Toronto Local Appeal Body

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ORDER ON MOTION FOR COSTS

Decision Issue Date Wednesday, Sept. 8, 2021

PROCEEDING COMMENCED UNDER Section 53, subsection 53 (19), Section 45(12), subsection 45(1) of the Planning Act, R.S.O. 1990, c. P.13

Appellant(s): BRADLEY SELLORS

Applicant(s): MATTHEW KONIUSZEWSKI

Property Address/Description: 367 HOWLAND AVE
Committee of Adjustment File

Number(s): 19 208800 STE 12 CO, 19 209007 STE 12 MV, 19 209008 STE 12 MV

TLAB Case File Number(s): 20 194299 S45 12 TLAB, 20 194329 S45 12 TLAB, 20 196319 S53 12 TLAB

Final Decision and Order: June 17, 2021

DECISION DELIVERED BY TED YAO

APPEARANCES

Name	Roles	Representative
367 Howland Avenue Inc (Leonid Kotov)	Owner/Party	Amber Stewart
Bradley Sellors	Appellant	

INTRODUCTION

367 Howland Avenue Inc (principal, Leonid Kotov), seeks costs as follows:

> . . .the costs of this proceeding are in the order of $81,000.00. I confirm that these costs have been incurred directly and necessarily as a result of Mr. Sellors' appeals. In my estimation, Mr. Sellors' unreasonable conduct vastly increased the costs of this proceeding. As a result, I am seeking an award of costs in the amount of $65,979.58, representing 75% of the costs I incurred plus $5,000.00 for the costs of preparing this motion.

BACKGROUND

Mr. Kotov is the principal of 367 Howland Avenue Inc, (which I will call "Mr. Kotov", for convenience). He is a lawyer, and developer, and sought to avoid a costly TLAB hearing by extensive consultation with the Howland Street community. He was largely successful; the Tarragon Village Community Association, local Councillor and most neighbours decided not to participate in the TLAB hearing. Mr. Sellors was the sole appellant and coordinated the opponents to Mr. Kotov.

> Mr. Kotov was successful before the Committee of Adjustment (COA). Mr. Sellors appealed. The TLAB set three days for the hearing, but in the end, it took approximately five and a half days spread over seven separate dates. The scheduling of the extra days was contested. Mr. Kotov called one witness, Mr. Dror, a planner. Mr. Sellors called six witnesses, including himself.

Mr. Kotov owns a rundown building occupying one lot with a wide side yard, almost the size of a typical lot on Howland. He proposed that the current building be torn down and replaced with two halves of a new semidetached house, each on its own lot. He thus sought a severance and variances, each requiring separate tests under the *Planning Act*. The severances require Official Plan conformity, including an examination of lot widths. The variances required an examination of how the proposed built form, parking deficiencies, secondary unit size and density (FSI), would fit into the neighbourhood. The most contentious issue was the density; Mr. Kotov sought an FSI of 1.30 for one half and an FSI 1.42[1] for the other half of the semidetached house. Official Plan compliance as regards to the variances required a comparison of how the proposed built form fit with other properties in the neighbourhood and whether each variance respected and reinforced the prevailing character of the neighbourhood.

Tenure and intensification were also issues; this will be purpose built rental

[1] TLAB draft decisions have two internal reviews before issuance; one for content and one for accessibility. The accessibility review checks for extra spaces, italics etc. for those who have visual challenges. A typographical error occurred in specification of the FSIs at the accessibility stage and because of that the decision is under review. The clerical error cannot be corrected until the review has concluded. If the review is successful the error becomes moot.

housing in a walkable area close to a subway station. There are relevant Official Plan policies that relate to these considerations.

This property was the subject of two zoning examinations, one in March 2020 by Jaimie Atkinson, who characterized the application as a three storey triplex, and a second by Stav Zaltzman, who characterized it as semidetached house containing three secondary units. Ms. Zaltzman's examination was caused by Mr. Kotov's decision to divide the ground unit into two, one in the basement and one on the first floor after the Committee of Adjustment decision. For the TLAB, any interpretation of "use" by the plan examiner , i.e., "semidetached house" is partly technical (the definition of multi-unit building using the zoning by-law interpretation section) and partly legal (the general intent of the zoning with respect to such use). The timing of the decision also was a complicating factor; Mr. Kotov initially underestimated the cohesiveness of the Howland Community and when Mr. Sellors appealed, Mr. Kotov made the decision to change the layout and advise the TLAB by a process known as "Applicant's Disclosure".

Mr. Sellors' main planning evidence consisted of a ten year COA study, prepared by Doris Sung, a lawyer, but introduced only through Mr. Sellors. Neither are planners. Ms. Sung did not testify although she observed the hearing. The COA study is the source of the photographs of 383 Albany at page 16 of the June 17, 2021 decision.

