Toronto Local Appeal Body

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MOTION DECISION AND ORDER

Decision Issue Date Monday, January 10, 2022

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): MARQUIS MANORS LTD

Applicant(s): EPIC DESIGN INC

Property Address/Description: 8 YORKLEIGH AVE

Committee of Adjustment File

Number(s): 19 264691 WET 02 CO, 19 264696 WET 02 MV, 19 264697 WET 02 MV

TLAB Case File Number(s): 20 189558 S53 02 TLAB

Last Submission date: March 22, 2021

DECISION DELIVERED BY S. Karmali

REGISTERED PARTIES AND PARTICIPANTS

Name	Role	Representative
Epic Design Inc.	Applicant/Agent	
Marquis Manors Ltd.	Owner/Appellant/Responding Party	David Neligan
Joseph Kennedy	Moving Party	Brendan Ruddick
Allan Ramsay	Expert Witness	

INTRODUCTION

This motion for costs ultimately arises from Marquis Manors Limited (MML) request to withdraw its TLAB consent appeal [Section 53(19) of the *Planning Act*] nearly six weeks before the scheduled hearing on the merits. Mr. Joseph Kennedy, the Moving Party, incurred costs to prepare for the hearing. Accordingly, he seeks actual costs against Marquis Manors Limited (MML), the Responding Party, for $14,500.16, of which $7,070.41 is for legal costs and $7,429.75 is for planning consultant costs. The requested legal costs include preparation for this motion (Exhibit 1C pdf p.10 of 13).

The Committee of Adjustment (COA) refused MML's development applications for severance and variance. MML, through its agent, filed an appeal in respect of the refused consent application (consent Appeal). TLAB Staff issued a Notice of Hearing for the consent Appeal. Whereas Mr. Kennedy complied with the procedural and document exchange deadlines stipulated on the hearing notice, MML did not.

Moreover, MML alleges that its agent neglected to file TLAB appeals for the two refused variance applications. Since it is not possible for a consent Appeal to constitute an appeal of the variance matters, the Appellant would have needed to file two additional appeals. However, it could not file these appeals because the appeal period deadline had passed, and the opportunity to appeal had expired with it. Instead, MML, on the advice of its counsel, opted to file revised variance applications to the COA. Its thinking was that if the COA refused the revised variance applications, MML would file appeals of those refusals and then request they be consolidated with the ongoing consent Appeal.

MML, through its counsel, eventually explained the situation to Mr. Kennedy and sought an adjournment. Mr. Kennedy, through his counsel, expressed his unwillingness to consent to an adjournment. MML did not seek a contested motion for an adjournment. Instead, it formally requested a withdrawal of its consent Appeal, which I accepted.

MATTERS IN ISSUE

The matter in issue on this Motion is whether costs should be awarded and, if so, in what amount.

JURISDICTION

The TLAB has authority to order costs subject to the Rules of Practice and Procedure as set out below.

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

Determining the outcome of a motion for costs award is a factual inquiry regarding the conduct against whom costs is claimed.

I mark the following as Exhibits in this written motion:

Exhibit 1A: Form 7 Notice of Motion dated March 10, 2021

Exhibit 1B: Form 10 Affidavit of Mr. Kennedy, including attachments, dated March 10, 2021

Exhibit 1C: Form 9 Notice of Reply to Response to Motion dated March 22, 2021

Exhibit 1D: Form 10 Affidavit of Mr. Kennedy, including attachments, dated March 22, 2021

Exhibit 2A: Form 8 Notice of Response to Motion dated March 17, 2021

Exhibit 2B: Form 10 Affidavit of Mr. Paul Mior (President of MML), including attachments, dated March 17, 2021

On November 18, 2020, Mr. Kennedy properly disclosed his intention to be a Party in the TLAB hearing scheduled for February 22, 2021. MML requested to withdraw its consent Appeal on January 12, 2021. On January 25, 2021, I dismissed MML's consent Appeal, which cancelled the scheduled hearing on the merits date and ended the proceeding.

