

DECISION AND ORDER

Decision Issue Date: Tuesday, May 5, 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): Felix Leicher

Applicant: Felix Leicher

Property Address/Description: 33 Fernwood Park Ave

Committee of Adjustment Case File: 17 239907 STE 32 MV (A1046/17TEY)

TLAB Case File Number: 18 144824 S45 32 TLAB

Hearing date: Monday, June 24, 2019

DECISION DELIVERED BY S. Makuch

APPEARANCES

Name	Role	Representative
Felix Leicher	Appellant	Mark Kemerer
Gord Holtam	Party	Kathleen Coulter
Allan Venema	Party	
Paul Johnston	Expert Witness	
Robert Brown	Expert Witness	
Janet Moorfield	Witness/Participant	
Michael McHenry	Witness	
Garry Carr	Witness	
Todd Wilson	Participant	

**Decision of Toronto Local Appeal Body Panel Member: S. Makuch
TLAB Case File Number: 18 144824 S45 32 TLAB**

Name	Role
Marlene Oleniuk	Participant
Valerie Bourne	Participant
June Clark	Participant
Diane Carr	Participant
Maria Crawford	Participant
Michael Pillon	Participant
Mary Hiron	Participant
Dani Petch	Participant
Nazifa Djafarova	Participant
Adriane Lam	Participant
David Wuebbolt	Participant
Alexandra Jacobs	Participant
Judith Wells	Participant
Maureen Mckee	Participant
Luanne Pucci	Participant
Maisaa Abdalrahmanalaraj	Participant
Ralph Detko	Participant
Elisa Moolecherry	Participant
Karen Macmillan-Wuebbolt	Participant
Lise Desrochers	Participant
Susan Walker	Participant
David Toto	Participant
Ruth Hayes	Participant
Danielle Telford	Participant

Name	Role
Frank Yee	Participant
Adrianus Van Den End	Participant
Elan Desrochers-O'Sullivan	Participant
Janine De Vries	Participant
John Cowdery	Participant
Kristin Holtam	Participant
Linda Speers	Participant
Martin Ralph	Participant
Michael O'Sullivan	Participant
Rachel Beatty	Participant
Steve Bain	Participant
Barbara Cooper	Participant
Michael McHenry	Participant
Donald Collinson	Participant
Sandy Walker	Participant
David Swadden	Participant
Rebecca Mollemann	Participant
James Lim	Participant
Michaela Jergentz	Participant
Kelvin Yu	Participant

INTRODUCTION

This is a decision arising out of a Motion for costs. \$10,900.00 are sought for the cost of responding to a Request for a review of my Decision granting certain variances to permit the construction of a pair of three story semi-detached dwellings, located one behind the other, on one lot at 33 Fernwood Park Ave. (the subject property). The request was denied in a 12 page decision.

BACKGROUND

The Request was brought by two Parties to the original Hearing, Mr. Holtam and Mr. Venema. They are neighbours owning property abutting each side of the subject property, to the north and to the south. The Request was based on a nineteen paragraph affidavit, sworn by Gordon Holtam. That Affidavit contained allegations of breach of rules of natural fairness and errors of fact in my Decision. A thirty nine paragraph affidavit sworn by the appellant, Mr. Leicher, was filed in response. Mr. Lord, TLAB Chair, issued a twelve page Decision refusing the request. Unfortunately, the analysis in that Decision does not make any reference to the affidavit of Mr. Leicher which was filed two days before Mr. Lord's decision was issued and almost a month after the Decision was signed. It is unclear why there was such a long period of time between the signing of the Decision and its issuance. It is also unclear why Mr. Leicher's affidavit was filed at such a late date.

The costs sought were all related to the Request for the review. Specifically they were for: \$3000.00 for the legal fees paid for preparing the response to the Request; \$1,000.00 for the cost of a planning opinion respecting the Request; \$5,400.00 for two months additional rental payments as a result of waiting for the decision respecting the Request; and \$1,500.00 for the preparation of the Request for costs.

MATTERS IN ISSUE

The only matter in issue is whether costs should be awarded given TLAB's Rules of Practice and Procedure (the Rules), set out below.

JURISDICTION

S.28.6 of the Rules state: 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.

S. 28.7 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.

EVIDENCE

The evidence related to the cost Motion was presented in two affidavits. One was sworn by Mr. Leicher and the one in reply by Mr. Holtam. The affidavits, which are on file with TLAB and thus do not need to be repeated here, may be described as follows. Mr. Leicher's affidavit made no reference whatsoever to any of the criteria in s. 28.6 of the Rules and included no specific evidence that the conduct of Mr. Holtam and Mr. Venema was "unreasonable, vexatious or in bad faith". Rather it referred primarily to the rehearing Decision which described the Request as lacking in substance and an attempt to re-argue the case. Mr. Leicher also swore that the delay resulting from the Request resulted in additional rental costs for him in the amount of \$5,400.00.

The response, Mr. Holtam's affidavit, pointed out: that the Request was as of right, that my Decision "was 3 pages in explanation" and "was light in detail," and that there was substantial neighbourhood support for the opposition to the appeal. Both affidavits also referred to an irrelevant comment by a participant and to the irrelevant expertise of Mr. Hotam and Mr. Venema.

ANALYSIS, FINDINGS, REASONS

Based on the evidence submitted I cannot conclude that there is a basis to grant costs. I see no need to summarize in detail the evidence presented in this case, or any of the case law referred to. Such detail is found in the evidence presented orally and recorded, and in writing. The case law is irrelevant to my analysis.

What is important in writing any decision, in my view, is a reference to the evidence which was considered in making the decision and the reasons for relying or

not relying on that evidence. Repetition of facts and verbiage for their own sake I do not find useful. Case law which does not support a conclusion is also not useful.

The argument proffered in support of an award of costs was basically the decision of Chair Lord which stated that the Request lacked substance and was a re-argument of the case. In my view this argument would apply to virtually any failed Request for a rehearing. Costs should not be awarded simply because a Request failed. Moreover, I find the evidence of the payment of additional rent is an insufficient basis for costs without a receipt proving actual payment and evidence of a lease or other documentation that the payment was caused and made solely as a result of the Request. There was no such evidence presented with respect to the rental payment.

Equally important to note is the that there was no significant evidence filed by Mr. Leicher which proved that any of the criteria set out in s. 28.6 were met. There was no evidence, for example, of failure to attend a proceeding, failure to act in a timely matter, and/or the presentation of false or misleading evidence. Most importantly, I agree with Mr. Holtam and Mr. Venema that the mere exercise of a right to Request a rehearing cannot in and of itself be a ground for costs. This is what Mr. Leicher is attempting to do.

It was not unreasonable for them to seek a rehearing, given their right to do so and their significant interest, as abutting neighbours, in the outcome of the decision. The risk of them doing so and thus causing a delay in Mr. Leicher obtaining a building permit was a risk Mr. Leicher had to bear as a result of the Rules. There was no clear evidence they acted for the purposes of delay, or were vexatious, frivolous, or unreasonable, in their actions or acted in bad faith in making an as of right Request for a review in a proper and timely manner in accordance with the TLAB Rules.

DECISION AND ORDER

The Motion for costs is denied.

X 

S. Makuch

Panel Chair, Toronto Local Appeal