Some of these events and pieces of evidence have found their way into Mr. Sellors' Response to the costs motion by way of comments about me, the decision maker. I do not reply for three reasons. First, tribunal members speak in their decisions; by custom they do not defend themselves in a personal way. Second, any response would be an additional comment to my decision under review. That decision must stand or fall on its own. Third, one of the issues in the costs motion is whether Mr. Sellors' conduct has caused Mr. Kotov extra hearing or preparation time. What Mr. Sellors thinks of me or my decision personally is generally irrelevant.

The costs request has complied with the Rules

The procedure for a costs request are contained the TLAB's Rules of Practice and Procedure. Rule 28.1 states that only a party can seek an award of costs[2]. 367 Howland Avenue Inc. is a party. Rule 28.2 states that a request for costs must be made within 30 days of the decision[3] and this was done. The written decision was issued June 17, 2021; Mr. Kotov's request for costs was filed July 14, 2021.

[2] 28.1 Only a Party or a Person who has brought a Motion in the Proceeding may seek an award of costs.
[3] 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.

Rule 28.3 says the member who conducted the hearing is seized of the costs request.[4] However, Mr. Sellors requested that the Costs Motion be consolidated with the Review Request.

> We ask that TLAB if possible, hears this motion together with the Review Request Order, to ensure that both matters can be resolved together, thereby saving incurred costs as well as time expended to ensure that both matters are dealt with efficiently, expeditiously and fairly. In the alternative if this matter can be stayed / adjourned until the Review Request Order has been dealt with.

The review request must be heard by the TLAB Chair or the Chair's designate and it is not clear how the two could be combined. If I were to step aside and allow the Chair to hear the costs motion, this would hardly "save incurred costs" as the Chair would be obligated to review the transcripts, as many of allegations and commentary require knowledge of what went on in the hearing room. I see no advantage to staying the matter. Costs are a separate matter from a review request, and like any other person seeking relief at the TLAB, Mr. Kotov deserves an expeditious answer.

Rule 28.4 says that motions for costs shall be by written motion "despite Rule 17.4" (that requires that motions be heard orally).[5] The Rules are silent about how to respond to a written costs motion. Presumably it is like any other motion and governed by Rule 17 (Motions). If so, the procedure a responding party must follow is unclear. Rule 17.6 states:

> 17.6 Where a Motion in writing is requested by a Party and where the TLAB agrees, the TLAB will provide the Moving Party with a date by which the Motion is to be Served. The Moving Party and any Responding Parties shall thereafter comply with the Rules **(Rules 17.8 - 17.12) relating to the Service and Filing of any needed responses or replies. (**my bold)

The second sentence requires the responding party to comply with the Rules, but only insofar with those Rules "relating to service and filing". (There is a typo; it must mean 17.12.) What the drafter meant was the responding party should comply with **all** applicable rules. The intent is that the responder's materials should mirror the mover's. Rule 17.7 says that the mover must provide an affidavit

[4] 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.
[5] 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

and Rule 17.10c)[6] requires that the responder do the same. Mr. Sellors did not provide an affidavit. Since the TLAB rules in this area are not completely clear, I give both parties the benefit of the doubt and conclude all pleadings are Rule - compliant and I can proceed to deal with the motion for costs.

Rule 28.5[7] lists what Mr. Kotov must set out; reasons for the request and amount requested, etc. — these requirements were met. Mr. Kotov is required to quantify "extra hearing or preparation time caused by the conduct". Mr. Kotov asks for 75% of the costs of the entire hearing plus 100% of the costs of this costs motion. He has not tried to estimate the extra hearing and preparation time by identifying specific wasted hours; this is not easy in a case like this, where some hearing time was not wasted and some was. I defer this exercise to the end of this decision.

Mr. Kotov asks $5,000 to prepare the costs motion. I have looked at Ms. Stewart's bill and there are no entries relating to the costs motion. The last entry is for 0.8 hr. (48 minutes) on June 17, 2021, the day the decision on the merits was issued: It says:

> Receipt and review of TLAB decision. Discussion with L. Kotov.

Undoubtedly, Ms. Stewart and Mr. Kotov discussed bringing this costs motion. But Rule 28.5 requires some breakdown.

In *Deo v Sheasby-Coleman*[8], Ms. Sheasby-Coleman, an unrepresented

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[6] Notice of Response to Motion and Service 17.9 If a Party needs to respond to a Motion a Responding Party shall Serve on all Parties and Participants a Notice of Response to Motion, using Form 8 and File same with the TLAB at least 7 Days before the Date the Motion is to be held by Oral Hearing or by Electronic Hearing, unless the TLAB directs otherwise. 17.10 A Notice of Response to Motion shall: a) state the Responding Party's response, including a reference to any statutory provisions or Rules to be relied on; b) list and attach the Documents to be used in the response to Motion; and c) be accompanied by an Affidavit setting out a brief and clear statement of the facts upon which the Responding Party will rely.

[7] 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

[8] CITATION: *Deo v. Sheasby-Coleman,* 2021 ONSC 4150 DIVISIONAL COURT FILE NO.: 073/19 DATE: 20210608

[38] At the end of the motion, Ms. Sheasby-Coleman requested that, if she was successful, she should receive some costs. As a self-represented litigant, she can only receive costs if she can

litigant was successful in appealing a severance and variances at the TLAB. Ms. Deo brought a motion for leave to appeal to the Divisional Court, and Ms. Sheasby-Coleman's response included receipt of a Factum and researching the limitation periods in the time of pandemic. She was entirely successful. She received no costs.

