Toronto Local Appeal Body

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DECISION AND ORDER

Decision Issue Date Friday, June 26, 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): John Costanzo

Applicant: Davies Howe

Property Address/Description: 116 Armour Blvd

Committee of Adjustment Case File Number: 19 164717 NNY 06 MV (A0401/19NY)

TLAB Case File Number: 19 202073 S45 06 TLAB

Hearing date: Click here to enter a date.

DECISION DELIVERED BY S. TALUKDER

REGISTERED PARTIES AND PARTICIPANTS

Applicant	Davies Howe (Andy Margaritis)
Owner	Gary Kivenko
Owner	Sari Shaicovitch
Appellant	John Costanzo
Appellant's Legal Rep.	David Strashin
Appellant's Legal Rep.	Howard Carson
Party	Gary Kivenko
Party	Sari Shaicovitch
Party's Legal Rep.	Andy Margaritis
Participant	Annette Filler

Expert Witness	Janice Robinson
Expert Witness	Greg Rapp

INTRODUCTION

1. This is a motion by the Applicants, Gary Kivenko and Sari Shaicovitch. The Applicants request an order for costs with respect to an appeal by the Appellant, John Costanzo. The Appellant is the owner of 114 Armour Boulevard and a neighbour to the Applicant's property at 116 Armour Boulevard.

2. For 116 Armour Boulevard, the Applicants filed an application for a variance with respect to a soft landscaping area in the rear yard at the Committee of Adjustment (CoA). The CoA approved the variance subject to two conditions.

3. The Appellant appealed the CoA's decision to the Toronto Local Appeal Body (TLAB). The hearing was scheduled for Monday, December 9, 2019. On Friday, December 6, 2019, the Appellant withdrew his appeal.

MATTERS IN ISSUE

4. The only matter at issue is whether costs should be awarded to the Applicants.

5. The Applicants seek the following as an award for costs on a substantial indemnity basis:

Legal fees and disbursement	$7,666.39
Ms. Janice Robinson's Invoice (land use planner)	$11,184.54
Mr. Greg Rapp's Invoice (architect)	$4,815.91
Total	**$23,666.84**

JURISDICTION

6. The following Rules of Practice and Procedure of the TLAB is applicable to deciding this motion:

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, ANALYSIS, FINDINGS, REASONS

Documents reviewed

7. I have reviewed the following in making my decision:

    a. CoA Decision with respect to the Subject Property (CoA Decision).

    b. The TLAB's decision confirming withdrawal of the appeal.

    c. The Applicants' Motion Record dated January 10, 2020 which includes notice of motion, affidavits, etc. filed by the Applicant.

    d. The Appellant's Notice of Response to Motion dated January 17, 2020 and filed by David Strashin (Appellant's Response).

    e. The Applicants' Reply to the Appellant's Motion dated January 21, 2020 (Applicants' Reply).

Summary of the appeal

8. As mentioned, the CoA approved the variance for rear yard landscaping, subject to two conditions, which were:

    a. The applicant provide a lot grading plan to the satisfaction of Toronto Building.

b. The proposal be developed substantially in accordance with the site plan submitted to the Committee of Adjustment, as attached.

9. The Appellant filed an appeal with the TLAB. A Notice of Hearing was issued by the TLAB on August 15, 2019. The Notice of Hearing outlined the deadline to file witness statements, expert witness statements and provide document disclosure by October 15, 2019. The Applicants filed document disclosure and expert witness statements of Greg Rapp and Janice Robinson on October 15, 2019. Mr. Margaritis submitted that the report of two expert witnesses were required because of the nature of the variance requested and the issue of lot grading plan. The Appellants did not file any form of disclosure or witness statements. On October 4, 2019, the Appellant filed Form 5 authorizing Howard Carson, a senior partner at Reitter Management Corporation, to be his authorized representative.

10. The Applicants' counsel, Mr. Margaritis, called Mr. Carson on October 31, 2020, regarding the Appellant's failure to file any document disclosure. In his email to Mr. Carson on November 7, 2020, Mr. Margaritis stated that "… I re-iterate my question to you of October 31st to which I have yet to hear any reply, what is your clients intention for the Hearing scheduled to commence on December 9th? As I advised you on October 31st, I remain willing to discuss options in relation to your clients persistent failure to adhere to the TLAB's dates and deadlines." Mr. Margaritis followed up by email on November 17, 2019 and November 24, 2019.

