

INTERIM REVIEW REQUEST ORDER

Issue Date: Monday, March 09, 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: Monday, February 24, 2020

DECISION DELIVERED BY ~~DECISION DELIVERED BY:~~ Ian James Lord

REVIEW REQUEST NATURE AND RULE COMPLIANCE TO INITIATE

This matter involves the request to review (Review/Request) a Decision and Order of the Toronto Local Appeal Body (TLAB) issued January 16, 2020 (Costs Decision) whereby Member D. Lombardi made a cost award under Rule 28 of the TLAB Rules of Practice and Procedure (Rules).

The Request was perfected before the TLAB on or about February 14, 2020 and was submitted on behalf of the Appellant, Ms. Elizabeth Manikas by her counsel, Mr. Andrew Coates.

The Request was subject to an Administrative Review pursuant to Rule 31 and a Notice of Non-Compliance, since rectified, and is now reported as having no procedural issues.

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The Request qualified to be conducted pursuant to Rule 31 as it has existed after May 6, 2019, when the revised Rules were promulgated.

The Request was forwarded for Adjudicative Screening under Rule 31.15.

The Costs Decision followed a Written Hearing in which the Member had for consideration a Motion for Costs by the Applicant (via Mr. Loccisano) dated November 27, 2019, a Response to that request by the Appellant dated December 10, 2019 (via Mr. Coates), a Reply by the Applicant dated December 16, 2019 and further submissions on behalf of the Appellant, dated December 17, 2017, all by their representatives with attendant affidavits, where required.

The Costs Decision itself is 17 pages of narrative ending with a cost award of \$5000. It relates to an initial Hearing earlier conducted by the Member with his Decision and Order issued November 11, 2019. In brief, the Cost Decision allows an amount, reduced from that claimed, principally on grounds of non-participation by the sole Appellant in the appeal without disclosure, filings, evidence or attendance at the proceeding, including the absence of any advice as to intended non-participation.

The Costs Decision reflects the Members reasons for the award.

The Request for Review challenges the Member's Cost Decision under Rule 31.25 (c):

c) made an error of law or fact which would likely have resulted in a different order or decision;

Covering correspondence also requests a stay of the Costs Decision, pending determination of the Review Request.

Pursuant to Rule 31, Adjudicative Screening serves several purposes:

- a) to address matters raised in the Administrative Screening, if any;
- b) to address the matters listed in Rule 31.15 for the purpose of the determination as to whether there is a basis to propose dismissal of the Request, with its associated procedures;
- c) to address a request under Rule 31.3 where the Request includes that a stay be placed on the Decision.

There were no early responses to or detailed submissions on these aspects of the Request.

This is a determination as to the Adjudicative Screening process.

JURISDICTION

Below are some of the TLAB Rules applicable to a request for review. They provide the framework under which the ultimate consideration of the Review is to proceed provided it survives the earlier screening processes.

“31.4 A Party requesting a review shall do so in writing by way an Affidavit which provides:

- a) the reasons for the request;
- b) the grounds for the request;
- c) any new evidence supporting the request; and
- d) any applicable Rules or law supporting the request.

31.6 The Local Appeal Body may review all or part of any final order or decision at the request of a Party, or on its own initiative, and may:

- a) seek written submissions from the Parties on the issue raised in the request;
- b) grant or direct a Motion to argue the issue raised in the request;
- c) grant or direct a rehearing on such terms and conditions and before such Member as the Local Appeal Body directs; or d) confirm, vary, suspend or cancel the order or decision.

31.7 The Local Appeal Body may consider reviewing an order or decision if the reasons and evidence provided by the requesting Party are compelling and demonstrate grounds which show that the Local Appeal Body may have:

- a) acted outside of its jurisdiction;
- b) violated the rules of natural justice and procedural fairness;
- c) made an error of law or fact which would likely have resulted in a different order or decision;
- d) been deprived of new evidence which was not available at the time of the Hearing but which would likely have resulted in a different order or decision; or
- e) heard false or misleading evidence from a Person, which was only discovered after the Hearing, but which likely resulted in the order or decision which is the subject of the request for review.

31.8 Where the Local Appeal Body seeks written submissions from the Parties or grants or directs a Motion to argue a request for review the Local Appeal Body shall give the Parties procedural directions relating to the content, timing and form of any submissions, Motion materials or Hearing to be conducted.”

CONSIDERATIONS AND COMMENTARY

The Request consists of the requisite materials filed pursuant to Rule 31.6, including Rule 31.6 e); namely “a statement as to the requested remedy”, in paragraphs 16 and 17, namely the elimination or reduction of the costs award by the Member.

In dealing with the relief requested it is appropriate to grant a stay on the enforcement of the Costs Decision pending the ultimate disposition of the Review Request.

I am, however, not satisfied the Review Request establishes, under the sole ground advanced, Rule 31.25 (c), that a triable ground has been made out that is sufficient to permit the Review Request to proceed to the stage of a Notice of Review.

The Appellant, in a seventeen paragraph submission, raises the following points of challenge:

1. The scope of recoverable costs that ‘do not directly relate to preparing for an attending a hearing’ (Request, paragraph 6).
2. The clarity of the Member’s Cost Decision as to whether any portion of the award related to “increased construction costs” (Request, paragraphs 7, 8).
3. Expenses incurred in relation to preparation, attendance and representation at the appeal hearing (and presumably the written Motion request for Costs) and the evidence as to their allocation and their eligibility, including via the ‘consultant’, as distinguished from legal counsel (Request, paragraphs 9, 10, 11 and 13).
4. In the absence of ‘proof’ as to the “amount of costs attributable to the TLAB appeal hearing, there should have been no order as to costs” (Request, paragraph 12).
5. The quantum of the Costs Decision is “wholly disproportionate” to one case authority (Request, paragraph 14, 15).

I am not satisfied that paragraphs 1 and 4, above can stand as being mutually consistent. Even if expressed in the alternative, my concern is that the

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reasons for the Request as summarized in paragraphs 1, 3, and 4 are simply an effort to reargue the Costs Decision and amount, perhaps with differ emphasis.

It is not the purpose of the Review Rule to permit the re-argument of a decision with which an aggrieved party disagrees. Rather, precise grounds are provided to focus the need for a remedy and these must be established, in at least a *prima facie* way, to enable the Review to proceed.

With respect to the second paragraph, above, a purposive reading of the Costs Decision clearly indicates that the Member properly instructed himself and applied, on the Appellants own case authority submissions, that recoverable costs are “costs which include both preparation for the hearing and the hearing itself” (Costs Decision, page 15 of 17). The Member was clearly alert to the Appellants submissions that requested costs (e.g., consequential construction delay damages), that are ‘outside the scope of these definitions’ are not recoverable. There is nothing apparent in the Costs Decision which attributes recovery to such claims.

Also with respect to the second and fifth paragraph, above, Rule 28 provides that the Member who conducted the proceeding shall make the decision regarding costs. That decision is discretionary as to quantum provided the estimates and breakdowns, rates and fees etc., are provided. Extensive filings by informed counsel participated in the written Motion resulting in the Costs Decision, including a response, a reply and further submissions by the Appellant. It is not for the Review Request to ask to review and to substitute for that exercise in discretionary judgment, without cogent grounds that make apparent the ‘error of fact or law’ advanced.

I am not convinced that a sufficient basis has been made in these paragraphs that identify an error of law or fact which would likely have resulted in a different Final Decision or final order.

DIRECTION

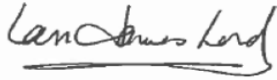
Rule 31 sets in chain a formal process that permits a Party to request a reconsideration of a TLAB Final Decision and final order while at the same time providing checks and balances to protect the sanctity of the TLAB decision making process and the rights of the parties. In this case, a formal request is made for a stay in the operation of the Decision. I find that to be appropriate while the ultimate determination of a properly engaged administrative process remains outstanding.

On the basis of the forgoing, it is not appropriate to issue a Notice of Review, pursuant to Rule 31.19, such that the matter can be advanced without a clearer articulation of eligible grounds.

DECISION AND ORDER

1. A stay is granted in the enforcement of the Costs Decision until such time as the Review Request is finally completed.
2. TLAB Staff are directed to issue following this decision a Notice of Proposed Dismissal with the attendant right to address the matters raised in the timeframe provided by Rule 31.16 (within ten (10) days of the receipt of the said Notice.

X



Ian J. Lord

Panel Chair, Toronto Local Appeal Body

Signed by: Ian Lord