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PL071013

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Avonwood Shopping Centres Limited. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 201-2000 of the City of Stratford to rezone lands composed of Part Of Lot 42, Concession 1 from I-2 (General Industrial) to C-4 Special (Shopping Centre Commercial- Special) to permit a department store on site with a floor area of 111,300 sq. ft., limit non-department retail stores to 20,000 sq. ft. and prohibit a supermarket on site
OMB Case No. PL071013
OMB File No. PL071013

Avonwood Shopping Centres Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Stratford to redesignate land composed of Part Of Lot 42, Concession 1 to redesignate the property from Industrial Area to Commercial Area and to add Special Policy Area policy between Festival Market Place and the CNR line, to permit a department store on site with a floor area of 111,300 sq. ft, limit non-department retail stores to 20,000 sq. ft. and prohibit a supermarket on site
OMB Case No. PL071013
OMB File No. PL080070

IN THE MATTER OF subsection 17(24) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Appellant:	Avonwood Shopping Centres Limited
Appellant:	Tanurb (Festival Marketplace) Inc.
Subject:	Proposed Official Plan Amendment No. 10
Municipality:	City of Stratford
OMB Case No.:	PL071013
OMB File No.:	PL071152

Avonwood Shopping Centres Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 201-2000 of the City of Stratford to rezone lands composed of Part Of Lot 42, Concession 1 from I-2 (General Industrial) to C-4 Special (Shopping Centre Commercial- Special) to permit a department store on site with an increase in floor area from the original 111,300 sq. ft. to 135,000 sq. ft., limit non-department retail stores to 20,000 sq. ft. and prohibit a supermarket on site
OMB Case No. PL071013
OMB File No. PL081093

Avonwood Shopping Centres Limited has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Stratford to redesignate land composed of Part Of Lot 42, Concession 1 to redesignate the property from Industrial Area to Commercial Area and to add Special Policy Area policy between Festival Market Place and the CNR line, to permit a department store on site with an increase in floor

area from the original 111,300 sq. ft. to 135,000 sq. ft., limit non-department retail stores to 20,000 sq. ft. and prohibit a supermarket on site
OMB Case No. PL071013
OMB File No. PL081092

APPEARANCES:

Parties	**Counsel**
City of Stratford	J. Matera E. Costello T. Halinski
Avonwood Shopping Centres Limited	D. Wood S. Mahadevan

DECISION DELIVERED BY C. HEFFERON AND ORDER OF THE BOARD

Summary

This is a written motion in which the City of Stratford ("City") seeks costs of $1,295,762.50 against Avonwood Shopping Centres Limited ("Avonwood") arising from the hearing of the appeals in this proceeding. In the alternative, the City requests an award of costs to reflect the difference between the agreed-upon timetable for the hearing (31 days) and the actual duration of the hearing (78 days). The City also requests its costs for the written motion for costs.

The City's motion for costs arises out of a proceeding before the Board concerning an appeal under sections 17(36) and 34(11) of the *Planning Act* against the decision of the Council of the City of Stratford either to refuse or to neglect to enact proposed amendments to the City of Stratford Official Plan and Zoning By-law 201-2000 respecting a 7.0 ha portion of Avonwood's total 14.6 ha land holding at the eastern portion of the Romeo Industrial Park in Stratford southeast of the intersection of Ontario Street East and C.H. Meier Blvd.

Avonwood also appealed Council's adoption of Official Plan Amendment 10 ("OPA 10").

In its decision issued May 18, 2010, the Board dismissed all three of the Avonwood appeals.

There were several other parties involved in the 78-day hearing but they did not participate in this cost motion.

I learned of the City's intention to seek costs in a letter to the Board dated August 5, 2010. At that point, I directed the Board's legal counsel to request that the City submit its reasons in a written motion. I also instructed counsel to request Avonwood to refrain from submitting its response to the City's motion sine die, or until I had had the opportunity to review and assess the City's motion materials in support of their request for costs.

