accept that the rear line of the proposed house would be in line with the rear walls of the adjoining houses, including Mr. Peck's, as the TRCA had concluded. His planning argument, ostensibly relying on certain Official Plan policies to support a non-planning position, was a thin one. He provided visual evidence of ravine construction in the neighbourhood that in fact contradicted his professional opinion. All of this lengthened the time required for the preparation and hearing of the Motion.

Mr. Kemerer concluded that this conduct was not reasonable, well informed or relevant. It forced the owner and TLAB into considerable time and expense in addressing the Appeal.

In the TLAB Decision on the Motion to Dismiss, Mr. Kemerer argued, I found that Mr. Peck had raised no legitimate planning grounds. I characterized the Appeal as "unfair" and "inappropriate". In Mr. Kemerer's submission, this is the very definition of unreasonable and vexatious behaviour. Additional arguments then made, supported by the owner's affidavit:

1. Mr. Peck refused to rely on the authorities having soil stability within their mandate. He did not undertake his own assessment to contradict the findings of the TRCA on the soil conditions. Rather he relied on hearsay evidence (a 1998 letter to another neighbour).

2. By launching the Appeal, he delayed the construction of the house, at significant costs to the owners, on the dubious grounds of obtaining an existing soils report. This delay meant that the owners had to rent the house they are living in for an additional two months.

3. Mr. Peck had participated in the 2017 application process, and was very familiar with the applications. According to the owner Mr. El-Ayari, the owners had then attempted to discuss their plans with him, despite his claim that he had no knowledge of them (affidavit of Mr. El-Ayari, Exhibit A to his affidavit on the Motion to Dismiss). He had sufficient familiarity with the appeals process to retain a planner prior to filing the Appeal (note: see Notice of Appeal – July 9, 2019, Expert Witness Statement of Mr. Mills stating he was hired on July 7, prior to this filing). With such backing, Mr. Kemerer argued, Mr. Peck was under an obligation to consider the merits of the Appeal, the evidence he would rely on, the expense and delay for the owners, and the risk that his unreasonable behaviour could result in a

costs award. Mr. Peck raised an issue (the proposed house size/character) that was not an issue in the Appeal, the variances being technical ones only. He had to know that construction issues did not fall within the jurisdiction of TLAB.

This conduct was such that a Costs Order should be awarded against Mr. Peck, in the amount of $18,200. This amount would not have been incurred if the Appeal had not been launched.

Mr. Kemerer relied on Rule 28, and also on the caselaw on costs. TLAB is entitled to conclude that an appellant has considered such matters as the merits of the appeal, the evidence to be called, the chance of success, the expense to both sides in terms of time and money; and the risk of a cost award. Under Rule 28, costs may be awarded against a party where that party failed to present evidence, continued to deal with irrelevant issues, and/or acted in an improper manner IF the Member is satisfied that that party at issue engaged in a course of conduct which was unreasonable, frivolous, vexatious and/or in bad faith.

Mr. Kemerer provided caselaw on the costs issue. In *Re Regional Municipality of Durham Official Plan Amendment 147*, 1987 CarswellOnt 3716, 20 O.M.B.R. 493, there was a request for a cost award where it was claimed that the appeal was not supported by proper evidence at the hearing. Where no reviewing agencies had objections, and the proponents' planning evidence confirmed the need for and suitability of the proposals, the Board found that the development would not produce the adverse impact envisaged by the objector. It stated:

"The appellant should be aware that there is a level of performance that must be exhibited which exhibits a reasonable, well informed, thoughtful, relevant presentation before the board. The appellant must be accountable for his actions…..With the rights of appeal to this board also come obligations to maintain the level of performance where the public, the board and the respondents are entitled to look to the proper discharge of the appellant's obligations. A failure to meet the obligations brings with it the risk of liability for costs. ….Concern, confusion and frustration with the process are not a sufficient justification in the absence of admissible evidence of some weight to avoid the obligation." (before Appendix A.)

Mr. Kemerer argued that it is trite law, as stated by the Board in *Re Town of Midland Zoning By-law 94-50*, 1995 CarswellOnt 5227, [1995] O.M.B.D. No. 3, 32 O.M.B.R. 4, that the simple test to be applied in considering a request for costs is as follows: ,.. would a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board's procedure, exclaim "that's not right; that's not fair; that person ought to be obligated to another in some way for that kind of conduct".

