Toronto Local Appeal Body

40 Orchard View Blvd, Suite 211
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, January 16, 2020

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): Elizabeth Manikas

Applicant: Enzo Loccisano

Property Address/Description: 48 Marilyn Cres

Committee of Adjustment Case File: 19 125205 STE 19 MV (A0256/19TEY)

TLAB Case File Number: 19 181390 S45 19 TLAB

Hearing date: Thursday, October 31, 2019

DECISION DELIVERED BY D. Lombardi

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Elizabeth Manikas
Party	Arch DWG Inc (Enzo Loccisano)
Owner	Dinesh Singh Christendat
Owner	Viviane Saridakis

INTRODUCTION

This is a Motion for costs arising from a Toronto Local Appeal Body (TLAB) Motion Hearing brought by Dinesh Singh Christendat and Viviane Saridakis (Owners) owners of the property at 48 Marilyn Crescent (subject Property), located in the former municipality of East York.

BACKGROUND

The Notice of Motion requests dismissal of the appeal filed by Elizbeth Manikas (Appellant) without holding a hearing, as permitted under Rule 9.1 of the TLAB's Rules of Practice and Procedure (Rules) on the following grounds:

- The Appellant, in her Notice of Appeal, failed to disclose any apparent land use planning grounds upon which the TLAB could allow all or part of the appeal;
- The appeal was frivolous, vexatious or not commenced in good faith;
- The appeal was made only for the purpose of delay; and
- The Proceedings related to matters outside the jurisdiction of the TLAB.

The Owners had submitted an application to the Toronto and East York District Panel of the City of Toronto (City) Committee of Adjustment (COA) to approve two variances to permit the alteration of the existing two-storey detached dwelling on the subject property by constructing rear one- and two-storey additions, as well as an attached garage.

On June 12, 2019, the COA approved the requested variances and Ms. Manikas, who resides next door at 50 Marilyn Crescent, appealed the Committee's decision. The TLAB set a Hearing date for October 31, 2019.

The TLAB's Notice of Hearing (Form 2) identified due dates for the filing of submissions by elected Parties and Participants, the most relevant to this matter being:

- **September 9, 2019** - Document Disclosure, Witness Statements, and Expert Witness Statements.
- **September 23, 2019** - Response to Witness Statements.
- **October 2, 2019** - Reply to Response to Witness Statements.

I note that these due dates are set pursuant to the TLAB Rules and are to be adhered to by all Parties and Participants.

By the due dates above, only the Applicant had filed the requisite documents necessary to proceed to the Hearing. The Appellant filed no materials at all by the due dates and, in fact, had failed to submit any evidentiary material by the October 31, 2019 Hearing date.

On the return date, both Mr. Christendat and Ms. Saridakis were in attendance promptly at 9:30 am, as was their authorized representative, Enzo Loccisano. The Appellant had not arrived by the scheduled start time and as the presiding Member and on consent, I allowed the Appellant the latitude of an additional 15 minutes to arrive before commencing the Hearing, given the inclement weather on that morning.

At 9:45 am, the Appellant had yet to make an appearance and I conferred with Tribunal staff as to whether Ms. Manikas had made contact to explain her tardiness, which I determined she had not.

On that basis, I advised the Parties in attendance that I was prepared to proceed with the Hearing and would deal with the Owners' Motion to dismiss the subject appeal.

TLAB Rule 17.4 requires that a Motion be heard by Oral Hearing and that a Motion date is to be obtained by the Moving Party prior to Service of the Notice of Motion. Given that I had been advised by TLAB staff that a Motion date was not available prior to the scheduled Hearing date I, therefore, dealt with the Motion at the commencement of the proceeding.

Based on the arguments presented in the Motion and the evidence provided at the Hearing, I subsequently found in favour of the Owners that there was no land use planning basis upon which the appeal could be allowed and in a decision dated November 11, 2019, I allowed the Motion dismissing Ms. Manikas' appeal.

In the Hearing, the Owners' representative, Mr. Loccisano, requested that the TLAB issue an award of costs against the Appellant in this matter. As reflected in my November 11th decision, I directed the Applicant to the Motion requirements of the Tribunal respecting the awarding of costs pursuant to Rule 28 of the TLAB's Rules as they were constituted prior to May 6, 2019 (after which the new Rules now apply).