Mr. Kotov appears to have drafted all the materials himself or Ms. Stewart did this as an accommodation to her client. Since there are no fees claimed that are associated with the costs motion, I do not award anything for its preparation.

ANALYSIS, FINDINGS, REASONS

Rules 28.6 and 28.7 state:

> 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:
>
> 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.

I first talk about the scheme of Rule 28.6. It sets out grounds a) to i), and as I read Mr. Kotov's allegations, I noted any one incident could fall under several different headings. Secondly the ground must meet a further threshold of "unreasonable,

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demonstrate that she had to forego paid employment or income to prepare for and participate in the motion. Ms. Sheasby-Coleman is recently retired and furthermore has not incurred any expenses, and accordingly I make no order as to costs. Favreau, J.

frivolous, vexatious or in bad faith." That is, not every failure to act in a timely manner will attract costs, it has to meet this threshold. Of the four adjectives, I would consider "unreasonable" to be the lowest bar; the others would attract a higher bar. I would add that the ascertaining of unreasonableness or bad faith is subjective; it is unlikely that a party would openly admit that that was their motive. I have to infer what is unreasonable from circumstantial evidence and indeed in this case, many of Mr. Sellors' motives seemed both unreasonable and counterproductive to his own best interests, for example, claiming he had privilege not to disclose his "deck of evidence" because of "trial tactics", as if the TLAB hearing was a TV courtroom drama. The TLAB has an orderly process for resolution of planning disputes and early and full disclosure is required as part of this process. Rule 28.7 also speaks of "conduct or a course of conduct"; in other words, to apply the test, there may have to be an assessment of a number of incidents over time.

Mr. Kotov lists a number of disrespectful comments from Mr. Sellors: At one point he called Ms. Stewart "Amber", referred to planning examiner Ms. Zaltzman as a "girl" and made submissions prefaced by "an ancient Chinese proverb". When I corrected him, he immediately stopped. Thus, I find that these remarks do not constitute a course of conduct that would attract costs.

The third step is to apply the test that the award "not act as a deterrent". An award of even a nominal amount might act as a deterrent to some. In *116 Armour Road*, Member Takluder quotes Member Makuch: "Therefore, on its face the "commitment" alone [i.e., the commitment not to deter legitimate debate, my interpolation] is difficult to apply on a case by case basis as it amounts to a virtual prohibition against awarding costs."

Although the Rules are couched in terms of "Parties" seeking costs, recent TLAB decisions[9] suggest the usual seeker of costs is the proponent and frequently the proponent mentions the financial costs of delay, which cannot be compensated for under the TLAB Rules[10]. On the other hand, the "does not act as deterrent" principle is meant to support legitimate public debate and testing of issues of neighbourhood concern, even if the end the position of opponents to a development is not accepted.

[9] Costs were refused in 283 McRoberts (March 31, 2021); 362 Rustic Rd (Jan 13, 2020); 17 Garden Place (March 9, 2020); 33 Fernwood Park (June 26, 2019); 641 Huron (March 18, 2019); 57 Bernard (Aug 7, 2019). Costs were awarded in 92 Glenview (Oct 31, 2019), 45 Marilyn (confirmed on review April 8, 2020) and 116 Armour Rd (June 26, 2020).
[10] Mr. Kotov estimated his economic loss as over $100,000, which appropriately, he did not seek to recover.

In *116 Armour Road*, a costs case, the appellant filed no materials whatsoever. The applicant's lawyer pressed for answers. The appellant did retain a lawyer, who was then instructed to file a withdrawal on the eve of the hearing and said that his client agreed to the lot grading plan. This was already agreed to by the owner/applicant so the appeal accomplished nothing. The applicant sought costs. In awarding $5,000 of about $23,000 requested, Member Talukder stated at par. 17:

> Member Makuch noted that the equality of bargaining power between the parties is a consideration. 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).

I now turn to the complained-of conduct in Mr. Kotov's Notice of Motion.

The failed negotiations

Both sides recounted fruitless and in their respective views, "bad faith" negotiations, particularly surrounding the Mr. Sellors' delivery of talking points on November 3, 2020. I am of the view that these types of negotiations, even if unfruitful should not attract costs because it would lead to fear that failed or clumsily handled negotiations could result in a costs award and deter unrepresented persons from entering into negotiations to discuss issues. The opening language of Rule 28.6 points to a concern about this deterrence.