The Respondent Mr. Peck

The Appellant Mr. Peck filed a Reply to Costs Submissions in many separate filings dated October 15, 2019. These were essentially the evidence already filed on the Motion to Dismiss. He requested that the TLAB deny the request for costs brought by the owner, for the reasons set out below (numbering added).

1. He does not believe his conduct during this lengthy process has been unreasonable, vexatious and/or made in bad faith. On the Motion to Dismiss, he provided TLAB with a reasonable, well informed, thoughtful, relevant presentation by an expert witness.

2. He could not rely on TRCA's decision on soil stability, since he did not see a soils report, and the TRCA letter did not indicate that its comments were based on a soil investigation. Its last letter mainly referred to accepting the alignment of the adjacent rear walls.

3. He has concerns as to how the proposed construction will affect the foundation of his home, as confirmed by an engineer. This is far from his only concern. His appeal was filed after discussing the redevelopment with another neighbor. He planned to include evidence from the many neighbors who share his concerns. This was not possible as the appeal was dismissed. He believes that he has valid concerns about the risk of demolition, due to unique factors. Had the owners tried to address his concerns in a reasonable way, possibly through an engineer-to-engineer review addressing the work to be performed, it's possible he could have come to an agreement.

4. While he understands that the mandate of the COA and TRCA is to protect the public interest, he does not believe they are responsible for the integrity of structures. Mr. Mills made this argument. He objected to the size of the house as it is intended to project into the ravine, causing disruption of the slope's stability and introducing additional loading on the ravine slope. This ravine condition exists all along the north side of Glenview.

5. He undertook a reasonable inquiry about the ravine-slope condition and tendered a detailed soils analysis from a nearby property, which was conducted for the same purpose of building a replacement house projecting into the ravine. It is unreasonable to expect him to acquire more immediate data, especially when there was a soils report for 92 next door, but he never received a copy.

6. The owners of 92 moved out well over a year ago, long before they could have known when they were likely to proceed with demolition. Since then the building and property have been deteriorating, there is a large hole in the roof and the power was disconnected. At the time of writing they still had not applied for a building permit. He objects to paying for their decision to move out.

7. He is not at all familiar with the TLAB appeals process, as claimed. He had not retained an expert to assist when he filed his appeal. He states that, had he known that he should not have appealed, being ineligible as not present at the latest COA hearing, he would not have appealed. He felt that it was necessary to follow through at the dismissal Hearing to "show respect for the process".

ANALYSIS, FINDINGS, REASONS

The test in the TLAB Rule 28.7 is the essence of what must be addressed here. Cost should not be awarded unless the Party has engaged in "conduct, or a course of conduct, which is unreasonable, frivolous, vexatious or in bad faith." While there appears to be no evidence of bad faith in Mr. Peck's actions, I conclude that launching an appeal in the subject circumstances was unreasonable and fairly frivolous, if not vexatious. Contrary to his assertion that he appealed without knowledge of the possible consequences, in Mr. Mills' own Expert Witness Statement it is clear that he was hired prior to the appeal being launched. Knowledge of the subject matter and consequences must be imputed to him. Mr. Mills is an experienced expert witness before the TLAB.

I accept Mr. Kemerer's arguments that really at no time during the applications, or the appeal process from them, did Mr. Peck act reasonably. I believe that Rule 28.6 f), whether a Party failed to present evidence, continued to deal with irrelevant issues, or asked questions or acted in a manner that the TLAB determined to be improper, could apply to his methodology in pursuing his Appeal. Although he did not engage directly in other conduct proscribed in Rule 28.6, there were other shortcomings. He refused to believe in the conclusions of the soils report, which the owners offered to share with him. They were unwilling to share all of it, as he kept requesting, wishing to retain privacy for some of the contents. I believe that this is a reasonable desire, and Mr. Peck's continuing insistence to be unreasonable.