On November 27, 2019, Mr. Loccisano filed a Notice of Motion (subject Motion), on the Owners' behalf, requesting the awarding of costs incurred as a result of the delay in obtaining approval of the proposed development caused by the appeal. The documents submitted included an Affidavit (Form 10) sworn by Mr. Loccisano, an invoice (Invoice – 005, dated November 4, 2019) from ARCH. DWG Inc., a copy of the contractual agreement to complete the construction on the subject property, prepared by Improved Spaces Building Services Ltd., and a breakdown of legal fees incurred by the Owners.

In summary, the Owners submit in the Notice of Motion that the appeal filed by the Appellant was a *"delay tactic and had no planning merit"* and supported, in part, by the fact that the TLAB dismissed the appeal. The Motion assert additional total costs in the amount of $28,445.42 incurred as a result of the appeal itemized as follows:

- Preparation of architectural documents and attendance at the Hearing - $1,706.80.
- Legal fees directly linked to the COA hearing and TLAB appeal - $6,373.20
- Increased Project Construction Costs resulting from a delay - $20,365.42.

I note that the third bullet above, reflects additional construction cost in the amount of $20,365.42 and is based on the contract agreed to with the contractor that stipulated the start of proposed construction was anticipated in mid to late summer of 2019.

The Owners assert that due to the subject appeal, that construction was placed on hold and the contractor advised the Owners through a letter, dated October 21, 2019, and attached to the Notice of Motion, that the anticipated delay would result in additional costs related generally to an increase in labour and material costs stemming from a deferred spring 2020 start date.

Additionally, the Owners assert that legal fees, in the amount of $6,373.20, were incurred as a direct result of the appeal as well as their solicitor's attempt to mediate an agreement with the Appellant to abandon her appeal.

In a retort, The Appellant filed a Notice of Response to Motion (Response) consisting of an Affidavit sworn by Ms. Manikas, dated December 11, 2019, essentially responding to the Owners' allegations that her appeal was undertaken *"as a delay tactic as leverage for our property boundary dispute"* (Affidavit, p. 2).

This, in turn, triggered the Owners to file a Notice of Reply to Response to Motion (Reply) essentially expounding on the facts highlighted in the Appellant's Response.

In response to this Reply, the Appellant's solicitor, Andrew Coates (Blaney McMurtry), forwarded an email to the TLAB, dated December 17, 2019, stating Ms. Manikas' objection to the Notice of Reply filed by the Moving Party and served on December 16, 2019, asserting that the TLAB's Rules provide no provisions for delivery of Reply materials.

Mr. Coates, in that correspondence, also requested that the hearing of the subject Motion for costs proceed by way of an oral hearing arguing that Ms. Manikas may suffer prejudice if not permitted to make oral submissions on the Motion. The grounds for this request are discussed in greater detail under the 'Evidence' section in this Decision.

As a side bar but also to provide relevant context to this matter, the Owners and Ms. Manikas have been involved in an ongoing, two-year property boundary dispute that the Parties acknowledge has complicated the Owners' ability to proceed with the subject development proposal.

The dispute involves a surveyed property line and small triangular parcel that is part of the Owners' front yard but also runs through part of the Appellant's driveway at 50 Marilyn Crescent. This is a distinct matter from the appeal and both the Parties have retained separate legal representation in respect of that dispute – John Polyzogopoulos of Blaney McMurtry LLP representing the Appellant, and Michael Carlson representing the Owners.

Nevertheless, this land dispute is germane and inextricably connected to the subject appeal and Motion. The Owners assert that Ms. Manikas' continued insistence that she be the ultimate owner of that contested parcel of land precipitated the appeal and is *"a tactic employed by the Appellant to leverage concessions from Mr. Christendat and Ms. Saridakis during negotiations"* (Notice of Reply to Response to Motion, p. 2).

MATTERS IN ISSUE

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

In addition to the question of whether to award costs, I must first address whether to grant the Appellant's request to have this Motion proceed by way of an Oral Hearing.