I have considered making an exception to this with respect to a meeting of March 8, 2021. Mr. Kotov wrote:

> Mr. Sellors wrote many times to the TLAB, Ms. Stewart and myself and stated that he had not had an opportunity to review the plans, and alleging that "the community" needed a meeting to understand the plans. We agreed to schedule another Webex meeting, which occurred on March 8, 2021. This meeting was circulated to everyone on the TVCA's mailing list, yet only a handful of people attended. On this call Mr. Sellors proceeded to say that he was in fact familiar with the plans and didn't need the explanation. This meeting was a waste of time and resources for me. Further, some signatories to the original letter of support criticizes (sic) Mr. Sellors and his utter disregard of all the work the community members had undertaken to have a collaborative process that culminated in an agreement.

Rule 28.7 speaks of "a course of conduct"... . This occurred shortly after Mr. Sellors' three summons requests, and I note he used the same language for each request; always requesting "disclosure" as the purpose for the summons, One of the

summonsed persons, Mr. Ursini, is the City planner in this file and is professionally obliged to disclose his planning opinion to the public and would have done so if asked.

March 8, 2021 was also a few days after the release of my interim decision denying an order of mandatory mediation, which Mr. Sellors had publicly rejected in his response to the motion. Had he accepted mediation, he surely could have obtained the disclosure he thought was necessary. On the second day of the hearing, he changed his mind and asked for mediation, which would have torpedoed the three days set aside for the hearing. Treated as a course of conduct, I can understand Mr. Kotov's frustration, but I am of the view that negotiations or failed negotiations should not be sanctioned with costs.

I find that several actions do attract costs;

- The summons issued to Mr. Kelly which falls under f) "acted in a manner the TLAB determined to be improper";
- Non-cooperation and failing file witness statements contrary to Rules 16.2 Disclosure of Documents and 16.7 Participant Witness Statements; and
- The failure to follow procedural rulings, which fall under e) failure to comply with procedural orders, f) caused unnecessary delays, and f) continued to deal with irrelevant issues.

1. The summons to Mr. Kelly

All three of these summonsed persons were either adverse in interest to Mr. Sellors or could be expected to give unhelpful or damaging testimony. I find that part of the impetus for the issuance of the three summonses was to inconvenience or embarrass the summonsed persons. The reason I do so is that Mr. Sellors announced at the outset that Dr. Sas would be testifying and needed accommodation as to his medical duties, but he did not suggest such accommodation for the other three.

The power to compel a person to attend a TLAB hearing is a serious imposition on the witness's day-to-day life. I was shocked at Mr. Sellors' use of legal process in the summons to Mr. Kelly and then fail to ask even a single question. Even as he was being excused, Mr. Kelly explained that should I (the decision maker) change my mind about excusing him, he would return voluntarily. He was fully cooperative, even in light of Mr. Sellors summonsing him and not asking questions.

I find this conduct meets the highest standard in 28.7, "frivolous, vexatious and in bad faith". An award of costs for this reason would not act as a deterrent to a person contemplating becoming a party because few persons would contemplate acting as Mr. Sellors did .

2. Failing to cooperate and disclose

In the opening minutes of the hearing, Mr. Sellors brought numerous preliminary motions and the first four rulings of the June 17, 2021 decision are devoted to the first hearing day, April 7, 2021. I explain in those rulings how Mr. Sellors objected to "late disclosure" when Ms. Stewart filed "Applicant's Disclosure" as required by Rule 11. I also explained why I denied him the opportunity to cross examine Ms. Stewart, the lawyer for Mr. Kotov.

The lack of cooperation in the previous rulings is fairly self-evident. I now explain why Mr. Sellors 'adjournment request was uncooperative. Earlier, I mentioned three summonses; the second was to Mr. Koniuszewski, an intern architect in Mr. Race's office. Mr. Race is Mr. Kotov's principal architect but Mr. Koniuszewski was the person making the formal application.

Since Mr. Race had overall responsibility, Ms. Stewart proposed that Mr. Race be substituted for Mr. Koniuszewski. Mr. Sellors could still ask all the questions he wanted, but it would be to a person with more knowledge. She arranged to have both persons in attendance[11], and in anticipation that Mr. Sellors would accept this arrangement, she furnished Mr. Race's CV some time before the hearing date. The CV could not be furnished by the usual deadline because the summons was requested after the disclosure deadline. Mr. Sellors objected to the "late disclosure" of the CV and asked for a short adjournment to study it. I refused.

This set the stage for the next event, which is when I called on both sides to identify intended exhibits, normally a routine matter. Mr. Sellors advised that he had speaking notes, which he would be using on cross examination of Mr. Dror. I required him to give a copy to Ms. Stewart. Mr. Kotov describes this incident as follows:

> Despite having submitted almost 2000 pages of documents, Mr. Sellors attended at the hearing on April 7, 2021 with 281 pages of slides, much of which had not previously been produced. Despite asking to have the slides marked as evidence, he resisted the TLAB's direction to provide a copy of the slides to the TLAB and Ms. Stewart. He stated numerous times that he did not wish to disclose his "strategy". On subsequent days of the hearing, Mr. Sellors put this document, which had been marked as Exhibit 1, back up on the screen. He continually added more pages to the exhibit, which eventually totalled more than 300 slides. (Kotov affidavit, par 20)

All of Mr. Dror's documents were produced in timely fashion except his reworking of FSI equivalents in reaction to Mr. Mastrangelo's evidence. Mr. Mastrangelo was called out of sequence, at Mr. Sellors' request. I accepted that there was a good reason for Mr. Dror's late filing. Even if Mr. Mastrangelo had testified in the usual order, these

[11] I note that Mr. Kotov has not claimed an amount for those persons' attendances as he could have.

documents could have been produced on Reply.

I find there was no excuse for Mr. Sellors not producing witness statements. Mr. Kotov writes:

> Mr. Sellors did not submit a single Witness Statement on behalf of any of the witnesses he called. As a result, we had no advance notice of their concerns, no understanding of how long their evidence would be, and no ability to pre-plan cross-examination. Ms. Stewart had to deal with the evidence in "real time" and was at a disadvantage in cross-examining the witnesses on their (in some cases more than others) lengthy oral evidence. (Kotov Affidavit, par 25c)

Witness statements, no matter how rudimentary, fulfil an important function. They force the witness to put down their position on paper. This shortens the hearing because a party can see how her or his evidence will be duplicative and could be a ground for costs under g):

> g) whether a Party failed to make reasonable efforts to combine submissions with another Party with similar or identical issues;

However, this Rule does not apply because the only party in opposition is Mr. Sellors and the Rule only targets multiple parties in opposition.

However, the absence of witness statements made it difficult to assess what was Mr. Sellors' evidence and that that of the witness. Mr. Sellors intended that the "historical" evidence be part of Mr. Alves' testimony. Mr. Alves expressed surprise on being led in this direction. Mr. Kotov alleges the absence of independent witness statements allowed Mr. Sellors to "feed answers to Mr. Alves"[12]. I find that this occurred. At times Mr. Sellors would simply state the evidence he wanted to hear from the witness as part of a stream-of-thought commentary.

Mr. Kotov also complains that the timing of Mr. Sellors' witnesses led to a maximizing of discontinuities in Mr. Dror's evidence, who should have been allowed to testify in uninterrupted fashion. Mr. Kotov states:

> Mr. Sellors requested accommodations for witnesses throughout the hearing, interrupting the flow of evidence and causing me to incur additional expense due to Mr. Dror being unable to complete his evidence within a single (or even two consecutive) hearing days.

I find that the flow Mr. Dror's evidence was interrupted and caused Mr. Kotov to incur

[12] Mr. Sellors also interjected repeatedly throughout the cross-examination, attempting to feed Mr. Alves answers with his objections. This extended the cross-examination and was inappropriate since Mr. Sellors was not acting as Mr. Alves' representative. (Kotov affidavit par 16d)

additional expense and that Mr. Sellors contributed to this in the way he conducted his case.

The above five persons' participant election Form 4s are not filed with the TLAB in the usual way; that is, by email from the participant to the TLAB. Instead, they are collected and filed as part of Mr. Sellors' document disclosure. An outside person would have to read all of Mr. Sellors' documentation to find just who should be on the mailing list. This created an obstacle to a late arriving interested person who wanted to participate in the hearing.

I accept that the witnesses called honoured their oaths and gave evidence truthfully, and that they were genuinely opposed to Mr. Kotov's project. However, I find that the lack of witness statements allowed the perception of a cohesive group with no shades of opinion. This is unreasonable and outside the norm and falls under Rule 28.6 b) introducing evidence not previously disclosed; and d) fail to comply with the TLAB's Rules. A person contemplating whether to become a party would not normally think of this and thus would not be deterred.

3. Failure to comply with the TLAB's procedural orders

Mr. Kotov lists 20 examples of d) failure to follow TLAB procedural orders; or b) fail to cooperate with others or the TLAB. I pick out three:

> *April 29, 2021, 10:49 Chair: "I wrote to you and said to be ready today"*
> Sellors: "*That's great for you Mr. Yao"*
>
> 14. May 26, 2021, 5:03:00 Stewart: "*I'm simply asking you to acknowledge that this was an approval for 2.21 times the lot area for FSI…an example of a higher fsi being approved*"
> Sellors: "*It's in our materials but it's not on Howland avenue*"
> 5:05:21 Stewart: "*I'm just asking you acknowledge that an fsi of 1.85X lot area was approved*"
> Sellors: "*this was not built. This was not in the focus area of Mr. Dror's*"
> Stewart: "*My question is whether there was an approval?*"
> Sellors: "*This is not a main artery and not part of the focus study area*"
> Stewart: "*Have you answered my question? I don't think so whether this is an approval for higher than 1.22x the lot area?"*
> Sellors: "*Refused*"
> Stewart: "*Still not answering the question, but heard you say refused so I'll take it and leave it at that*"
>
> 28. May 21, 2021, 7:29:30 Chair: "*The rule is you answer the question and then*

you give an explanation. You've just given an explanation and not answered the question"

Sellors: "*I've done the math, I've showed you my math…*"

Chair: "*That's not an answer that's a refusal to answer. Do you get 5229 when you do the math?*"

Sellors: "*I'm not here to do math…you want me to do real time metric conversions so that she can get a quote. I don't think so sir*"

When this rejection comes from a lawyer, there are rules of professional conduct for lawyers that require that lawyers refrain from petty or intemperate criticism of a tribunal [13] Mr. Sellors is not a lawyer and I cannot hold him to this standard.