11. The Appellant filed another Form 5 on November 11, 2019 and named lawyer David Strashin as their authorized representative. The notice of motion states that Mr. Margaritis called Mr. Strashin once he became aware that the Appellant retained counsel. It is not clear when the legal representatives communicated prior to December 6, 2019. However, some form of communication had occurred because on December 6, 2019, Mr. Strashin emailed TLAB confirming that the parties had reached a resolution as a result of which the Appellant withdrew his appeal. Based on Mr. Margaritis' letter to Mr. Strashin and the Appellant's Response, the reason for withdrawal was that the Applicants agreed to file the lot grading plan with the City of Toronto by January 31, 2020.

Summary of Applicant's Submissions

12. Mr. Margaritis submits that the Applicants did not know the Appellant's position on the appeal until Mr. Margaritis had a discussion with Mr. Strashin and a resolution was reached, which was at the eve of the hearing. Mr. Margaritis further submits that the Appellant's conduct as described above was unreasonable and in bad faith, and that he failed to co-operate with the Applicant, failed to act in a timely manner and failed to comply with the TLAB's Rules and the Notices of Hearing, including failing to prepare for the hearing and to present evidence. Mr. Margaritis submits that the appeal itself was frivolous, unreasonable and brought in bad faith.

Jurisdiction to hear the motion for costs in writing

13. Rule 28.3 states that the member presiding over the hearing shall hear the motion for costs. In this case, there was no hearing as the appeal was withdrawn. The TLAB has discretion under Rule 2.2 and 2.6 to facilitate the adjudication of this motion by any TLAB panel member as there was no hearing.

Should costs be awarded against the Appellant?

14. The TLAB rarely awards costs. One main reason of TLAB's reluctance to awarding costs is to avoid deterring the public from participating in the hearing process. As an administrative tribunal, the TLAB has a duty to ensure access to justice to all members of the public, whether they are self-represented parties, parties represented by counsel, or attending the hearing as a participant. This approach to facilitate access to justice is clearly outlined in Rule 28.6.

15. The TLAB's discretion to award costs is subject to the threshold requirement relating to costs set out in Rule 28.7, which is that the Party against whom costs are claimed must have engaged in conduct or a course of conduct which is unreasonable, frivolous, vexatious or in bad faith. A reasonable conclusion that can be derived from Rule 28.7 is that costs can be awarded to deter parties from acting in a manner that is unreasonable, frivolous, vexatious or in bad faith.

16. I refer to Member Makuch's decision regarding a cost award for 15 Nelles Avenue.[1] I believe that this is the only decision by TLAB to date that has led to an award for costs. Member Makuch addresses the TLAB's commitment set out in Rule 28.6 and identifies the difficulty in determining cost awards:

> "It appears to be an obligation in the abstract — a "commitment" not to award costs in this case if such an award would deter others from undertaking or continuing in an appeal. It does not recognize that a decision not to award costs can deter parties from appealing or defending an appeal depending on the circumstances. For example, applicants may be deterred from making an application given their relationship with their neighbours and the belief that those neighbours can undertake an appeal with virtual impunity given this commitment. On the other hand, in all cases, possible appellants may fear initiating an appeal knowing that applicants can recover costs. Therefore, on its face the "commitment" alone is difficult to apply on a case by case basis as it amounts to a virtual prohibition against awarding costs. An example of this can be seen in the case of Goldstein v. Toronto (City), [2015] O.M.B.D. No. 1217 (O.M.B.) where, without analysis of the conduct of the party in question, the Board refused costs. I believe this is contrary to the purposes for which a costs award can be granted by this tribunal: (1) to deter certain conduct and/or (2) to

[1] Re: Sendrowicz,17 208355 S45 13 TLAB; 2018 CarswellOnt 13151, 3 O.M.T.R. 106.

compensate parties for the need to respond to the inappropriate conduct of an opposing party."[2]

17. Member Makuch noted the TLAB's commitment as set out in Rule 28.6 should be taken in context with the overarching Rule 2.2, which directs TLAB to adjudicate matters before it in a just, expeditious and cost-effective manner. Member Makuch noted that the equality of bargaining power between the parties is a consideration.[3] I do not necessarily accept that this proposition is applicable in all situations as a person with less bargaining power can still conduct themselves in a manner which is unreasonable, frivolous, vexatious or in bad faith to trigger a cost award. Each motion for a cost award is very much factually based and requires an in-depth analysis of the conduct of the party against whom costs is claimed (as per Rule 28.7).