As well, I must also determine whether to consider the Applicant's Notice of Reply to Response to Motion (Form 9) and what weight, if any, to give to this submission in arriving at a fair, just and expeditious disposition of this matter.

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 Moving Party, in bringing this Motion, submits that the Owners have suffered significant financial impacts due to the appeal filed by the Appellant's failure to submit any documents in support of that appeal, and her failure to appear at the scheduled Hearing of the appeal.

In his Affidavit, Mr. Loccisano submits that the renovation of the Owners' home was scheduled to begin in early fall of 2019 but has now been delayed until spring 2020, at the earliest, as a result of the appeal.

As noted in my decision of November 11, 2019, the Appellant failed to provide any evidence to justify the appeal and did not attend the scheduled Hearing date. She also provided no reasons for her absence to either the other Parties or the Tribunal.

At the Hearing, Mr. Loccisano advised the presiding Member that the Owners of the subject property and the Appellant were involved in a land dispute regarding the ownership of a driveway easement over a small triangular parcel currently part of the corner of the front yard of 48 Marilyn Crescent which also forms part of Ms. Manikas' property.

He asserted that discussions and negotiations regarding this parcel of land had occurred with the Appellant without success blaming Ms. Manikas' continued insistence that she is the rightful owner.

In the subject Motion, he reiterates what the Owners asserted at the Hearing on October 31, 2019, specifically, that the Appellant filed the appeal as a tactic to delay the construction of the subject development, with no planning merit, in order to leverage negotiations with the Owners in respect of the boundary dispute.

As a result, the Owners assert that given the Appellant's failure to submit any supporting evidence or to attend the scheduled Hearing, the appeal should be considered frivolous and vexatious, and initiated in bad faith and that such conduct warrants a cost award.

The Respondent Ms. Manikas

In her Notice of Response to Motion, Ms. Manikas readily confirms that she has been involved in a property boundary dispute with the Owners of the subject property for approximately two years. She notes that the dispute concerns a surveyed property line in her front yard that *"runs at an odd angle through part of my driveway"* and that *"has caused friction between the Neighbours and myself"* (Appellant's Affidavit, p. 1).

She submits that apart from this dispute, the Owners have proposed a renovation of their home requiring the approval of two variances that will result in an increase in the roof eaves projections adjacent the west side lot line and a decrease in the setbacks both from the east and west side lot lines of the subject property. She opposed this proposal at the COA because it will adversely impact her property.

In describing her opposition to the variances, she asserted that *"they were not "minor" due to the severe close impact of the side yard setbacks, the impact that the height of the Neighbours' proposed two-storey addition would have on my view and privacy, potential overflow flooding onto my property from the proximity of the proposed eves (sic) variation"* (Appellant's Affidavit, p. 2).

She attended the COA in opposition to the variances sought by her neighbours and was represented at the hearing by Angella Blanas (Synthesis Architects & Design

Group) who requested that the hearing be adjourned to allow the parties to resolve the issues *"especially in light of the property boundary dispute"* (Appellant's Affidavit, p. 2, para. 5).

Nevertheless, the COA approved the requested variances and Ms. Manikas appealed to the TLAB.

However, she asserts in her Affidavit that she *"did not have much time to consider my position before initiating an Appeal within the prescribed time limits, so went ahead and submitted the Notice of Appeal (Form 1) to the Toronto Local Appeal Body (TLAB). I did so on my own and without my lawyer's assistance as he was representing me in the property boundary dispute"* (Appellant's Affidavit, p. 2, para. 8).

After filing the appeal, and between submitting her Notice of Appeal and the scheduled Hearing date, she discovered that *"the required consultant reports and representation were cost-prohibitive to follow through with the Appeal"* (Appellant's Affidavit, p. 2, para. 9).

Furthermore, her husband became ill and required her aid in his ongoing care and recovery while, at the same time, being forced to operate her restaurant business without assistance. She asserts that this series of events during the period leading to the Hearing, directly impacted her ability to prepare for the October 31, 2019 Hearing.

