

REVIEW REQUEST ORDER

Review Issue Date: Wednesday, April 08, 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 Number: 19 125205 STE 19 MV (A0256/19TEY)

TLAB Case File Number: 19 181390 S45 19 TLAB

Decision Order Date: Thursday, January 16, 2020

DECISION DELIVERED BY Ian James LORD

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This matter arises by way of a Request for Review (Request) made February 24, 2020 in respect of a costs award decision made by Member D. Lombardi, January 16, 2020 (Costs Decision).

The Request was considered in an Interim Review Request Order issued March 9, 2020 (Interim Order). In the Interim Order, as the reviewing Chair, I granted a stay in the enforcement of the Costs Decision (for the Appellant herein to pay owners of 48 Marilyn Cres. (subject property), the sum of \$5000). I also directed that the Staff of the Toronto Local Appeal Body (TLAB) issue a 'Notice of Proposed Dismissal' of the Request for reasons expressed in the Interim Order.

A Notice of Proposed Dismissal was issued March 17, 2020 (Notice). The purpose of the Notice is to permit the Parties, in a specific timeframe, to address the matters raised.

The Appellant provided a comprehensive 'Response to the Notice of proposed Dismissal' (Response) dated March 26, 2020, within the timeframe.

Neither the Owners nor the Applicant participated in any way with the Request, the Interim Order, the Notice or the Response.

BACKGROUND

The elements of the Request are reviewed in the 'Considerations and Commentary' section of the Interim Order, pages 4 and 5.

In brief, I was not satisfied that the challenges to the Decision, founded on Rule 31.25(c), were sufficiently established to warrant issuing a Notice of Review and appointing a different Member of the TLAB to conduct an oral Hearing to determine the Request.

The Appellant has expanded on the justification for those challenges in the Response to the Notice.

This is my disposition of the Request.

JURISDICTION

The Interim Order sets out the framework applicable to the basis and conduct of a request for review under Rule 31 once a Notice of Review is issued.

Below are the TLAB Rules applicable to a request for review prior to the issuance of a Notice of Review:

"Adjudicative Screening by Chair

31.15 The Chair may, on notice to all Parties, propose to dismiss all or part of a Review request without holding a Hearing on the grounds that:

- a) the reasons set out in the Review request do not disclose any grounds upon which the TLAB could allow all or part of the requested relief;
- b) the Review request is frivolous, vexatious or not commenced in good faith; 43
- c) the Review request is made only for the purpose of delay;
- d) the Requesting Party has persistently and without reasonable grounds commenced Proceedings that constitute an abuse of process;
- e) the Requesting Party has not provided written reasons and grounds for the Review request;
- f) the Requesting Party has not paid the required fee;
- g) the Requesting Party has not complied with the requirements provided pursuant to Rule 31.11(b) within the time period specified in Rule 31.12;
- h) the Review request relates to matters or grounds which are outside the jurisdiction of the TLAB; or
- i) the submitted Review request could not be processed and the matter was referred, pursuant to Rule 31.13, for adjudicative screening.

Requesting Party may Make Submissions in Screening Process

31.16 A Requesting Party, and any other Party wishing to make written submissions on the Notice of Proposed Dismissal of a Review request, shall File those submissions with the TLAB

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and Serve all Parties within 10 Days of receiving a Notice of Proposed Dismissal under Rule 31.15.

31.17 Upon receiving written submissions, or, if no written submissions are received pursuant to Rule 31.16, the Chair may dismiss the Review request or make any other order.

31.18 Where the Chair dismisses all or part of a Review request, or is advised that the Review request is withdrawn, any fee paid shall not be refunded.

TLAB shall give Notice of Review

31.19 Where a Review request has not been dismissed under Rule 31.17, the TLAB shall give a Notice of Review to all Parties.”

CONSIDERATIONS AND COMMENTARY

In the Interim Order I expressed the following reservations as to whether the Request presented or substantiated an eligible ground for a Notice of Review to issue:

- a). whether the reasons were founded in an effort to re-argue the Costs Decision in amount and also merit;
- b). whether the Member misconstrued his role in the consideration of a costs award;
- c). whether the discretion afforded the Member to determine a costs award as to quantum had a proper basis.

In effect, the concern was whether the matters raised were compelling as raising an error of fact or law which would likely have resulted in a different Final decision or final order.

The Response, in a sixteen paragraph submission, addresses some matters and requests that Request proceed to a Notice of Review.

Specifically, the Response asserts:

1. The “amount of the Costs Decision requires review because it is”:
 - a. “Inconsistent with the accepted definition of “costs”” (paras. 3, 14);
 - b. Cannot be attributed to the TLAB appeal hearing (para. 5, 7);
 - c. There is an absence of the proof of “costs” (para 10, 12);
 - d. Estimates and breakdowns of relevant rates and fees, etc., are not provided (paras. 11-13).