However, a tribunal has to establish norms, even for unrepresented parties and those parties must accept the ruling of the decision maker. Those that disagree, as is their right, must follow the prescribed appeal process and not turn the tribunal process into an endless quarrel; otherwise, there is not resolution to the planning disputes. S. 1.1 (d) of the *Planning Act* state one of the purposes of the Act is to provide for planning processes that are fair by making them "open, accessible, timely and efficient".

I find that Mr. Sellors' constant questioning of TLAB procedural rulings did not provide for a planning process that was either timely or efficient. On April 21, 2021, in discussing scheduling, I asked him what testimony remained:

Mr. Sellors: I am here today to schedule the rest of the hearing. I would like to address some of the other issues. Um Mr. Kelly. Um **as he was sent back prematurely before he was finished or even start any questioning**. . . . There's certainly the issue of Mr. Kotov being cross examined. And that has to be discussed. As well there is Ms. Irish. And Ms. Sung presenting, which has been on the agenda since April 20th or something when I sent over what I proposed we needed. I would also like to clarify that . . .I required three days for my information to be

[13] Rule 5.6 [3] Criticizing Tribunals - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate, or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, where a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because in doing so the lawyer is contributing to greater public understanding of and therefore respect for the legal system

> presented to this tribunal. We were only granted one day, until a month before all this started, and there were two additional days granted um when Ms. Stewart asked for more days and none for me um so I just want to make it clear that that really at best at this point we're really only half a day longer and I think it is really due to the new information that was being submitted around FSI **and the ever changing information** from the expert witness Mr. Dror who **I have been unable to complete my cross examination of.** So, again I'd ask . .
>
> Chair: Um Mr. ah ...
>
> Mr. Sellors: If I could finish, thank you. . .
>
> Chair: Alright, go ahead
>
> Mr. Sellors: . Thank you so much. Um **even the other day there were numerous interruptions** when I was trying to cross examine Mr. Dror, um besides from that. I have provided dates which I'm available which aren't in the distant future and I have arranged my schedule to accommodate the best I can which obviously was a great mistake.

Mr. Kotov states the whole discussion was unproductive[14] and I agree. This constituted conduct that was "unreasonable, frivolous, vexatious and in bad faith". A person contemplating becoming a party would understand that a decision maker would hear their evidence and could possibly make adverse rulings or make procedural orders that must be followed.

Rudeness to the Chair

Mr. Kotov writes:

> Ground 6 [i.e. Rule 28.6h]]: Acted disrespectfully and maligned the character of another Party or Participant
> 1. Once again, there were numerous examples of Mr. Sellors acting in a disrespectful manner and maligning the character of other attendees, including witnesses and the Chair (shockingly).

[14] On the hearing date that had been scheduled for April 29, 2021, Mr. Sellors indicated that his time conflict was only due to a phone call, and he refused to co-operate by completing the phone call and returning to convene the prescheduled hearing in accordance with Chair Yao's direction. This resulted in an unproductive attendance and a wasted day. Due to Mr. Sellors' use of the time during that call (making complaints) and his refusal to remain beyond a half hour, substantive concerns such as the appropriateness of Ms. Sung providing evidence were not discussed. Other parties were in attendance and ready to proceed.

2. On May 21, 2021, Ms. Stewart was in the midst of cross-examining Mr. Sellors, and the Chair implored him to simply answer the questions being asked of him. Mr. Sellors made statements to the effect that Ms. Stewart and the Chair were ganging up on him and that they were both lawyers and subject to rules of professional conduct. The inference was clear to all; Mr. Sellors was insinuating that their behaviour was a breach of Law Society Rules, when it was perfectly legitimate cross-examination (please note that I am a lawyer by background, and I am familiar with these matters). The Chair stated the obvious at 6:57:31 "I see, are you going to make a complaint to the Law Society against Ms. Stewart and me?".
3. Mr. Sellors was generally rude in tone and language, often when addressing the Chair. Some of the many examples include: April 7, 2021, 3:30:00

> Sellors: "my question to you 10 minutes ago before we went on this journey was.."
> Chair: "Mr. Sellors, I interpret that as being kind of rude. I'm trying to establish a process here. I can't help it if you aren't exactly following the process…I don't appreciate you saying to me when I'm trying to intervene that we go on a journey. I think frankly I'm going to call a break."
> Sellors: "Thank you Mr. Chair will I get to ask questions when we get back"
> Chair: "Mr. Sellors I think you better think first then talk later"

Rule 28.6h reads:

h) whether a Party acted disrespectfully and maligned the character of another Party or Participant

