

MOTION DECISION AND ORDER

Decision Issue Date Thursday, April 15, 2021

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): 1742385 ONTARIO INC

Applicant: BATTAGLIA ARCHITECT INC

Property Address/Description: 939 WARDEN AVE

Committee of Adjustment Case File: 17 207626 ESC 37 MV

TLAB Case File Number: 19 212994 S45 21 TLAB

Hearing date: Tuesday, July 14, 2020

DECISION DELIVERED BY S. Karmali

PARTIES TO THE MOTION

Name	Role	Representative
1742385 Ontario Inc. (Hatcho Narcessian)	Moving Party/Owner	Mark Vernon
City of Toronto	Responding Party	Lauren Pinder

INTRODUCTION & BACKGROUND

1. The Owner, 1742385 Ontario Inc., moves for costs arising out of an appeal at the Toronto Local Appeal Body (TLAB).¹ The Committee of Adjustment (COA) had refused the Owner's revised application which proposed a rear yard setback variance of 4.97 metres from the minimum requirement of 7.5 metres under the former City of Scarborough Employment District Zoning By-Law 24982. By Order, the TLAB allowed the Owner's appeal, which authorized the variance subject to conditions. The Owner now, by way of motion in writing, requests costs against the opposing party, the City of Toronto.

¹ The type of appeal indicated was, as such, to appeal a decision on minor variance from the provisions a zoning bylaw passed under Section 34 (zoning by-law) of the *Planning Act*, which in this case, is a reference to Section 45(1). There was no other type of appeal indicated.

2. Well before the TLAB received the Owner's appeal, Toronto Building, Toronto City Planning, and Transportation Services communicated with the Owner about the Owner's proposed development on the subject property. That communication was mainly transportation-related and included concerns and requirements about parking supply and drive aisle width for a new automotive supply warehouse use.
3. According to the information provided by one City zoning examiner expert, the Owner believed that reducing the building's gross floor area by demolishing an existing rear main wall would help him move in the direction of compliance with the identified requirements for parking.² And so, and in order to obtain a building permit, the Owner demolished the wall. It turned out that reducing the building footprint did not get the Owner any closer to compliance with the parking requirements. This was according to information provided by another City zoning examiner expert.³ Imaginably, a detailed communication exchange ensued between the City and the Owner. The Owner was able to satisfy Toronto Building's requirements which would permit parking deficiency to be cured using the legal non-conforming clause in By-Law 24982. Although parking variances were no longer required, the Owner was expected by Toronto Building to continue with a revised COA application purposed to reconstruct the previously demolished rear addition for which a variance from the rear yard setback performance standard would need to be sought.⁴ The COA refused the application for variance.
4. The TLAB approved the application subject to conditions. In this motion, the Owner asserts that the proposed rear yard setback had existed before the demolition and had, therefore, retained a long-standing "legal non-conforming" status. Accordingly, the Owner contends he did not need to move through the variance system.
5. As a result, the Owner seeks an award for costs, as permitted under the TLAB Rules. The Owner seeks costs in the total amount of \$21,162.22, inclusive of Harmonized Sales Tax (HST), from the City of Toronto, as follows:

² Zoning By-Law Notice dated Monday December 12, 2016 and related to Zoning Certificate Number 16 251751 ZC 00 ZR shows the requirement for parking rate according to land use and area.

³ Zoning By-Law Notice dated Thursday October 4, 2018, and related to Building Permit Application (BPA) Number 18 226312 BLD 00 BA. The Zoning By-Law Notice dated Monday June 3, 2019 which related to the same BPA Number was the basis of the application for variance to the Committee of Adjustment.

⁴ Toronto Building informed the Owner that when the Owner chose to demolish a portion of the building, the demolished portion would no longer retain legal non-conforming rights. See page 1 of Reply to Response to Motion.

Costs of the Owner's appeal to the TLAB from the City of Toronto Committee of Adjustment Scarborough Panel refusal on August 22, 2019, in the amount of:

- a. \$13,792.22 for legal costs, HST and disbursements as per Friedmans Law Firm statement of account dated February 10, 2020; and
 - b. \$7,370 inclusive of HST for Evans Planning Inc.'s invoice dated January 2, 2020.
6. Framed as an imprecise alternative form of relief in the Moving Party's accompanying Affidavit, the Owner believes that had the City engaged in settlement discussions and not opposed the appeal, the Owner's costs could have been reduced by "at least 1/2 as a result of decreased time to prepare and time at the hearing." The Owner estimates the City's continued opposition amounted to \$9,000.00 plus HST.

MATTERS IN ISSUE

7. The issue on motion is whether costs should be awarded and, if so, in what amount.

JURISDICTION

8. The TLAB has authority to order costs and in doing so, must take into account its Rules as set out below.
9. The TLAB's Rules of Practice and Procedures dated May 6, 2019, apply to this motion. Specifically,

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 AND REASONS

10. The evidence primarily consisted of:
- Notice of Motion (Form 7) with accompanying affidavit (Form 10), planner's invoice, lawyer's statement of account, and case law
 - Notice of Response to Motion (Form 8) with attachment and accompanying case law
 - Notice of Reply to Motion (Form 9)