There is no reference in the Response to the ‘alternative’ position in the Request of a minimal costs award of 5 hours attributable to the Applicant’s (a consultant) attendance at the appeal Hearing, in the amount “fixed at \$225 plus HST for a total of \$254.25.”

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Respectfully, I find it necessary to comment on the authority by which 'costs' considerations are allowed to be accessed from both a procedural and substance perspective.

The jurisdiction to award costs is prescribed in TLAB Rule 28, recited in the Member's Decision.

The Interim Order reviewed the extensive filings, response and reply evidenced before the Member on the request for costs under Rule 28.

The TLAB Rules also mandate that a liberal interpretation be taken of the Rules 'to secure a fair, just and expeditious determination of every proceeding on its merits'.

There is no dispute that the Member properly instructed himself. Generally, this can be described as follows: costs are not awarded lightly and automatically but parties must be held accountable for their conduct and if that conduct or course of conduct has been unreasonable, frivolous or vexatious, or if a party has acted in bad faith, then costs may be awarded.

Neither the Request nor the Response takes significant issue with the Member's finding, clearly stated and summarized on page 16 of the Costs Decision, describing the Appellant's conduct and actions as "patently unreasonable", for the reasons given.

In my view, this is the essence of a justification for a cost award. This finding, in the Costs Decision, follows the proper assessment considerations of conduct and is grounded in the often repeated adage: "...would a reasonable person, having looked at all 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 practice and 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."

Once that substantively if not entirely uncontested determination is made, based on evidence supporting a conduct assessment, as herein, the matter of an award amount follows in the discretion of the Member, provided an adequate basis exists under Rule 28.5 a)-d).

In my view, fundamental to the costs award jurisdiction, is the finding of conduct under Rule 28.6 resulting in a determination, as evidenced in the Costs Decision, under Rule 28.7. The Member found the conduct of the Appellant was such that an award of costs should be made in favour of the owner.

The submissions in the Request and in the Response focus on the amount and justification of the quantum of the cost award. While I find this to be a matter entirely in the discretion of the Member, that discretion cannot be exercised in a vacuum. The Rules and essential fairness require a foundation of justification in 'estimates', 'a breakdown of all associated rates, fees and disbursements' and 'copies of supporting invoices'.

A plain reading of the Costs Decision identifies that these materials and attestations were before the Member who then proceeded to examine, parse, discard

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and accept aspects of the evidentiary record in the full sunlight of the Appellants submissions and responses.

I see nothing in the Costs Decision, the Request or the Response that suggests the Member made any error in that sorting process. While the reasons could have been more definitive in the absolute exclusion of elements, not every mile post needs to be described provided there is evidence of no clear misdirection, or a failure to consider a relevant consideration.

I find that the conditions identified in Rule 31.15 a) and e) exist.

The Costs Decision is based on a fulsome review with full participation rights being fully exercised. The Member is experienced, was the Chair of the Hearing Decision in which the Appellant caused but failed to participate in - to the disadvantage and inconvenience of the owner. The Member had rates, observed the Hearing time and had the filings and an appreciation of the time engagement in trial preparation. I cannot conclude that the failure to fully articulate those considerations constitutes an error of fact or law let alone a compelling basis to reconsider the Costs Decision.

There is no issue of inexperienced counsel throughout.

There were 'costs' incurred following the appeal in preparation, efforts to resolve and in the conduct of an appeal Hearing. The Request suggests, in the alternative, a quantification of this at '5 hours', being Hearing time. This fails to acknowledge the intervening weeks and months of dislocation that the Appellants conduct precipitated, not to mention the standard of advance preparation and pre-filings required by the Rules antecedent of a TLAB Hearing. These were caused by the appeal.

The Member found the Appellants' conduct to not be responsible.

I find the Appellants' focus, on an attempt to parse and refine eligible costs to an unstated but alleged 'acceptable' definition, to be disingenuous. It is a focus on quantum, divorced from the finding of conduct as to acceptable behavior of an Appellant and as to how it reflects on the integrity and fairness of the planning appeal process in Ontario.

The Member reduced the claimed costs award requested by an exclusion of clearly ineligible categories unrelated to the Hearing. The Member was left with findings on an extended period of conduct implications, efforts in preparation for what was reasonably anticipated to be a typical contested hearing and the associated obligations on the owners.

The amount awarded is the Member's reflection on the seriousness of the misconduct. It is significant enough to send the message that the type of conduct exhibited is unacceptable. I have not been supplied, in the one case referenced, of a sufficient rationale to challenge those determinations or to warrant the issues raised be placed before another Member.


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I find nothing to suggest that the amount is punitive in scale, nor so high as to offend the Rule, nor constitute a 'chill' on others in exercising appeal rights. Where conduct is reasonable and responsible such awards are likely to be avoided.

DECISION AND ORDER

The Request for Review in respect of the Costs Decision is refused, the stay in the Interim Order is lifted and the Request is dismissed.

No Notice of Review is to issue.

X 

Enter Panel Member Name

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord