



# Toronto Local Appeal Body

40 Orchard View Blvd, Suite 253  
Toronto, Ontario M4R 1B9

## MOTION DECISION AND ORDER

**Issuance Date:** April 8, 2024

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): D. J. ROSS  
Applicant(s): K. AHIR  
Property Address: 169 PARKMOUNT RD  
COA File No.: 23 178780 STE 14 MV (A0658/23TEY)  
TLAB Case File No.: 23 217787 S45 14 TLAB

Hearing Date(s): February 20, 2024

Decision Delivered By: A. Bassios

### REGISTERED PARTIES AND PARTICIPANTS:

<i>People Type</i>	<i>First Initial. Last Name</i>	<i>Representative</i>
<i>Appellant</i>	D. J. Ross	A. Garde
<i>Applicant</i>	K. Ahir	
<i>Party (TLAB)</i>	City of Toronto	D. Abimbola U. Gautam
<i>Party (TLAB)</i>	L. Kalafatides	W. Roberts
<i>Participant</i>	C. Aenishanslin	
<i>Participant</i>	C. Soulodre	
<i>Participant</i>	C. V. Warzycki	
<i>Participant</i>	S. Wilson	
<i>Participant</i>	L. Dufault	
<i>Participant</i>	J. Delago	
<i>Participant</i>	R. Golden	
<i>Participant</i>	K. Hull	
<i>Participant</i>	D. Wandel	
<i>Participant</i>	M. Davis	
<i>Participant</i>	M. Brown	
<i>Participant</i>	K. Blair	
<i>Participant</i>	B. Aenishanslin	
<i>Participant</i>	M. Bynoe	
<i>Participant</i>	B. Washbrun	
<i>Participant</i>	R. Delago	
<i>Expert Witness</i>	M. Manett	

## **INTRODUCTION AND CONTEXT**

- [1] This is a Motion for Costs filed by Ms. Kalafatides against D.J. Ross, the Appellant and Owner of the subject property, 169 Parkmount Rd.
- [2] On October 4, 2023, the Committee of Adjustment refused the variances requested for the Committee file number set out above. An appeal was submitted by Appellant D. Ross. Ms. Kalafatides elected Party status in this matter.
- [3] A Hearing date was scheduled for February 20, 2024. On February 5, 2024, an email withdrawing the Appeal was received by the Toronto Local Appeal Body (TLAB) from the Appellant's representative.
- [4] The Motion for Costs was heard on the date that had been scheduled for the hearing of the appeal, February 20, 2024.
- [5] The relief sought in the Notice of Motion is as follows:

Linda Kalafatides requests:

- A) An order for costs, on the basis that:
- i. The Appellant has failed to meet the requirements for evidentiary submission pursuant to the TLAB Rules of Practice and Procedure;
  - ii. The Appellant failed to act in a timely manner;
  - iii. The Appellant failed to comply with the TLAB's Rules or Procedural Orders; and
  - iv. The Appellant has caused or will cause unnecessary adjournments, delays or failed to adequately prepare for a Proceeding.

- [6] (For convenience, I will refer to Mr. Ross as the Appellant and to Ms. Kalafatides as the Respondent, following the language of the Motion materials).

## **THE LEGISLATIVE POLICY AND FRAMEWORK**

- [7] STATUTORY POWERS AND PROCEDURE ACT (SPPA)

### **Costs**

17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding. 2006, c. 19, Sched. B, s. 21 (2).

### **Exception**

- (2) A tribunal shall not make an order to pay costs under this section unless,
- (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
  - (b) the tribunal has made rules under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

[8] TLAB RULES OF PRACTICE AND PROCEDURE (TLAB RULES)

## **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 any person connected with the Hearing; 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.

28.9 In no case, where a Party has brought a Motion requesting an award of costs against a Party or Parties in a Proceeding, shall an award of costs be greater than:

- 100% of disbursements
- 90% of planners' or analogous professionals' fees; and
- 60% of the fees of a legal representative.

## **SUMMARY OF EVIDENCE**

- [9] The Appellant directed that an appeal of the COA decision be filed by his Legal Representative at the time, Mr. Martin Mazierski.
- [10] On December 5, 2023, Mr. Mazierski ceased to act for the Appellant and notified the City, the only registered Party at the time, and the TLAB.
- [11] In his communication notifying the TLAB, Mr. Mazierski asked that his name not be listed on the People List<sup>1</sup> and that all communications be sent directly to the Owner.
- [12] Due to an oversight by TLAB staff, Mr. Mazierski's name was included on the People List and was not removed until after Mr. Roberts (representing the Respondent) contacted him to enquire why Witness Statements had not been filed.
- [13] Witness Statements and Expert Witness Statements were due no later than January 8, 2024. The Expert Witness Statement of the Respondent was filed with the TLAB within the deadline. Witness statements were not filed on behalf of the other two Parties (the City, and the Appellant).
- [14] On January 30, 2024, the Appellant filed revised plans, well beyond the Disclosure deadline of November 27, 2023. No Witness Statements or Expert Witness Statements supporting the Appeal were filed by the Appellant in the course of these proceedings.
- [15] Ultimately, the Appeal was withdrawn two weeks prior to the set Hearing date, and the decision of the COA was affirmed.
- [16] The central assertion in the Motion Materials is that the actions of the Appellant caused the Respondent to bear costs that otherwise she might not have had to bear and further, that the conduct taken as a whole is unreasonable, frivolous, vexatious or in bad faith.
- [17] The Motion Materials assert that Applicants should be discouraged from appealing unless they intend to fully engage in the process.

## **ISSUES AND ANALYSIS**

- [18] The consideration of costs at a tribunal like the TLAB is premised on a different approach than the civil courts, where costs are more routinely awarded to the "winner".
- [19] The Statutory Powers and Procedure Act (SPPA) applies to a proceeding by a tribunal, like the TLAB, in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by, or under such Act... to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision.

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<sup>1</sup> A list of Parties, Participants, Experts and Legal Representatives included in the public documents collection on the City's Application Information Centre electronic file.

[20] Under this governing legislation, the TLAB may make an award for costs where the conduct or course of conduct of a party has been *unreasonable, frivolous or vexatious or a party has acted in bad faith*.<sup>2</sup>

[21] This threshold is replicated explicitly in TLAB Rule 28.7.

[22] TLAB Rule 28.6 places this caveat at the beginning of the section on Considerations for Costs Award: 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.

[23] The information in the Motion materials is not organized in a way that identifies the specific conduct that supports each part of the claim. This makes it difficult to understand which parts of the materials are intended to substantiate the four specific contraventions that are claimed. (Paragraph 5).

[24] In summary terms, the narrative for the Respondent's complaint is as follows:

- She was not notified that the Appellant had dispensed with the services of his legal representative after filing the Appeal. She proceeded to retain the services of a solicitor and a planning consultant because she thought he had a lawyer, and this caused her to incur expenses of approximately \$40,000.
- The Appellant did not file a Witness Statement or an Expert Witness Statement.
- The Appellant attempted to revise his proposal via an Applicant Disclosure which was submitted well after the due date and after the Expert Witness Statement and Witness Statements of other Parties and Participants had been submitted.

#### Choice of Representation

[25] The TLAB is committed to sustaining an accessible forum for the resolution of land use disputes within its mandate. A lawyer is not required for hearings before the TLAB. Similarly, expert witnesses are not required for a TLAB proceeding.

[26] Persons unfamiliar with the land use planning process and the procedures of the TLAB can, and have been, successful in achieving the outcomes they sought through a TLAB proceeding.

[27] The Appellant was not under any obligation to continue to use the services of a legal representative. In dispensing with Mr. Mazierski's services, there is no reason to suppose that he acted with intent to misdirect the Respondent.