I interpret the "and" in this Rule as conjunctive and there is no ground that disrespectful action by itself can attract costs. The disrespectful action must be in relation to another party. Mr. Kotov then lists numerous statements in which it is alleged that Mr. Sellors maligned Ms. Stewart, Mr. Dror, and the plan examiner Ms. Zaltzman. I find all these persons are not "another party". Mr. Kotov says he was maligned:

> Mr. Sellors has also maligned my character numerous times in a public forum, through communication that was frequently shared with the TLAB, City staff and Councillor Matlow, and the community at large. On March 2, 2021, I wrote to Mr. Sellors and demanded that he stop doing so; a copy is attached as Exhibit F. Exhibit F also includes prior emails, which contain some but not all of these maligning comments. Mr. Sellors made accusations that the FSI, GFA, and mass of the project was never disclosed. He insinuated that I would be operating a rooming house, with over 30 people living in the units. He suggested numerous times that my project would destroy the community, and that my past projects are atrocious. He accused me of "extortion" during the negotiations prior to the Committee hearing, where nothing could be further from the truth. Making these comments prejudices my reputation in the community and with the City. Given that I am active in developing properties in this community, the reputational damage caused by Mr. Sellors' misinformation campaign could have serious and lasting financial implications. For example, on May 26, 2021, at 7:08:20, Mr. Sellors stated the following in open session at the TLAB hearing: Sellors: "I think your client is running a fund to maximize profits for investors and that's now causing bad planning." (Kotov Affidavit ground 6, par 6)

All but one of these statements were made outside the TLAB hearing, where it is difficult for me to judge the context, tone of voice etc. I find the statement made in the hearing in the last sentence to be maligning. After the hearing a person listed as a potential witness in Mr. Sellors 'materials wrote:

> I'll stop harassing you. But stop building [expletive] [expletive] [expletive] buildings. You are an interloper block buster and I'm working to save 367 Howland.

This is offensive but it was not from Mr. Sellors, so it also does not fall under ground g). Mr. Kotov concludes this section of his affidavit as follows:

> I conclude that it is impossible to convey the extent to which Mr. Sellors acted rudely and disrespectfully during the hearing, and the extent to which his sarcastic tone conveyed the negative implications of his words. It is necessary to have either participated in the hearing or to review the video of the proceedings to get the full picture. Despite his behaviour, other attendees in the hearing process were, for the most part, entirely patient and respectful. (Kotov Affidavit ground 6, par 16)

I now move to the formal assessment of the costs.

Calculation of the costs

Costs mean costs as awarded by the Courts: that is, fees and disbursements[15]. The task is not only to assess whether costs are payable, but also their quantum. I am somewhat in the position of an assessment officer who is specifically directed to consider steps that unnecessarily lengthened a hearing.[16]

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[15] 58.05 (1) If costs are to be assessed, the assessment officer shall assess and allow,
(a) lawyers' fees and disbursements in accordance with subrule 57.01 (1) and the Tariffs; and
(b) disbursements for fees paid to the court, an authorized court transcriptionist, an official examiner or a sheriff under the regulations under the *Administration of Justice Act*. (Rules of Civil Procedure)

[16] 58.06 (1) In assessing costs the assessment officer may consider,
(a) the amount involved in the proceeding;
(b) the complexity of the proceeding;
(c) the importance of the issues;
(d) the duration of the hearing;
(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
(f) whether any step in the proceeding was,
  (i) improper, vexatious or unnecessary, or
  (ii) taken through negligence, mistake or excessive caution;
(g) a party's denial of or refusal to admit anything that should have been admitted; and
(h) any other matter relevant to the assessment of costs. (Rules of Civil Procedure)

In *92 Glenview*, a costs decision, the TLAB awarded 100% of the costs claimed by the proponent, including economic loss. I agree with Mr. Kotov that the neighbour appellant's behaviour (in *92 Glenview*) was more reasonable than Mr. Sellors' behaviour here. However, I am not awarding 100% of the claim or even 75%.

A proponent in the development business must expect there may be some opposition, no matter how painstaking the consultation process. In *210 Seaton*, with many of the same elements as this case: rental housing, City non-objection, a local ratepayer group that was consulted but did not intervene; that hearing took two days. This has to be regarded as the norm and would not attract costs. The planning process "builds in" the fact that a neighbour, even one who is "difficult", may at the end of the day, contribute to the public interest in raising an issue that should have been considered or testing the proponent's evidence. In TLAB matters, there is no right to development approval; the proponent has the obligation of establishing to the tribunal that the legislative tests set out in the *Planning Act* are met. However, the proponent has a right to expect that in coming to the TLAB, all parties will respect the adversarial process, which has norms, and that the TLAB will enforce those norms, even for non-lawyer litigants.

The second matter to consider this that costs are not a usual part of the planning process; they are rarely demanded and the Rules have explicit policies that prevent the TLAB from acting like judge, whose usual task is to determine costs as well as the result. Costs are built into the system in the courts but our Rules are different.