In addition, the Appellant contends that not having the benefit of legal counsel when she initiated the subject appeal and the fact that she was unfamiliar with TLAB's Rules contributed to her decision not to attend the scheduled Hearing or to notify the Tribunal, stating the following:

> *"I also did not advise the TLAB, or the Neighbours, that I would not be proceeding with the Appeal because I was not aware that the Appeal would proceed in the absence of me filing material. If I had known, I would have notified the TLAB and the Neighbours that I was not going to pursue the Appeal"* (Appellant's Affidavit, p. 2, para. 10).

In concluding remarks, she submits that she did not initiate the appeal as a delay tactic as leverage for the property boundary dispute, and that the appeal was commenced in good faith as she had "legitimate" (her word) concerns regarding the requested variances. Furthermore, she posited that her non-attendance at the Hearing *"was a function of my procedural 'naiveté' and not as a result of malice or bad faith"* (Appellant's Affidavit, p. 2, para. 11).

With respect to the Owners' Motion, Ms. Manikas submits that no order of costs should be made against her for the following reasons:

i. *The Responding Party has not engaged in conduct that meets the threshold relating to costs pursuant to Rule 28.7 of the TLAB's Rules;*
ii. *The Moving Party's request includes claims for alleged increased construction costs and legal fees related to a property boundary dispute between parties, neither of which are "costs" for the purpose of the TLAB appeal. There is no*

basis or jurisdiction for the TLAB to award such sums as "costs" or on any other basis; and

iii. *The Moving Party seeks costs related to the Committee of Adjustment hearing, which are not related to the TLAB appeal Hearing held on October 31, 2019 and are therefore not recoverable.*

She references my Decision and Order of November 11, 2019 and asserts that in that decision I made no finding that the Owners met any threshold for awarding costs pursuant to TLAB Rule 28.7 or that I made a finding of an intention to delay the proceedings pursuant to TLAB Rule 9.1 (a) and (h). She further noted that I found the Appellant's conduct *"does not rise to the level of unreasonableness, frivolous, vexatious or in bad faith vexatious or not commenced in good faith to attract any cost consequences that the Moving Party seeks"* (Response, p. 2).

She asserts that the Owners' cost claim of $20.365.42 for "increased construction costs" due to the alleged delay her appeal caused are, in her words, *"not costs for the purpose of the (TLAB) Rules."* She argues that the proper meaning of 'costs' relates to expenses incurred for consultants to prepare for and attend the appeal Hearing and not financial consequences flowing from an appeal.

As to the Owners' claim of $6,373.20 for legal fees, she submits that these fees were incurred in respect of the property dispute and are not recoverable costs. Additionally, the $1,706.80 amount claimed for the preparation of drawings by ARCH.DWG Inc.is not itemized with respect to which costs are associated with the COA application and which relate to the TLAB appeal; therefore, she asserts that the TLAB has no jurisdiction to award costs required as a result of a COA application.

Furthermore, her Response asserts that the Tribunal is not authorized to award any of the claimed costs, above recited.

Conversely, she seeks the costs of this Motion against the Moving Party and requests the opportunity to make further submissions as to costs once the TLAB determines the outcome of this proceeding.

The Owners' Notice of Reply to Response to Motion

The Owners submitted a Reply to the Appellant's Response to Motion (Reply) on December 16, 2019, which included an Affidavit, again sworn by Mr. Loccisano. That Reply, the filing of which the Appellant is objecting to, is a more detailed clarification explaining the information provided at the Hearing of the appeal and an elaboration of the facts provided in the Moving Party's Notice of Motion document.

In an email dated December 17, 2019, submitted to the TLAB by the Appellant's solicitor, Mr. Coates, Ms. Manikas objects to the filing of the Reply asserting that there is no provision in the TLAB Rules for delivery of such Reply material. Furthermore, he contends that the Reply includes *"new facts and issues rather than only responding to issues raised in the Responding Party's Notice of Response to Motion (Form 8)."*