After consideration of all the supporting materials submitted by the City, the Board Orders the motion for costs is dismissed, and no costs are awarded against Avonwood. The reasons follow.

Issues

The City's application for costs asserts that Avonwood:

1. wasted time at the hearing by
    a. introducing volumes of irrelevant evidence, and
    b. dragging out cross-examination;
2. expanded the hearing in an attempt to outspend the municipality; and
3. delayed the implementation of OPA 10 - a "legitimate policy" of Council - by appealing to the Board.

All of these factors are relied upon in the City's motion to support a cost award.

The Relevant Statutes

Under subsection 97(1) of the *Ontario Municipal Board Act ("OMB Act")*, the Board may, at its discretion award costs of any proceeding may be fixed or assessed. Under subsection 97(2) of the same *Act*, the Board "may order by whom and to whom any costs are to be paid".

Under subsection 17(1)(1) of the *Statutory Powers Procedure Act*, RSO 1990, c.S.22, a tribunal (such as the Board) may in the circumstances set out in its rules, "order a party to pay all or part of another party's costs in a proceeding.

Section 91 of the *OMB Act* gives the Board jurisdiction to make general rules regulating its practice and procedure and describing the circumstances under which costs may be awarded. Rule 103 of the Ontario Municipal Board's Rules of Practice and Procedure sets out the circumstances in which a cost order may be made by the Board against a party. The Board is not required to award costs even when these criteria in Rule 103 are met. The rule states:

> 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 it the party has acted in bad faith.

Rule 103 also provides that:

> The Board is not bound to order costs when any of these examples occur as the Board will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Board may decide to reduce the amount awarded. The Board will not consider factors arising out of mediation of settlement conference in determining whether there should be an award of costs."

Rule 104 permits the Board to deny or grant an application for costs or award a different amount than that which was requested.

A body of case law addresses subsection 97(1) of the *OMB Act*, the Board's Rules and the circumstances in which the Board has awarded costs. Applications for costs are not routine, and costs awards are rare because the Board is wary of discouraging parties from bringing legitimate land use planning matters to a hearing.

Regardless, the Board has determined that parties must be accountable for their conduct, and if, during the course of the proceedings that conduct has been unreasonable, frivolous or vexatious, or if a party has acted in bad faith, then the Board may, depending on the facts of the case, exercise its discretion to order costs.

Precedents

The City of Stratford cited a number of Ontario Municipal Board decisions in support of its request for costs. The Board carefully considered all of the decisions referenced. Several warrant mention here:

In the 2002 Board case, *Customized Transport Ltd. v Brampton (City)*, costs were awarded because the appeal of Customized Transport Ltd. and others (including Universal Am-Can Ltd., a.k.a. McKinlay Transport) delayed the planning process so that Tornorth, the developer of a residential subdivision incurred costs that the Board determined to be excessive because the actions (of one of the appellants) were unfair and "not right". The Board found that McKinlay "fought too hard" and that McKinlay had advanced its own self interest with little regard for the public interest…." In doing so, McKinlay took "unreasonable and improper positions designed to delay Tornorth (the applicant) and win at all costs". Concluding that McKinlay's conduct in a number of areas was "unreasonable", it awarded their direct costs be paid by McKinlay to Tornorth and the City of Brampton.

In the 2006 case, *Hanover County Fair Plaza ("CFP") v. Loblaws*, the Board found that CFP had not disclosed any land use planning ground in its appeal. Legal fees were awarded on a partial indemnity basis because CFP's conduct was "clearly unreasonable".

In the 2006 case, *Sobeys (Ontario) v. Innisfil (Town)* the Board found that Sobeys not only did not disclose any land use planning reasons for its appeal but dragged the case out until the last possible minute before withdrawing its appeal. This conduct caused the Town to incur a great deal of expense, and was, in the Board's view, "unreasonable" and that Sobeys appeared to be "indifferent to the costs of its actions", especially given that Sobeys is a "sophisticated client well able … to read the

Act and file an appeal properly." Costs were awarded to the Town and to the moving parties (Loblaws and Alcona) on a partial indemnity basis.