He appeared to assume that the TRCA and City Planning would not act in the public interest. He had to know that construction issues did not fall within the jurisdiction of TLAB. He refused to conduct his own due diligence by obtaining a soils report of his own from an engineer. His "obsession" with the soils condition meant that he forced the owner and TLAB through a time-consuming, costly appeals process. This is not neighbourly or reasonable behaviour, Mr. Kemerer asserted, and I agree. A TRCA permit has been issued for the development. This followed TRCA's review of the stamped engineering drawings, including a soil study and a shoring plan. It is the TRCA that has jurisdiction over and regulates potential impacts from construction in ravine areas. It is not a planning issue. As Mr. Kemerer argued, Mr. Peck raised an issue (the proposed house size/character) that was not an issue in the Appeal, as **the 2019 variances were technical ones only and did not address the merits (as their subject matter had already been approved in 2017).**

In my view, Mr. Peck was wrong to use the TLAB forum just to force the disclosure of a soils report. He unreasonably failed to rely on the findings of the very agency in charge of making the findings on slope stability and suitability for the proposed dwelling. Once the owners had obtained a permit to locate the dwelling where it was proposed, contrary engineering evidence might have been the only possible evidence in my view that could be raised as a "planning issue" to challenge it. Allegations of "concerns" on this issue, even from an experienced developer such as Mr. Mills, did not suffice. No other neighbour, whom he claimed to have similar objections, stepped forward at either of the COA meetings. The other planning issues have been long resolved, since the 2017 variance approvals were not challenged. It was simply unfair to force the owners through an appeal of the most recent variances, essentially just ones of By-law interpretation and not additional planning issues.

In the *Town of Midland* case above*,* the Board went on to find that " The conduct of the appellant in this case was not fair, it was not right, and it was clearly unreasonable……It is not acceptable, as was the case here with the appellant, to remain willfully or recklessly ignorant of the subject-matter of the hearing. That is clearly unreasonable behaviour. There is an obligation on all parties to make an effort to find out what the issues are, and to obtain what information is reasonably available about those issues. One cannot simply pay the appeal fee, wait for the appointed hour, read a prepared statement which may or may not be accurate, and expect to walk away unscathed by a costs award."

Similarly, as mentioned, in *Re Regional Municipality of Durham* (above), the Board concluded:

"Concern, confusion and frustration with the process are not a sufficient justification in the absence of admissible evidence of some weight to avoid t**he obligation."**

I find that this conclusion (although reached after a hearing had proceeded in that matter) to be apt for the present Motion, following as it does only the Motion to Dismiss and no actual Hearing. Both Mr. Peck and his expert witness failed to realize that their appeal was not based on a planning issue within the TLAB's jurisdiction. They did not inquire as to the effect of the TRCA permit. They produced no expert to counter their objection based on the soil condition. I believe Mr. Mills experienced all of the difficulties he expressed with subsidence in other projects, but none of them were of direct application here.

As my colleague Ms. McPherson stated in her decision on a costs request for 7 Brooklawn Avenue, 17 27 9307 S45 36 TLAB (p. 7):

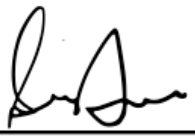
"The TLAB is a relatively new body with rules and procedures that differ from the OMB. It is expected that residents, who are likely participating in a TLAB hearing for the first time, would not have in-depth knowledge of the Rules of Practice and Procedure. It is common in TLAB hearings for the member 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…..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….. 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."

The request for an award of costs was therefore denied in *Brooklawn*. The facts in this Glenview matter are very different, as it is an appeal from only one party, on so-called grounds found to be of a non-planning nature. Even if there could be a scintilla of merit to the argument that the application might somehow contravene the OP, I find this of no relevance where the requisite permits have been obtained. A lack of trust in the responsible authorities is, I find, so inappropriate as to constitute a bad faith rationale for the appeal. I rely on the excerpts from the OMB decisions above, especially the *Town of Midland* matter, to find that an award of cost here to be appropriate, and in the amounts claimed. All were justified expenses incurred by the owners, and well documented in the Motion materials. It would be desirable if a lesser amount than requested could be agreed upon by the parties. However, I believe that the full amount requested is appropriate.

DECISION AND ORDER

The TLAB orders that costs in the amount of $18,200.00 be paid forthwith to Mr. Mounir El-Ayari and Ms. Jane Rachel Shantz.

X 

G. Burton
Panel Chair, Toronto Local Appeal Body