On March 9, 2021, the TLAB received a Notice of Motion for costs from Mr. Brendan Ruddick, who is named as the authorized representative for Mr. Kennedy. Rule 28.2, however, stipulates that in all cases a request for costs shall be made no later than thirty days after the TLAB issues its written decision. On a plain reading of this rule, it was imperative for Mr. Kennedy to make his move for costs by February 26, 2021, which is thirty calendar days from the date I accepted MML's request to withdraw.

I recognize the Moving Party did not seek relief for an extension of time for me to consider the costs motion. At the same time, the Responding Party did not raise Rule 28.2.

I am aware there exists some irony in that the motion itself is in part about respecting fixed and definite dates. Still, costs sought at the TLAB typically arise when the hearing on the merits has been adjudicated and has reached its end. In this case, although there has not been a hearing on the merits, out of fairness for the Moving Party and Responding Party, I think it is appropriate and just to consider and completely adjudicate the motion.

To adjudicate the motion, I am guided by Member Lombardi's comments in *362 Rustic Road*, a cost award decision in which he wrote: "Even where a cost award can be considered, it is a higher threshold for unreasonableness, frivolous, vexatious or bad faith behaviour or conduct to be made out." This is central to the TLAB's threshold for relating to costs. I am also mindful that awarding costs should not act as a deterrent to those who would like to become a party to a TLAB proceeding.

I have considered the cost submissions from the Moving Party and the Responding Party up to March 22, 2021. Both parties were initially unaware of the TLAB process. Unlike the Moving Party who, to some extent, worked to familiarize himself with TLAB procedures, the Responding Party simply trusted his agent to file and manage his desired appeals (Exhibit 1D pdf p. 3 of 8; Exhibit 2B pdf p. 3 of 10).

The Moving Party provided a breakdown of associated rates, fees, and disbursements as well as copies of supporting invoices for expenses claimed. An Affidavit (sworn) of Mr. Kennedy was also provided, verifying that the expenses were properly incurred. In addition to providing an Affidavit (sworn) of Mr. Mior, the Responding Party, through its counsel, provided an erudite response.

The Moving Party claims the Appellant took an unreasonable and frivolous course of conduct from which legal fees and disbursements and planning consultant fees and disbursements were incurred directly and necessarily by Mr. Kennedy. Specifically, the Moving Party alleges that the Appellant changed his position without notice, failed to act in a timely manner, failed to adequately prepare for the scheduled hearing, including failing to present written evidentiary filings, and failed to comply with the TLAB's Rules and procedural orders (Exhibit 1A pdf p.11 of 13).

The Moving Party pointed out that frivolous signifies a lack of seriousness and unreasonable reveals that the conduct in question was not right, not fair and that the person whose conduct is in question ought to be obligated to another in some way (Exhibit 1A pdf p.10-11 of 13).

The TLAB is committed to fixed and definite dates and the Rules should be interpreted in a manner that facilitates this objective. I agree with the Moving Party that a TLAB appeal must be taken seriously and pursued with diligence (Exhibit 1C pdf p.12 of 13). It is not clear why MML did not make reasonable inquiries with its agent early on as it was the agent who had carriage over its severance and variance land-use interests. I note the Appellant received the hearing notice and would have therefore observed obligations and deadlines to meet in preparation for the scheduled hearing.

I accept that upon honestly discovering its agent's alleged critical errors – namely, the failure to file documents and failure to file appeals for the refused variances - MML acted with seriousness to retain a lawyer, Mr. David Neligan. This was done almost forty-five days before the scheduled hearing date albeit sixty days after the Appellant's disclosure (Form 3) was due. Nevertheless, disclosure was not filed.