The Appellant requests that the subject Motion proceed by way of an Oral Hearing, positing that Ms. Manikas may suffer significant prejudice if not permitted to make oral submissions on the Motion for costs because:

a. *The presiding Member has only had the opportunity to hear from the Owners and in person; the Appellant should be given the same opportunity to make submissions in person and to answer any factual questions the Member may have;*
b. *The Responding Party has been put at a disadvantage given that the Moving Party waited until submission of its December 16th Notice of Reply to Response to Motion to present its full argument;*
c. *The $28,445.42 costs claim is a significant sum to be decided without the presiding Panel Member hearing from Ms. Manikas or her representative in person;*
d. *The nature of the costs requested by the Moving Party raises a significant legal issue of the meaning of the term "costs" under the TLAB Rules. The Appellant's solicitor cites for the Tribunal's guidance case law in the form of The Federal Court of Appeal in Canada (Attorney General) v. Mowat, 2009 CAF 309. Also cited is M.M. Orkin in The Law of Costs, 2nd ed. (Aurora: Canada Law Book, 1987) which defines 'Costs of Hearing';*
e. *There will be no corresponding prejudice to the Moving Party if there is an oral hearing given that "both Parties were under the impression that the Costs Motion would include an oral hearing when the Moving Party represented to the Responding Party in an email on December 2, 2019 that an oral hearing date was yet to be scheduled."*

ANALYSIS, FINDINGS, REASONS

It is important to note that the TLAB is a relatively new body with rules and procedures that differ from the recently reconstituted Local Planning Appeal Body (formerly the Ontario Municipal Board) in many ways. As has been acknowledged by my colleagues in many TLAB decisions decision since the Tribunal's inception, it is expected that residents, who are likely participating in a Tribunal hearing for the first time and who choose to participate without expert guidance, would not have in-depth knowledge of the Rules of Practice and Procedure or, for that matter, expertise in planning matters.

I am mindful in addressing any Motion request for costs as a result of a disposition of an appeal 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.*"

Prior to determining whether an award of cots is warranted in this matter, as asserted by the Applicant, I must address the two questions I previously identified under the 'Matters in In Issue' section of this Decision, namely, should I grant the Appellant's request that the hearing of this Motion proceed by way of an Oral Hearing, and what weight should I give to the Moving Party's Reply to Response to Motion (Reply) given that there is no explicit provision in the TLAB's Rules for the delivery of such material?

Should this Motion Proceeding by way of an Oral Hearing?

The facts in this matter are, in my mind, rather unequivocal and unambiguous; Ms. Manikas appealed the COA's approval of the Owners' application to the TLAB but failed to submit any documentation, retain representation or qualified experts or attend the scheduled Hearing to oppose the Application. This is in absolute contrast to her approach at the COA where, as she confirmed in her Affidavit (dated December 9, 2019), she had retained a representing agent (Angella Blanas) to oppose the subject variances and personally attended the hearing.

She also confirmed that she retained a lawyer (John Polyzogopoulos) to undertake settlement negotiations with the Owners regarding the property line dispute.

This is of import as she has now retained separate legal representation with respect to the Motion for costs (Andrew Coates) but, yet, argues that she is at a "disadvantage" (her word) given that she has not had an opportunity to present oral submissions in person. Furthermore, she contends that the Moving Party has presented *"its full argument"* (again, her words) in their Reply and, as a result, she *"may suffer significant prejudice."*

In this regard, I strongly disagree with the Appellant's arguments for the following reasons.

First, Ms. Manikas had every opportunity to submit any documents she felt necessary during the four months between the filing of her appeal (July 2, 2019) and the scheduled Hearing (October 31, 2019), which she failed to do.

Second, and more importantly, she did not attend the oral hearing of this matter at which time she would have been afforded the opportunity to hear the Applicant's evidence, cross-examine witnesses and present her own evidence.

With respect to her request to have this Motion proceed by way of Oral Hearing, I note that Rule 28.4, 'Submissions Respecting Costs', in the TLAB's Rules states that:

> *"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 Fields with the Local Appeal Body (TLAB), unless a Party satisfies the Local Appeal Body that to do so is likely to cause the Party significant prejudice."*

In this regard, I find that the Appellant has failed to satisfy the TLAB that she would be prejudiced if not permitted to make oral submissions on the Motion for costs. I disagree that she has not had the opportunity to do so and I disagree, unreservedly so, with her suggestion that the Owners waited to present their full argument in the Notice of Reply to Response to *Motion "rather than putting its best foot forward in the original Notice of Motion dated November 27, 2019"* (Andrew Coates' correspondence to the TLAB, Dec. 17, 2019).