The Moving Party

11. This Party alleges it was unreasonable for the City to oppose the TLAB appeal and, therefore, an award of costs is warranted.
12. This Party claims that costs were borne out of:
- the Responding Party's refusal to engage in any substantive settlement discussions, which could have avoided the TLAB hearing;
 - the amount of time and expense involved in hearing preparation and participation during and after the TLAB hearing for which a lawyer was retained;
 - the amount of time and expense involved in hearing preparation and participation during the TLAB hearing for which a planner was retained;
 - error and redundancy in that requesting permission to return to the subject building footprint was the result of inconsistent zoning certificates issued by the Toronto Building

The Responding Party

13. This Party asserts that the City's participation at the TLAB hearing was not unreasonable, frivolous, vexatious, or in bad faith. This Party thus seeks an Order of the TLAB denying the motion.
14. This Party asserts that whether the City participated or not, the Owner had the unchanging onus of demonstrating that his proposal seeking a variance could satisfy the *Planning Act*. This Party further asserts that the onus is the same irrespective of the hearing being a settlement hearing.

15. This Party claims:

- the TLAB is not the proper forum to challenge the validity of a zoning notice issued by a delegate of the Chief Building Official (CBO) as per Section 25(1) of the *Building Code Act*
- the test to acquire rights under Section 34(9) of the *Planning Act* [Excepted lands and buildings] is not a jurisdiction statutorily conferred upon the TLAB; though, the power to permit the enlargement or expansion of a legal non-conforming use according to Section 45(2) is statutorily conferred upon the TLAB
- whether the previously existing structure was legal non-conforming is not properly before the TLAB
- the City's participation in the hearing did not unduly delay or prolong the hearing since the City only asked modest questions of the Moving Party's two witnesses and made short closing submissions
- the assessment of costs is arbitrary and unsupported:
 - The Owner's estimate that costs could have been reduced by half, or \$9,000 does not identify how any fees were incurred
 - The planner's invoice was issued before the TLAB hearing, which, as a result, could not have contributed to the costs contained in the invoice
 - The lawyer's statement of fees shows that time was spent on corresponding with the Owner, reviewing previous correspondence, undertaking research and preparing and planning party witnesses, whereas there are limited entries showing corresponding with or responding to the City

The Moving Party's Reply

16. This Party posits that:

“[s]ince 939 Warden had a long standing legal nonconforming setback (which was only removed based on parking requirements communicated by the City that it subsequently agreed do not apply) should have been a significant mitigating factor for the City to consider when deciding whether or not to oppose the Appeal.”⁵

17. The Party reasserts that it was unreasonable that the City “continued to oppose the appeal, increasing the length of the hearing through submissions and cross-examinations, and requiring extra preparation time by counsel and witnesses.”

⁵ See page 2 of Reply to Response to Motion.

18. The Owner seems to have went through a perplexing process with the City to identify zoning requirements to develop his property. That process, however, unfolded as between him and the City. It appears as though the Owner relied on the City to review his proposal and list accurately how the Owner's proposal does not comply with Scarborough Zoning By-laws.
19. The Owner submitted an appeal to the TLAB, which was based on the Committee of Adjustment's decision to refuse his revised application for a variance. His revised application was directly informed by the City's zoning notice identifying one variance to the minimum rear yard setback contained in Zoning By-Law 24982. The Owner had a continuing intention to follow through with the COA process to seek a variance under Section 45(1).
20. The Owner had the onus to advance the best case available in support of variance relief. That the City registered as a party in the TLAB matter does not diminish that onus in any way. In any event, the Owner had successfully discharged his onus in the substantive matter wherein, and importantly, the TLAB did not make any findings of "legal non-conforming" status.⁶
21. In 59 Bernard Avenue, also a motion for costs, TLAB Member Talukder stated: "The motion for cost awards is not a forum for re-litigating the issues at the hearing or to introduce new evidence on the decision granting minor variances." I concur with this statement. The TLAB makes no findings of "legal non-conforming" status concerning the subject property in the current motion for costs.⁷
22. The TLAB indeed has broad jurisdiction to award costs. However, the considerations for a costs award ought to relate to the activities within the TLAB appeal process. I had presided over the substantive matter and I note that what was squarely before me was a request for a variance.
23. The TLAB still must be 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. In this case, and having considered the case law provided by the Moving Party, I do not find any conduct as such. The TLAB also does not find that the City's participation unduly delayed or prolonged the TLAB process.

⁶ Section 34(9) and Section 45(2) were not raised in the substantive matter. As mentioned, the application came to the TLAB requesting variance relief, which is different from seeking permission to enlarge or extend a building with a legal non-conforming use.

24. Furthermore, the City raised in its responding motion materials that the TLAB is not the proper forum to challenge the validity of a zoning notice issued by a delegate of the Chief Building Official under Section 25(1) of the *Building Code Act*. It seems the Owner had the option to further challenge the zoning notice's validity before he decided to request a rear yard setback variance at the COA. It could have been the Owner's responsibility to have explored that option satisfactorily.
25. Even if the TLAB was found, based on evidence proffered, to be the proper forum to challenge the zoning notice's validity, the TLAB does not find that the City's involvement in the TLAB process amounted to unreasonableness.⁸
26. Based on the reasons above, an award of costs is not found at the TLAB.

DECISION AND ORDER

27. The request for costs is dismissed.

X

Sean Karmali
Panel Chair, Toronto Local Appeal Body

⁸ Bad faith, frivolous, and/or vexatious conduct or in the course of conduct were not properly advanced by the Moving Party.