Mr. Neligan explained the errors to the other side and that his client was unfortunately out of time to file appeals for the refused variance applications. Accordingly, Mr. Neligan asked the other side for their consent to adjourn the scheduled TLAB hearing date so that the "revised" variance applications, presuming the COA would refuse them, could "catch up" to the consent Appeal and be considered for consolidation (Exhibit 2A pdf p.10 of 11).

I agree, in theory, that it would not be efficient to proceed with a hearing of the consent Appeal independent of appeals for the refused variance requests. In fact, the TLAB Public Guide states: "It is important that consideration be given to the appeal of all related matters to an address with applications of interest" (p.10 of 38). I also read that some of the variances the COA refused were necessary to permit the proposed reduction in lot frontage and lot area resulting from the proposed severance (Exhibit 1B pdf p.4 of 10).

Although Mr. Kennedy decided not to provide his consent to adjourn the scheduled hearing, I find it curious that MML did not then decide to bring a contested motion for adjournment for the TLAB to properly consider. Even if the other side strenuously objected to the motion, it would be up to MML to make its case.

With no motion on consent in hand for adjournment and no attempt at a contested motion, the Responding Party submitted a revised consent and variance proposal to the COA. It then requested to withdraw its existing consent Appeal to "save everyone further time and expense" (Exhibit 2A pdf p.8 of 11).

I cannot completely accept that the Appellant's request to withdraw was "the most reasonable course of action" (Exhibit 2A pdf p.9 of 11). I also cannot completely accept that the request to withdraw was consistent with securing the most just and cost-effective determination. In my view, although it could be thought of as "swift and determinative", the Appellant's request to withdraw was not the most just course of action considering that the other side invested time and expense to adequately prepare for the hearing on the merits. On the other hand, avoiding a multiplicity of hearings on the same topic could be viewed as moving in the direction of cost-effectiveness (Exhibit 2B pdf p.6 of 10).

At the same time, I cannot accept the Moving Party's assertion that their costs to prepare for the hearing are "wasted" (Exhibit 1A pdf p.11 of 13). The Appellant's pursuit of land-use permissions does not appear to be abandoned in the grand scheme of things (Exhibit 2A pdf p.10 of 11).

The Responding Party communicated to the Moving Party that should the COA refuse the revised applications for consent and variances, TLAB appeals would be sought, and the Moving Party could, again, become a party and rely on the evidence of its planning consultant (Exhibit 2A pdf p.10 of 11). On the other hand, if the COA approved said applications, the Responding Party would expect the Moving Party to file TLAB appeals, at which point the evidence of the Moving Party's planning consultant may be relied on. Of course, this is speculative.

That the Appellant failed to act in a timely manner, failed to adequately prepare for the scheduled hearing, and suddenly changed its position is, overall, unreasonable in my view. It was open to the Appellant to seek an adjournment albeit on a contested basis. Withdrawing the matter placed the land-use issues outside of the TLAB process and created uncertainties for Mr. Kennedy who seems to have adequately prepared for the scheduled hearing on February 22, 2021.

Mr. Kennedy adhered to the TLAB timelines on the hearing notice. I am satisfied that he has provided sufficient evidence that justifies an award of costs against the Appellant.

However, I believe the Appellant's attempt to seek an adjournment on consent was done in good faith. I take note that the Appellant's request to withdraw was not done at the eleventh hour. And, I do understand this is an unfortunate situation in which the Appellant finds itself.

Accordingly, I do not award costs on a full indemnity or substantial indemnity basis.

I grant an award of costs in the amount of $3,000.00 payable by the Appellant to Mr. Kennedy.

DECISION AND ORDER

Costs are awarded against the Appellant, Marquis Manors Limited, in the amount of $3,000.00 payable to Joseph Kennedy. The Appellant shall pay the costs forthwith within sixty days following issuance of this Decision and Order by the TLAB. Costs shall bear interests at the same rate as under the *Courts of Justice Act,* as per Rule 28.8.

X 

Sean Karmali
Panel Chair, Toronto Local Appeal Body