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<sup>2</sup> The TLAB has instituted the required Rules to exercise this power.

[28] Mr. Mazierski informed the TLAB and the only known Party, the City, that he was no longer retained by the Appellant very early in the process. He discharged his duty to the tribunal.

[29] The formal recording of representatives is for administrative purposes so that there is a known point of contact for the exchange of documents and for communication purposes. It is not intended as a disclosure of sorts to signal a Party's intent or strategy in putting together a case. Indeed, a Party may identify a representative for contact purposes that is not the person or lawyer that will ultimately represent them at the Hearing.

[30] It is unfortunate that Mr. Mazierski's name was included on the "People List" on the City's website by error on the part of TLAB staff. I am not aware of any communication or notice that was thwarted by this oversight on the part of staff, and when Mr. Roberts made the TLAB aware of the situation, the information on the website was corrected.

[31] The Respondent chose to retain legal advice and a planning expert to bring the most effective case possible. Presumably, she considered the expenditure worth achieving the goal of defending the COA's refusal of the application. In this, she was ultimately successful as the Appellant withdrew his Appeal prior to the Hearing.

[32] Contrary to conventional practice, the Appellant did not retain expert advice. Instead, the Appellant has been represented by Mr. Garde, whose professional credentials have not been established. While this choice is somewhat unusual, as the burden is on the Applicant (the Appellant in this case) to prove their case, it does not contravene any of the tribunal's Rules.

[33] The Appellant has a right to appeal. He has no obligation to retain a lawyer or expert advice in the pursuit of his appeal. His conduct in choosing to be represented by a non-expert without legal training does not contravene the TLAB Rules and does not qualify as unreasonable conduct.

[34] The Appellant is not responsible for the Respondent's choice to retain advice and he is not culpable for her costs.

#### No Witness Statement

[35] TLAB Rule 28.6 outlines the considerations for awarding costs. Sub f) references 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.

- [36] The TLAB *Notice of Hearing* initiates the TLAB proceedings. In service of procedural fairness, it sets out deadlines for the submission of any documents (Disclosure, Witness Statements etc.) that are to be relied on in the Hearing.
- [37] In order to be heard by the TLAB, a witness statement (a written outline of that person's evidence) must be submitted by the due date (not later than 60 days after a *Notice of Hearing* is served). The purpose of this TLAB Rule is to ensure that the other Parties and Participants have prior knowledge of the issues in order to prepare for the Hearing.
- [38] The Appellant did not file any Witness Statements or Expert Witness Statements. Neither did the other Party to the Appeal, the City.
- [39] Evidence to support a case at the TLAB must be entered via the Statement and testimony of a Witness. Parties are not obligated to call Witnesses or enter evidence to preserve their position at a Hearing. Their rights to participate in a Hearing, by cross-examining witnesses, making submissions in the proceeding etc., are not premised on the production of evidence.
- [40] While I would have expected the City to proceed in this reduced way in order to preserve their interest, it is unusual for an Appellant/ Applicant to forego the opportunity to enter evidence to support their Appeal. A hearing before the TLAB is a hearing "*de novo*", which means that the entire application must be considered anew and the burden remains on the Applicant to satisfy the TLAB that the four tests set out in the *Planning Act* have been met.
- [41] An Applicant that does not bring evidence to a Hearing stands a poor chance of satisfying the TLAB as to the validity of their proposal. The consequence of this choice of the Appellant would likely have been the denial of his Appeal, had he not withdrawn the Appeal two weeks prior to the Hearing date.
- [42] In withdrawing the Appeal, the additional costs of a Hearing that would have been incurred by all Parties, Participants and the TLAB were avoided.
- [43] The choice of the Appellant to forfeit the opportunity to bring evidence to a Hearing is unwise, and yes, disrespectful of the opportunity they have been afforded as well as the investment of time, effort and resources of the TLAB, the other Parties and the Respondent.
- [44] I do not find, however, that the failure to enter Witness Statements qualifies as grounds described under TLAB Rule 28.6. The Appellant did not continue to deal with irrelevant issues, did not ask improper questions and did not act in a manner that the TLAB deemed improper.
- [45] The failure to engage effectively in the Appeal process sabotaged the Appellant's own interests. The failure to file a Witness Statement did not frustrate the proceedings of the TLAB or the resolution of the Appeal and in fact precipitated the early completion of the Appeal via a withdrawal. There is no suggestion that in failing to present evidence the Appellant pursued false claims or misled the other Parties as to the facts.