In re: *London (City) Official Plan Amendment No 332*, wherein the Board dismissed the appeals of Rio Can Companies, the Board found that "Rio Can's concerns were based on competition grounds rather than genuine planning grounds" and that Rio Can acted in a manner that was "clearly unreasonable and in bad faith". Costs were awarded on a partial indemnity basis.

In re: *Brampton (City) Official Plan No 208*, which involved Brampton, Loblaws Costco and IPCF Properties (Price Club) and others, the Board characterized the dispute as a "store wars case between two retailing leviathans". The Board found that "no municipality should have to be dragged through a hearing such as this without their costs being very seriously taken into consideration" and awarded costs against IPCF and Costco because in the Board's view, they "utterly disregarded the impact their strategy would have on the public resources of the municipality, not to mention its effect on the Board's calendar and resources". Costs were awarded against those parties whose "conduct has not been entirely reasonable" and awarded to those parties whose 'conduct has been reasonable. A portion (30%) of the costs awarded also went to the developer (First Gulf Business Parks Inc) which the Board found had been "caught in the middle of the dispute" between the two corporate retailing giants – IPCF and Costco. The Board's touchstone in this matter was, it stated, simply "what was fair given the conduct of parties and all the circumstances of case".

In re: *Norwich (Township) Zoning By-law No. 7-97* the Board found that the appellant misled the Board in its August 5, 1997 request for adjournment. Costs were awarded on a partial indemnity basis for the appellant's "unreasonable conduct".

In re: *Niagara Falls Zoning By-law Amendment 2001-85*, which was heard in 2001, the Board found unreasonable conduct, perhaps unintentional, but nonetheless unreasonable and awarded costs on a partial indemnity basis.

In reviewing the cases put before me by the City, I noted that in every one of the Board decisions in which costs were awarded, it was on the basis of clearly unreasonable conduct. But after careful consideration of my notes from the Avonwood appeal, I have been unable to conclude that Avonwood's conduct was in any way

unreasonable. It is clear that counsel for Avonwood left few stones unturned, but given the circumstances of the case and what was at stake for Avonwood, this behaviour was not, in my view, unreasonable.

Analysis of City's Submissions

The test for unreasonable conduct often cited in Board decisions is whether a reasonable person having looked at all the circumstances of the case, concludes that the conduct of one or other of the parties was not right and that that party ought to be obligated in some way for that kind of conduct.

When legal counsel for Avonwood would sometimes, in the course of calling his case, veer off into areas that did not directly pertain to land use planning, an argument would be made (and generally accepted by the Board) that that evidence was relevant as background or context to the land use planning matter at hand. In any case, such occurrences were infrequent over the course of this proceeding.

Similarly, while legal counsel for Avonwood took a great deal of care and time in testing the evidence of the expert witnesses for the City and its co-respondent the CCC, I did not at any time get the impression that it was for the purpose of delay or that Avonwood's conduct was "unreasonable". When I review the criteria listed in Rule 103, I do not conclude that legal counsel for Avonwood conducted himself in such a manner as to fall within these examples of "clearly unreasonable, frivolous, vexatious or bad faith conduct".

As far as the City's charge in its Request for Costs (page 1) that the application and appeal process continued as long as it did because Avonwood thought that it could somehow intimidate the City by the prospect of incurring runaway costs, I respectfully disagree. I saw no evidence of this within the hearing and I do not accept the City's argument on this point.

OPA 10 is the policy on commercial and retail development in Stratford. It was first adopted in October 2007 (and subsequently modified) but was not forwarded for approval. The testimony that the Board heard was that the City delayed sending it on for approval at the request of Avonwood. No cogent reasons were given why the City acted

in this way, except as was suggested in the hearing (and included in the City's Request for Costs material) to be "fair" and "to allow Avonwood to catch up in its planning."