Even courts do not impose 100% of costs actually incurred. The Rules of Civil Procedure distinguish between a "partial indemnity scale" and "substantial indemnity". Neither is complete indemnity. The differential is used to promote the acceptance of offers made before trial. In *Hanis v. The University of Western Ontario et. al.*, 2006 CANLII 23155 (ON SC), [2006] O.J. No. 2763 (S.C.J.), Power J. deduced that partial indemnity was 60% of the full bill, as a "rough estimate"[17] and thus Mr. Kotov's 75% would be too high even if this were a successful civil court action.

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17 Par 46 . . .however, the hourly rates claimed on the substantial indemnity scale, are in my opinion, too high. Rule 1 defines "substantial indemnity costs" as meaning costs awarded in an amount that is 1.5 times what would otherwise be allowable in accordance with Part 1 of Tariff A — i.e. 1.5 times the partial indemnity rate. Costs calculated on a substantial indemnity scale, obviously represent something less than full indemnity. By way of example, if the actual fees charged by the lawyer to his client, for instance, $300 per hour, and if $300 is acceptable as an appropriate hourly rate in the circumstances, the partial indemnity rate should be something in the range of 60% of that amount or $180 per hour. This equates to something in the range of 90% of the fees actually being charged to the client, i.e. full indemnity. [for substantial indemnity, my interpolation] These numbers, needless to say, are simply rough estimates of the relationship between the three levels of costs – i.e. 60%, 90% and 100%

If I were to assess costs in according with some lower percentage, I would regard the lengthening of the hearing as in the order of causing two wasted days to the lawyer's bill and four for the planner's bill. The TLAB website lists hearing days as follows:

(Day 1) Wednesday, April 7, 2021
(Day 2) Thursday, April 8, 2021
(Day 3) Monday, April 12, 2021
(Day 4) Tuesday, April 27, 2021
(Day 5) Thursday, April 29, 2021
(Day 6) Friday, May 21, 2021
(Day 7) Wednesday, May 26, 2021

Mr. Dror attended Days 1, 2, 3 and 4, when he finally completed his cross examination. I have allowed four 9-hour days for Mr. Dror.

Ms. Stewart attended throughout and was subjected to a great deal of criticism but that "goes with the territory" where there is neighbourhood opposition. Mr. Dror was also subject to egregious disrespect; in effect Mr. Sellors called him a liar and this was uncalled for and vexatious. Mr. Dror was under oath; it is a serious matter professionally and legally to lie under oath. I find he did not lie under oath. The Rules say there is sanction only for maligning another party; not his witness. I can consider this behaviour as attracting an award of costs under: b) failed to cooperate; e) caused unnecessary delay; and f) asked questions or acting in a manner the TLAB considered improper.

Mr. Sellors requested and received accommodation for scheduling witnesses which cut into the continuity of Mr. Dror's presentation. A witness who has to put down a file and then take it up days or weeks later has to do much needless work. Mr. Dror was under cross examination at 6:45 PM of Day 3, when Mr. Sellors refused to continue his cross, saying he was "exhausted '(Ruling 6). Mr. Dror, as a witness under cross examination was ethically unable to communicate with Ms. Stewart until Day 4, two weeks later. This lengthened Mr. Dror's preparation time. He was Mr. Kotov's sole witness.

Mr. Dror's hourly rate is $179.

4 days x 9 hours per day x $179 = $6,444.

Ms. Stewart's hourly rate is $425; which was discounted 20% = $340.

2 days x 9 hours per day x $340= $6,120.

Dror bill	$6,444
Stewart bill	$6,120
Subtotal	$12,564.00
GST 13%	$1,633.32
Total	$14,197.32

Final considerations in the light of *Zesta*

The Court of Appeal decision of *Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577 (ON CA) states:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant

In accordance with the direction to be fair and reasonable, I reexamine the costs award, both as to whether any costs should be awarded at all, as well as their quantum.

Most TLAB decisions to date scrutinized the non-meritorious nature of an appellant who launched a non-meritorious appeal, delaying the proponent and causing unnecessary (in the proponent's estimation) delay. The day to day conduct of the appellant as self-represented litigant during a lengthy hearing has not frequently been discussed.

Another distinguishing element is that I have found that Mr. Sellors has used TLAB procedures themselves for improper purposes, such as the issuance of a summons to Mr. Kelly without asking questions. I found that this delayed and frustrated the expeditious determination of the proceeding (Rule 2.2).

I conclude that by any measure, Mr. Kotov deserves some of his costs. He "played fairly" and deserves credit. But this is not about his character but about whether delay was caused. The Rules state there should be a "commitment" not to deter public participation. Each member will have their own perception as to how a costs award might affect that commitment, as Member Makuch said, "on a case by case basis". In my estimation, a fair and reasonable costs award is $14,197.32.

DECISION AND ORDER

The costs motion is not consolidated with the pending review request, nor is it stayed or adjourned. I award 367 Howland Avenue Inc. costs of $14,197.32 against Bradley Sellors. Interest will commence to run October 1, 2021 in accordance with the *Courts of Justice Act*, to give Mr. Sellors time to pay without incurring interest.

Ted Yao
Panel chair, Toronto Local Appeal Body