

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 17, 2016

CASE NO(S): PL150532

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Y & Z Zahavy Holdings Inc.
Subject: Request to amend the Official Plan – Refusal of request by City of Niagara Falls
Existing Designation: Residential
Proposed Designated: Special Policy Area
Purpose: To permit a residential development with a density of 109 units per hectare
Property Address/Description: 5971 Dorchester Rd
Municipality: City of Niagara Falls
Approval Authority File No.: AM-2014-004
OMB Case No.: PL150532
OMB File No.: PL150532
OMB Case Name: Y & Z Zahavy Holdings Inc. v. Niagara Falls (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Y & Z Zahavy Holdings Inc.
Subject: Application to amend Zoning By-law No. 79-200 – Refusal of Application by City of Niagara Falls
Existing Zoning: Institutional (I) Zone
Proposed Zoning: Residential Apartment 5C Density (R5C) Zone
Purpose: To permit the development of a four storey and five storey apartment building with a maximum of 154 dwelling units
Property Address/Description: 5971 Dorchester Rd
Municipality: City of Niagara Falls
Municipality File No.: AM-2014-004
OMB Case No.: PL150532
OMB File No.: PL150533

PROCEEDING COMMENCED UNDER subsection 97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended

Request by: Y & Z Zahavy Holdings Inc.
 Request for: Request for an Order Awarding Costs
 Costs sought against: City of Niagara Falls

Heard: In Writing

APPEARANCES:

Parties

Counsel

Y & Z Zahavy Holdings
 Inc. ("Appellant")

Patrick Bakos

City of Niagara Falls ("City")

Ken Beaman

DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD

Introduction

[1] The Appellant has brought a motion in writing, as directed by the Ontario Municipal Board ("Board"), seeking costs of \$36,203.61, payable on a full indemnity basis by the City, in relation to a hearing I conducted in Niagara Falls on October 19, 2015.

[2] At the hearing, the Appellant sought and successfully obtained, as reflected by my decision issued November 17, 2015, amendments to the City's Official Plan and Comprehensive Zoning By-law (collectively the "Applications") to develop 5971 Dorchester Road with a 4-storey and 5-storey apartment building comprising a total of 154 units.

[3] The City's planning staff had recommended the proposal but City Council ("Council") did not approve it. In the Notice of Refusal sent following Council's denial ("Council's Decision"), the justification was that the proposal was an over-development

of the site, was not appropriate for the neighbourhood and would have a negative impact on traffic.

[4] During the hearing, the City did not submit any report or call any witness opposing the Applications with the exception of written submissions of persons with homes in the vicinity of the proposed development, all of whose questions were answered by the Appellant's experts.

Positions of the Parties

[5] The Appellant argues that by denying the Applications, City Council acted unreasonably, frivolously and vexatiously and did not meet the standard of conduct required of it under the *Planning Act* ("Act") and otherwise.

[6] To quote from the Appellant's Motion Record, the Appellant argues "City Council's refusal of the Applications was clearly unreasonable, frivolous and vexatious..." (paragraph 11), "City Council's decision to refuse the Applications without justified and proper meritorious reasons resulted in a planning process that was untimely and inefficient, and also was an improper use of the City's decision-making authority and accountability to the Appellant" (paragraph 15) and "City Council's refusal to approve the Applications followed by its participation...without calling any evidence to counter the Applications was lacking in seriousness..." (paragraph 20).

[7] The Appellant submits that Council's actions were in violation of Rules 102 and 103 of the Board's *Rules of Practice and Procedure* ("Board's Rules") and pursuant to s. 97(1) and 97(2) of the *Ontario Municipal Board Act* ("OMBA"), costs should be paid by the City.

[8] The City, on the other hand, denies any unreasonable, frivolous or vexatious conduct and argues that Council's refusal of the Applications did not occur during the course of the proceeding as required by Rule 102 of the Board's Rules.

[9] In the City's view, it acted, at all times, in a helpful and courteous manner with respect to the Appellant and its counsel.

[10] The City also submits that if I were to grant an award of costs in favour of the Appellant, the costs awarded should be less than the full indemnity amount claimed. According to the City, an award of full indemnity costs can only be made if the City is guilty of some form of reprehensible conduct which, according to the City, is clearly not the case here.

Statutory Regime

[11] Although the *Statutory Powers and Procedures Act* also deals with a tribunal's ability to order costs, for purposes of this motion, I will refer specifically to the relevant provisions of the OMBA and the Board's Rules.

[12] Subsection 97(1) of the OMBA states "The costs of and incidental to any proceeding before the Board, except as herein provided, shall be in the discretion of the Board and may be fixed at a sum certain or may be assessed." Subsection 97(2) provides that the Board may order "by whom and to whom any costs are to be paid" and s. 97(3) permits the Board to prescribe a scale under which any costs shall be assessed. And lastly, s. 91 provides that the Board may make general rules regulating its practice and procedure.

[13] Rule 102 of the Board's Rules stipulates that the Board "may make a costs award for conduct at any time during a proceeding." Rule 103 then provides that the Board "may only order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith." This Rule then goes on to give eight examples of conduct falling within such parameters. I would note, at this point, that bad faith, on the part of the City, has not been alleged by the Appellant.