I am cognizant of the Appellant's arguments in her Affidavit that her husband became ill in the month prior to the scheduled Hearing and that running the family's restaurant business as well as aiding in her husband's care and recovery was her

primary focus. That does not, however, abrogate her responsibilities to at the very least determine what responsibilities result from an appeal filed with the TLAB. The Appellant has now made the Tribunal aware of the events that impacted her person life weeks prior to the Hearing.

I do not find that there is a need for, or there is additional benefit to the presiding Member accruing from the scheduling of an Oral Hearing at which information that has now been revealed and of which I am already aware would be rehashed, again. More importantly, I am satisfied that I have all the facts required to make a determination in this regard.

With respect to the Appellant's objection to the Owners submitting a Notice of Reply to Response Motion (Reply) because the document includes new facts or issues rather than responding to issues already raised in the Responding Party's Notice of Response to Motion (Response), I am unconvinced. The Reply generally elaborates on the information highlighted by the Appellant, now filed, and expounds on that information. It also expands on the salient points already offered by the Owners at the Hearing, which Ms. Manikas chose not to attend.

Therefore, the Appellant's request that the hearing of this Motion proceed by way of oral Hearing is denied.

What Weight Should be Given to the Applicant's Notice of Reply to Response to Motion

The Appellant is correct in her statement that there is no 'explicit' (my word) provision in the TLAB's Rules, and specifically Rule 28 related to Costs, for the delivery of Reply material. However, the Tribunal's Rules (Rule 2.2) allow the Rules to be liberally interpreted to *"secure the just, most expeditious and cost-effective determination of every Proceeding on its merits."*

Generally, the TLAB does permit a Moving Party to Reply to "new issues, facts or Documents raised in the notice of Response to Motion" pursuant to Rule 17.9. Read in conjunction with the Rule, above recited, this permits the presiding Member latitude to allow the subject Reply if it addresses 'new issues or facts'.

The Appellant's solicitor, in his correspondence of December 17th, argues that the Moving Party's material *"is not (sic) proper Reply because it includes new facts and issues rather than only responding to issues raised in the Responding Party's Notice of Response to Motion."*

I disagree with the characterization of the information contained in the Reply material offered by the Appellant. I find, as noted above, that the Reply contains information relatively similar to that presented at the October 31st Hearing. I also find that it responds directly and explicitly to the issues and facts raised by the Appellant in her Affidavit and Response material, contrary to the Appellant's assertion.

Therefore, I do not find the Reply contentious or prejudicial to the Appellant. As to the weight to be given to the information provided in the document regarding whether

cost should be awarded, I will consider it as part of my assessment of the other evidentiary documents submitted in this matter.

Should Costs be Awarded and, if so, in What Amount?

The test in the TLAB Rule 28.7 is the essence of what must be addressed here. Costs 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."

I stated in my November 11, 2019 decision that it appeared the underlying issue in this matter is a land dispute between the Owners of the subject property and the Appellant, the abutting neighbour to the east. At the October 31st Hearing, Mr. Loccisano presented evidence of an updated, legal survey supporting the contention that the Appellant has no ownership of the lands in question. In that decision, I stated that this is a matter that must be addressed through a separate legal process outside of the TLAB proceedings as the Tribunal has no jurisdiction. This fact still holds.

The Owners presented rather compelling evidence at the October 31st Hearing which resulted in my decision to dismiss the appeal.

In this regard, my position has not changed as a result of the arguments provided by the Appellant and her legal counsel. In fact, it is further bolstered by that the Appellant articulation in her December 9, 2019 Affidavit (paragraph 10), *"if I had known (that the Appeal would proceed in my absence), I would have notified the TLAB and the Neighbours that I was not going to pursue the Appeal."*

While this clearly suggests that Ms. Manikas was a novice with respect to the TLAB's requirements in filing an appeal, it does not relieve her of the responsibility and, for that matter, the courtesy to at least contact the other Party and/or the TLAB to acknowledge that the appeal might be abandoned.