18. I am satisfied that the Applicants have provided sufficient evidence that justifies the award of costs against the Appellant. To not allow costs in this matter is to send a message to the public that the rules regarding prompt disclosure for an appeal can be ignored without any consequences. This frustrates the purpose of providing proper disclosure at a specified deadline, which is to ensure all parties are aware of other parties' positions and have knowledge of the documents or facts that other parties plan to rely on. This type of conduct can create frustration for parties who have followed the TLAB rules and invested both time and monetary resources to prepare for their case. It is just to deter such conduct of a party by awarding costs because this provides a surety to the public that all parties are expected to adequately prepare for an appeal before the TLAB and give serious consideration towards forwarding their case by way of document disclosure and submission of witness statements.

19. Whether self-represented or represented by a counsel, once a party initiates an appeal before the TLAB, that party and all involved parties and participants are required to follow the procedural rules set out in the Rules. Specifically, with respect to rules for filing witness statements, expert witness statements and document disclosure, these rules allow all involved persons to be aware and knowledgeable about what is expected of them and also to have disclosure in advance to prepare their own case.

20. The Appellant after filing the appeal, did not proceed with any filing of witness statements or document disclosure. I note that even in responding to the motion for costs, the Appellant did not file any affidavits to provide evidence to support and defend his position.

21. A self-represented party may not file the same type, format or depth of evidence as a party represented by counsel may file, but they are required to provide supporting materials to advance their case. Substantial compliance with a Rule is sufficient, as

[2] *Ibid.*, para. 20.
[3] *Ibid.*, para 21.

per Rule 2.10. Self-represented parties are not provided any flexibility with respect to the filing requirements (subject to the hearing member's discretion). However, the fact that the Appellant retained an authorized representative and later legal counsel aggravates the Appellant's failure in not following the TLAB Rules. This fact acts as a complete bar for the Appellant to claim that he was unable to understand the TLAB Rules.

22. The Appellant received the Notice of Hearing on August 15, 2019 and had until October 15, 2019 to prepare and file witness statements and document disclosure. The Appellant had more than sufficient time to file the required documentation to support his case. The Applicants' counsel, Mr. Margaritis, had repeatedly reminded the Party (through Mr. Carson) of the Appellant's failure to submit any document disclosure on November 7, 17 and 24, 2019. This deficiency in disclosure could have been addressed then by way of late filing, but was not. As there were no witness statements or document disclosure, it is reasonable to conclude that the Appellant did not have any evidence to put forward or call to support his appeal.

23. In considering Rules 28.6 and 28.7, I have also considered the unique nature of TLAB hearings. While an appeal, the hearing is *de novo*, which requires the Applicants, even though they were successful at the CoA, to prove their case again. As a result of this requirement, it is essential for the Applicants to file all necessary documents on the filing due dates. In many cases, an Applicant hires expert witnesses which can be an expensive undertaking.

24. I adopt Chair Lord's statement in his decision with respect to 129 Campbell Avenue,[4] which the Applicants submitted in the Applicants' Reply:

> The obligation on a Party is set out clearly in the Rules applicable to the TLAB. The Applicant carries an onus, in a *de novo* Hearing, to present the best case available in support of variance relief, and to do so by addressing the statutory and policy tests applicable and as above recited.
>
> By the same token, an Appellant must, to a satisfactory level, address the same considerations and show cause why the relief sought meets the standard necessary to demonstrate non-conformity, undesirability in the public interest or undue adverse impact of the degree necessary to warrant the relief sought, in this case of a dismissal.[5]

25. The Decision in this matter and Mr. Strashin's email to TLAB on December 6, 2019 referenced that the parties had reached a resolution and as a result, the Appellant had withdrawn the appeal. Based on Mr. Margaritis' letter to Mr. Strashin, the resolution was reached based on the Applicant's agreement to file the lot grading plan by January 31, 2020. What is concerning about this resolution is that there is a suggestion that the Appellant appealed the CoA's decision based solely on the issue

[4] Re Ott, 19 143533 S45 19 TLAB; 2019 CarswellOnt 13484.
[5] *Ibid.*, paras. 36 and 37.

of grading, which is already a condition in the CoA decision. Absent any document disclosure and a responding affidavit from the Appellant for the motion for the award for costs, I do not see any reason why not to accept Mr. Margaritis' letter as the reason for the resolution. Further, the Appellant's Response states in paragraph 3:

> In our view, all costs described in the motion must be borne by 116 Armour because such costs are directly related to the agreed upon condition and further requirement for 116 Armour to submit on or before January 31, 2020 to the City of Toronto for review and approval a bona fide drainage and/or grading plan to correct the deficiencies resulting from 116 Armour's non-permitted backyard renovation.