[46] I find that while the conduct of the Appellant in failing to provide a Witness and a Witness Statement is unwise, and somewhat disrespectful, it does not rise to the threshold of unreasonable, frivolous, vexatious or having acted in bad faith.

#### Late Revised Proposal

[47] The assertion in the Motion materials is that the Applicant filed revised plans long after witness statements including an expert witness statement had been filed by others.

[48] There is a specific TLAB Practice Direction, posted on the TLAB website, addressing late materials. Practice Direction 7<sup>3</sup> indicates that late filings will be permitted only under justifiable circumstances.

[49] On occasion, the TLAB will admit late filings for good reason, or in order to further the just, most expeditious or cost-effective resolution of the Appeal. The presiding member has the discretion under the TLAB's Rules and under the SPPA to admit or refuse to admit late filed materials.

[50] It would seem that the Appellant was attempting naively to offer a revised proposal that would be less offensive to the other Parties. With a different set of Parties, this may have been a path to a positive resolution of the Appeal.

[51] The TLAB is committed to fixed and definite dates and to strict deadlines. There is, however, flexibility to accommodate change within the process of the Appeal, at the discretion of the Presiding Member, in order to reduce the issues or to find a resolution on the basis of a compromise between the Parties.

[52] Filing revised plans without understanding the protocols for introducing such an amendment, or the requirements for fair notice that are the foundation of fair legal proceedings, illustrates the Appellant's ignorance of the procedural requirements.

[53] The act of filing the revised plans, however, is not grounds for costs. There is a TLAB Practice Direction for addressing late filings. The filing of revised plans did not frustrate or prolong the appeal process, and in the end, the revised plans were superfluous as the Appellant withdrew the Appeal.

#### Adjournment or Delay

[54] The *Notice of Motion* requesting costs was filed on the same day that the Appeal was withdrawn. It was filed in anticipation that an adjournment or delay could be caused by the Appellant's filing of the revised plans.

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<sup>3</sup> Practice Direction 7: "Late Filings", can be found on the TLAB website.

[55] As it transpires, the Appeal was withdrawn and the process was truncated, not prolonged.

## **CONCLUSION**

[56] The assistance of legal representation and expert witnesses is undoubtedly helpful to Parties in this quasi-judicial process. Nonetheless, the TLAB does not require that a Party be represented by a legal representative or retain an expert in land use planning.

[57] The TLAB's procedures and requirements strain to find a balance between basic legal rules that protect procedural fairness on the one hand and the intent of City Council that the TLAB be an affordable and accessible venue for the resolution of land use planning matters on the other.

[58] I am sympathetic to the circumstances that the Respondent finds herself in. She invested in and fully prepared for what she expected to be a hard-fought, professionally supported Appeal Hearing, only to find that the Appellant was less willing to invest in the pursuit of his Appeal than she was in her defence against it.

[59] I would describe the Appellant's conduct as inept and uninformed and as frustrating as it is to deal with an Appellant that is ignorant of the expectations of an Appeal process, I do not find that the conduct of the Appellant has fully reached the threshold required by the SPPA; that the conduct must be found to be unreasonable, frivolous, vexatious or made in bad faith.

## **DECISION AND ORDER**

[60] No cost award for any amount is made against the Appellant.

A. Bassios  
Panel Member