[14] And finally, there are two other passages from the Board's Rules which have a bearing on this matter. In Rule 2, Definitions, a 'proceeding' is defined as "a matter before the Board" and Rule 3 states that "These Rules shall be liberally interpreted to secure the just, most expeditious and cost effective determination of every proceeding on its merits."

Analysis and Discussion

[15] As a general proposition, the Board has historically been reluctant to award costs in Board proceedings. Unlike the Superior or other higher Courts, costs do not follow the event. Arguably, this approach has been fostered to encourage public participation at Board hearing events. As ratepayer groups have argued in the past, to do otherwise would suppress the ability and frankly, the proclivity of affected ratepayers, from challenging development proposals and other planning matters. As Vice Chair de P. Seaborn stated in *Kimvar Enterprises Inc., Re* (2009) 55 M.P.L.R. (4th) 305, "unlike the courts, applications for costs are not routine, and cost awards are rare."

[16] The threshold issue for determination on this motion is therefore whether the City's conduct falls within the four corners of Rule 102? If it does, then a further determination must be made as to whether the conduct in question was unreasonable, frivolous or vexatious.

[17] Rule 102, including the definition of 'proceeding', require that the impugned conduct occur during the proceeding in question. Since Council's Decision was made at a time when the Applications were not yet before the Board, any claim for relief based upon that decision must fail, because it does not meet the specific language of Rule 102, i.e. "...for conduct *during a proceeding*." (Board emphasis in italics)

[18] Even though Council's Decision was not upheld at the hearing, in my estimation, Council possessed the requisite authority and jurisdiction to make whatever decision it deemed appropriate at the time. Furthermore, s. 2.1 of the Act which states, *inter alia*,

that the Board shall have regard to decisions of Council, clearly establishes a degree of deference which must be accorded those decisions. If I were to award costs against the City in this case for the decision made, I would not only be fettering Council's decision making authority without legal basis, but, in my view, I would also be ignoring the provisions of s. 2.1.

[19] As for the City's failure to call a witness at the hearing, it is obvious that such conduct did occur during the proceeding. However, there are a number of reasons why I do not believe costs should be awarded for such conduct.

[20] First, as was stated by Vice Chair de P. Seaborn in *Kimvar, supra*, citing a number of earlier Board decisions, "The test for clearly unreasonable conduct that is most often cited in Board decisions is: would a reasonable person, having looked at all the circumstances of the case, conclude that the conduct was not right, the conduct was not fair and that person ought to be obligated to another in some way for that conduct."

[21] And as was stated in *Pauze v. Midland (Town)* [1995] 32 O.M.B.R. 4, by Mr. Melling, 'frivolous' means a "lack of seriousness" and 'vexatious' means action instituted "without sufficient grounds for the purpose of causing trouble or annoyance."

[22] In this case, I am satisfied that the City acted throughout in a forthright and professional manner. As an example, the City took steps to co-ordinate the attendance of City planner Alex Herlovitch at the hearing. Mr. Herlovitch was placed under summons by the Appellant to provide evidence in support of the proposal. In addition, the City advised the Appellant well in advance of the hearing that the City would not be calling witnesses. The conduct of the City, during the course of the proceeding, did not result in the Appellant being misled or deceived in any way and there was no obligation on the City, by way of Procedural Order or otherwise, to call witnesses.

[23] Although Council's Decision was not well received by the Appellant I fail to see how the City acted unreasonably, or with a lack of seriousness or attempting to cause

difficulty for the Appellant. In my view, the City was acting in a way which, in its opinion, best served the interests of the area residents.

[24] Second, the Appellant referred to the earlier Board decision of *Holy Cross Greek Orthodox Church v. Scarborough (City)*, [1991] O.M.B.D. No. 1839 , which, according to the Appellant, stands for the proposition that costs should be awarded when a municipality does not lead evidence at a hearing. That case however, is easily distinguishable from the matter before me because Rule 102 did not exist at the time of the *Holy Cross* case.

[25] Third, to suggest that s. 1.1 (f) of the Act prescribes a type of conduct or standard of care on the part of the municipality, which would prevent it from making the decision it made in this case, is, in my opinion, overstating the import of s. 1.1 and understating the weight to be given Council decisions as reflected by the very language of s. 2.1 of the Act. Accountability, as that word is used in s. 1.1 (f) under the heading of 'Purposes', should not be confused with or translated into, an abrogation of the decision making jurisdiction, obligations and authority of a municipal council.

[26] In the final analysis, although the Proponent was not pleased with Council's Decision and the conduct of the City during the hearing itself, something more than dissatisfaction is required to satisfy the provisions of Rule 102 and to establish unreasonable, frivolous or vexatious conduct on the part of the City.

Disposition

[27] Based on all of the foregoing therefore, it is ordered that the motion is dismissed.

[28] Although costs of this motion are sought by the City, this is not a case for costs.

“Steven Stefanko”

STEVEN STEFANKO
VICE CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248