

MOTION DECISION AND ORDER

Decision Issue Date Friday, November 25, 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): SHIN YEONG KANG

Applicant: SOUVIK MUKHERJEE

Property Address/Description: 120 HENDON AVE

Committee of Adjustment Case File Number: 20 143409 NNY 18 MV (A0274/20NY)

TLAB Case File Number: 20 202821 S45 18 TLAB

Hearing date: Wednesday, April 21, 2021

DECISION DELIVERED BY Panel Member S. Makuch

REGISTERED PARTIES AND PARTICIPANTS

Appellant	Shin Yeong Kang
Applicant	Souvik Mukherjee
Party	City of Toronto
Party's Legal Rep.	Jason Davidson
Party	Souvik Mukherjee
Participant	Andrew Lee
Participant	Sungdae Choi
Participant	Wantae Kim
Expert Witness	Michael Romero
Expert Witness	Kadambini Pandey
Expert Witness	Carolyn Winsborough

INTRODUCTION

This is a motion for costs arising out of a number motions and hearings including two review requests, all of which respected a variance to permit an alteration to the height of an existing garage. Although the Committee of Adjustment granted the variance it was appealed by a neighbour, Mr. Kang.

BACKGROUND

The essential issue throughout was the current height of the existing garage and therefore what its proposed height would be. The applicant, Mr. Mukherjee, at no time brought any reliable evidence as to the actual height of the garage, and, therefore, no reliable evidence as to the impact of the proposed height. As I stated in a Review Decision dated March 22, 2022 "the applicant gave no clear evidence, at the hearing on the merits or at the review hearing, regarding the height of the existing garage which the TLAB member could have relied for his decision."

MATTERS IN ISSUE AND EVIDENCE

Mr. Kang brings this motion for cost for a number of reasons related to Mr. Mukherjee's alleged conduct. The allegations of misconduct included: dishonesty, a failure to act respectfully, and a failure to cooperate. In doing so the appellant relies on his own affidavit. The only issue of substance I find, however, is Mr. Mukherjee's failure to present evidence related to the height of the garage. In his evidence at all of the hearings, including in his evidence in response to this motion, Mr. Mukherjee does not give reliable evidence regarding this issue. As a result Mr. Mukherjee, who must demonstrate that the variances meet the four tests of the Planning Act, and in particular that the height variance is minor and desirable, did not properly identify the required variance and its impact. He failed to present evidence in this respect and, indeed, the evidence he did give was often perplexing. He, for example, gave evidence of: different actual heights, altered plans which created confusion about the actual height, and stated that the height could not be determined because of raccoon feces within the garage.

JURISDICTION

Rule 28 of the TLAB Rules of Practice and Procedure, which governs the awarding of costs states that in awarding costs the following may be taken into account: " f) whether a Party failed to present evidence," and " i) whether a Party presented false or misleading evidence". Rule 28.7 provides that: "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."

ANALYSIS, FINDINGS, REASONS

I find that the Mr. Mukherjee gave no evidence of substance, at the hearings on the merits or the review hearings, regarding the actual height of the existing garage which the TLAB member could have relied upon for his decision. Moreover, when Mr. Mukherjee presented evidence, it was simply confusing respecting the height as different heights were stated to be accurate. As a result an award of costs can be made. Moreover, I find it appropriate to award costs since Mr. Mukherjee's conduct was unreasonable; it required Mr. Kang to expend funds to retain legal assistance to specifically deal with Mr. Mukherjee's application at numerous hearings when Mr. Mukherjee could have had the height of his garage easily and properly determined and presented such evidence. His conduct, I find, was, therefore, unhelpful. While costs should be awarded sparingly as TLAB does not wish to discourage parties from participating in its appeal process, such conduct as that of Mr. Mukherjee should clearly be discouraged. If Mr. Mukherjee had conducted himself reasonably, Mr. Kang would not have had to expend funds for professional assistance. Cost should therefore be awarded to restore Mr. Kang to the position he would have been in had Mr. Mukherjee not put him in the position of needing to retain professional help.

Finally, I find that there is no adequate challenge to the fees demonstrated to have been spent by Mr. Kang in retaining legal counsel and that the request for \$4000.00 is appropriate.

DECISION AND ORDER

An award of costs is hereby made in the amount of \$4,000.00, payable forthwith.

X 

S. Makuch
Panel Chair, Toronto Local Appeal