Furthermore, at paragraph (9) in the same document she writes *"Between the date of submitting my Notice of Appeal and the hearing date, I discovered that the required consultant reports and representation were cost-prohibitive to follow through with the Appeal."*

In my mind, this is indicative of someone who did not want to proceed with an appeal at some point and then abandoned any responsibility, despite intervening personal events, demonstrating no intention of providing any evidence to the Tribunal or, for that matter, in attending the Hearing.

The Appellant also asserts in her Affidavit that due to the fact that she did not have the benefit of legal counsel when she initiated the appeal *"I did not fully understand the TLAB Rules of Practice and Procedure and so did not attend the Appeal Hearing on October 31, 2019."*

The TLAB is a forum were the public can raise their concerns regarding development in their neighbourhood and how they believe that development may impact upon their lives. In many cases, as in this matter, members of the public may not be financially able to retain experts to support their opinions and may not have the

expertise to address the tests for approval of variances. There is an expectation, however, that any person appearing before the TLAB as a Representative, Party or Participant should be diligent in making themselves familiar with the Tribunal's Rules and its procedures, which is different than having an in-depth understanding of the legal tests for variances and consent.

Such a duty of information is clearly visited on an Appellant.

While I am profoundly sympathetic to the Appellant family circumstances regarding the serious health concerns of her husband and his care and recovery leading up to the appeal Hearing, I am less understanding of her professed 'naivete' of the TLAB Rules and her careless decision to not notify the TLAB or the Owners of her intent not to proceed with the appeal.

If a person is unreasonable or acts in bad faith or does not adhere to the TLAB Rules, then a cost award can be considered, as the TLAB Member sees fit, based on the evidence provided in the Motion for costs.

I accept Mr. Loccisano's arguments that really at no time after her determination on expenses not to pursue the matter and during the appeal process did Ms. Manikas act reasonably. I believe Rule 28.6 f), whether a Party failed to present evidence, continued to deal with irrelevant issues, or ask questions or act in a manner that the TLAB determined to be improper, could apply to his methodology in pursuing the appeal.

While there appear to be some extenuating, external circumstances that may have contributed to the Appellant's lack of participation in the appeal proceeding, I still must conclude on the evidence that continuing with an appeal in the subject circumstances was unreasonable, and frivolous, if not vexatious.

I agree with the Owners that Ms. Manikas' conduct resulted in a significant financial burden on Mr. Christendat and Ms. Saridakis, as evidenced by the material included in their Notice of Motion. Their Representative's Affidavit explains that the eight-month delay has resulted in *a "tremendous amount of planning, identifying a rental property, finding a storage location for furniture, and their ability to secure a loan for the proposed renovation."*

I also agree that the Appellant was aware of the Hearing date, the possible ramifications resulting from a delay of the anticipated renovations planned for the subject property resulting from the appeal and could have simply forwarded correspondence advising that she was abandoning the appeal.

Instead, she did nothing until she was apprised of the Owners' Motion for costs at which time, she responded by retaining additional counsel and submitting numerous documents requesting that the subject Motion be dismissed.

Based on the evidence at hand, I am satisfied that the Appellant's conduct and behavior rises to the level and reaches the threshold of conduct that could be considered 'unreasonable, frivolous or in bad faith' and that the Appellant caused the resultant delay to the Owners in the disposition of this matter.

Consequently, I find that an award of costs is warranted.

The question of what amount of costs to award in this matter is a more challenging consideration.

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 Owners are requesting an award of costs totaling $28,445.42. As previously recited, this total encompasses the cost of preparing architectural drawings, documents and attendance at the Hearing, additional construction costs resulting from a delay of the project due to the appeal, and legal fees incurred *"during the process of trying to mediate an agreement with the Appellant, which did not happen"* (Notice of Motion, p.3), as the Owners assert.

It was also asserted that the legal costs included the preparation and filing of the COA application and attendance, including mediation associated with and prior to the COA disposition, none of which would be recoverable, if included.