In its Request for Costs, legal counsel for the City seems to be implying that the decision to delay forwarding OPA 10 to the approval authority was totally one-sided, that Council was somehow duped, in its attempt to be fair to this powerful landowner into acceding to Avonwood's manifestly unreasonable request. I find that I cannot accept this line of reasoning.

The evidence shows that Council was being advised at every step of the way by sophisticated outside legal counsel and by experienced professional land use planners (Sorensen, Gravely, Lowes Ltd.) as well as by veteran retail market experts (Robin Dee & Associates). If another course of action had been recommended by either legal counsel or by the planning and retail market consultants and Council chose for its own reasons to disregard the advice it was being given, that, in my opinion, is its prerogative. That, in hindsight, Council may have made the wrong decision in not immediately forwarding OPA 10 for approval is not a matter that can be rectified by this Board by way of a costs award.

The fact is that the Avonwood application was complicated. As soon as these proceedings began, it was immediately evident to this Panel that the matter being dealt with had great significance to the future of the City both as an internationally-known centre for the arts and culture and as a regional-servicing centre. The parties wanted to – indeed, were obliged to under the circumstances – examine all aspects of the proposed official plan amendment ("OPA 10") in a thorough, comprehensive fashion. In my opinion, both Avonwood and the City adopted diligent, equally-thorough approaches to the material. After consideration of the cost materials, I cannot conclude that the City has demonstrated that Avonwood wasted time or unreasonably expanded the hearing. To suggest that Avonwood did either of these might imply that the City also did so.

General Finding

This costs application by the City requires the Board to determine whether Avonwood's conduct during the hearing was "unreasonable and/or frivolous and

vexatious", or if Avonwood acted "in bad faith" in contravention of Rule 103 of the Board's Rules of Practice and Procedure.

While the hearing was lengthy – some 78 days, including final argument – it was not, in my opinion, unreasonably so given the breadth of the evidence introduced and the matters at stake. And, while legal counsel for Avonwood took great pains to ensure both that the evidence he had determined was critical to the disposition of this case was entered, and that the testimony of the expert witnesses for the opposing sides was tested from every reasonable angle, he did not, in my opinion, cross over the line into what could be interpreted as an attempt to obfuscate or delay to invoke the criteria in Rule 103 respecting conduct.

After reviewing the facts cited in the City's Request for Costs alleging unreasonable delay and "an expensive, time-consuming and unnecessarily exhausting hearing prolonged by the unwillingness of (Avonwood) to 'adopt a more realistic scale of evidence and argument,'" and after reviewing my own notes from the hearing, I cannot find sufficient grounds for granting the City's request.

In arriving at this decision, the Board also relies on the principles set out in the January 30, 2009 OMB decision, re: Kimvar Enterprises Inc. ("Kimvar") where one of the parties, the developer, alleged that certain parties, Nextnine Limited, Innisfil District Association Inc and 2025890 Ontario Inc, and the legal firm of Gilberts LLP, conducted themselves in an unreasonable, frivolous and/or vexatious matter, thereby precipitating costly delays. The Board found that the prehearing delays and the length of the hearing had several causes apart from any that may or may not have resulted from the manner in which Nextnine et al and Gilberts LLP conducted themselves before and during the hearing. No costs were awarded in this case.

In Kimvar, the Board reminded the parties that costs do not follow the cause, and success is never the determining factor. In fact, costs awards from Board hearings are exceedingly rare.

Also in Kimvar, the Board wrote that the decision rendered in that matter is intended firstly to confirm the Board's practice that costs are not awarded either routinely or lightly, and secondly to strengthen the notion that no party to an OMB proceeding need hesitate to present its case out of the real or imagined fear of costs

being awarded against it. In the opinion of the Board in Kimvar, that would be manifestly contrary to the public interest.

This Panel supports that conclusion.

Disposition and Order of the Board

The request seeking costs in connection with the Avonwood site specific official plan and zoning by-law amendments and the appeal against OPA 10 is dismissed. No costs are awarded. There is therefore no need for Avonwood to defend itself in this instance.

So Orders the Board.

"C. Hefferon"

C. HEFFERON
MEMBER