26. The foregoing paragraph indicates that the Appellant appealed the CoA Decision to require the Applicant to file a lot grading plan with the City of Toronto on a specific date. However, the requirement to file the said plan was already a condition set out in the CoA Decision. The requirement that the plan must be filed by January 31, 2020 is not a legal consideration for the purposes of the four tests that the Applicant must satisfy for variance approval. I accept Mr. Margaritis' submission that the Applicants agreed to file the lot grading plan by January 31, 2020 to avoid a hearing before the TLAB. This is a reasonable action, as attendance at a hearing would have resulted in further costs. Even if this reason for appeal is not to be considered, the Appellant did not provide any document disclosure, witness statements or response to the Applicants' witness statements to direct me to an appealable issue before the TLAB.

27. I also note that the resolution reached by the parties does not refer to any waiver of costs as claimed by the Appellant. There is no implicit waiver of costs in any settlement or resolution. In cases before the TLAB, a resolution or settlement usually acts as a bar to the claim that a party acted in any manner that was unreasonable, frivolous, vexatious or in bad faith as per under Rule 28.7. It is difficult to prove conduct of a party specified in Rule 28.7 in the aftermath of a resolution. The matter before me is different – the resolution is based on what is already a requirement set out in the CoA Decision. Mr. Margaritis is correct when he stated in the Applicants' Reply that there can be no settlement if the Parties settled for what is already part of the CoA Decision, which is the requirement for the lot grading plan with the City of Toronto. The only part that is different is the Applicant's acceptance of the added requirement that the lot grading plan must be submitted before January 31, 2020, which does not add any substance to the requirement of filing a lot grading plan as a condition to the CoA approval.

28. Based on the foregoing, I am satisfied that the Applicant has succeeded in proving that the Appellant acted unreasonably that satisfies the threshold test set out in Rule 28.7 for an award for costs. I note that if the sole reason for the appeal was that the lot grading plan, which is already a condition imposed by the CoA, must be filed by a certain date, then the Appellant also acted frivolously. It has not only wasted the Applicants' time, effort and expenses, but also the public resources that the TLAB utilizes to administer hearings.

29. My decision should not be taken to imply that any neighbour who fails in proving their case should be subject to a cost award. This is not the case. I have had the opportunity to hear from neighbours and neighbourhood ratepayers' associations who had genuine concerns about the changes in their neighbourhood, had followed or attempted to follow the TLAB Rules substantially but did not succeed at the hearing. Their conduct was not unreasonable, frivolous, or in bad faith and therefore costs should not and could not be granted against them. The TLAB has sufficient measures under Rules 28.6 and 28.7 to effectively block trivial requests for cost awards against serious and vested litigants.

30. With respect to the consideration of the bargaining power of the parties, I do not have any evidence to consider whether the parties have any unequal bargaining power or whether this factor should be a consideration in this matter.

Quantum of Costs

31. I have reviewed the invoices of the Applicant's counsel and the hours and the hourly rate invoiced. In my view, they are reasonable. Similarly, Ms. Robinson's and Mr. Rapp's invoices are reasonable as well. It is the norm to retain a land use planner for appeals before the TLAB. However, I do not have sufficient evidence before me to substantially confirm that Mr. Rapp's retainer would have been helpful to TLAB in making its determination if the hearing had proceeded. This is a consideration that would have been made by the Member presiding over the hearing. As such, I am using my discretion to not consider Mr. Rapp's invoices. Instead, I have focused on the legal fees and disbursement and Ms. Robinson's invoice. Together, this amounts to $18,850.93.

32. The Applicant is not entitled as-of-right to recover costs on a substantial indemnity basis, a scale which is rarely awarded. TLAB has complete discretion to award costs and the quantum of such costs. In considering the quantum, I have considered that early resolution and avoidance of a hearing as a positive and mitigating factor for the Appellant, as the duration of the hearing is shortened. I have also considered the complexity of this matter. This matter deals with one variance with respect to backyard landscaping – an issue that is not complex to address.

33. Based on these considerations, including the responsibilities of the Parties as above described, I grant an award of costs in the amount of $5,000.00 payable by the Appellant to the Applicants, jointly. There was no motion to challenge the authenticity of the appeal and I make no finding in that regard. Rather, I have considered the obligation on the Applicant to prepare for the appeal and the conduct of the Appellant in prosecuting the matter following the institution of the Appeal: I find it wanting under the language of the Rule.

DECISION AND ORDER

34. Costs are awarded against the Appellant, John Costanzo, in the amount of $5,000.00 payable to the Applicants, Gary Kivenko and Sari Shaicovitch, jointly. The Appellant shall pay the cost forthwith within sixty days following issuance of this Decision and Order by TLAB. Costs shall bear interest at the same rate as under the *Courts of Justice Act*, as per Rule 28.8.

X 

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