However, they also clarify that legal costs incurred as a result of those parts of the negotiation that did not involve the basis of the appeal have not been included in legal fees, above listed.

Conversely, the Appellant's solicitor argues that the costs submitted by the Owners requires an analysis of the meaning of the term 'costs' under the Tribunal's Rules and cites case law as identified in the 'Evidence' section of this Decision.

In *Mowat*, he submits that the Court held that *"the concept of costs in the context of administrative tribunals carries the same general connotation as legal costs, which have been developed over years to be defined as, "payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding"."* (December 17, 2019 Email, p. 2)

In *The Law of Costs*, Mr. Coaters contends that that document defines "Costs of Hearings" as "costs which include both preparation for the hearing and the hearing itself" (December 17, 2019 Email, p. 2).

He argues that the Owners have requested costs that are outside the scope of these definitions and that the presiding Member would benefit from further submissions on the scope of costs that the Tribunal has the jurisdiction to award. Hence, the Appellant's request to have an opportunity to make oral submissions on the Motion in person.

With respect to the costs submitted by the Owners, I'm prepared to dismiss the costs detailed in Invoice – 005 (from May 27/19 to November 1/91) in its entirety since drawings would have been required as part of the COA application and I see no evidence of additional drawings or revisions as a result of the appeal.

While I am cognizant that the Owners' representative likely prepared for the Hearing, it became apparent early in the proceeding that the Appellant had not filed any

submissions or evidence and the Hearing did not last long. The drawings may yet serve a purpose in the building permit process. The Owners had also filed a Motion to dismiss the appeal anticipating that no defense of their application would be required.

As to the legal fees, in the amount of $6,373.20, detailed on the page date stamped as Received by the TLAB on November 27, 2019 and attached to the Notice of Motion, I'm of the opinion that these are substantially related to discussions that occurred with the Appellant in regard to the ongoing boundary dispute. I make this determination based partly on the introductory sentence on the last page of the Notice of Motion document which states that "*This is a list of invoices that were directly linked to the COA hearing and TLAB appeal.*" I'm skeptical as to where the distinction occurs but acknowledge that the appeal generated an obligation on the Applicant to carry the onus of proof at an appeal Hearing.

Therefore, I am prepared to include some of those costs in any award.

I find that the Appellant's conduct from the period of her decision to not proceed with the appeal through to the cost request was unreasonable causing pursuit of the appeal and the ensuing Motions. This merits sanction based on my review of eligible legal costs incurred by the Applicant.

The reasonable person would find that the Appellant should have advised on a timely basis that they were not going to proceed with the appeal and having failed to do so resulted in the Owners spending time and costs in unnecessary hearing preparation. The reasonable person would also have expected the Appellant to have prepared and submitted evidence and filed those documents by the due dates as required by the Tribunal's Rules.

In summary, the Tribunal finds that the reasonable person would consider that the hearing schedule of the TLAB is a public resource to be carefully managed and optimized so as to be available on a timely basis to all residents. The TLAB finds that a reasonable person would regard the Appellant's actions as patently unreasonable by unduly requiring more Hearing preparation expenses by failing to file any evidentiary material and by failing to attend the scheduled Hearing, resulting in a longer, more costly hearing event. Additionally, the Tribunal finds that a reasonable person could have notified both the Applicant and the TLAB. The Appellant did neither; she did not advise that she didn't intend to appear at the Hearing and that she was contemplating abandoning the appeal which may have resulted in a shorter, more focused, and less costly proceeding.

Given that the TLAB's Rule 28 is moot as to the strict calculation of cost components, I believe the presiding Member with carriage of the Motion for costs has latitude in determining what amount should be awarded. Based on the submissions provided by both the Owners and the Appellant, I therefore find that an award in the amount of $5,000 is appropriate in the circumstances.

DECISION AND ORDER

The TLAB orders that costs in the amount of $5,000 be paid forthwith to Dinesh Singh Christendat and Viviane Saridakis.

Interest on this amount shall accrue at the rate set for post judgement interest by the Supreme Court of Justice, if remaining unpaid thirty (30) days from the date of issuance of this decision.

X 

D. Lombardi
Panel Chair, Toronto Local Appeal Body