

**Ontario Land Tribunal**  
Tribunal ontarien de l'aménagement  
du territoire



**ISSUE DATE:** October 06, 2022

**CASE NO(S).:**

OLT-22-002235

**PROCEEDING COMMENCED UNDER** subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Appellant: Carlo Silvestri  
Subject: To permit residential dwelling units of townhouses, maisonette units, and single detached dwellings (By-laws 21-238 and 21-249)  
Municipality: City of Hamilton  
OLT Lead Case No.: OLT-22-002235  
OLT Case No.: OLT-22-002235  
OLT Case Name: Silvestri v. Hamilton (City)

**PROCEEDING COMMENCED UNDER** subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Motion Request by: DiCenzo Construction Company Ltd. ("Applicant")  
Purpose of Motion: Request for an Order dismissing the appeal  
Appellant: Carlo Silvestri  
Subject: To permit residential dwelling units of townhouses, maisonette units, and single detached dwellings (By-laws 21-238 and 21-249)  
Municipality: City of Hamilton  
OLT Lead Case No.: OLT-22-002235  
OLT Case No.: OLT-22-002235

**Heard:** September 21, 2022 by written hearing

**APPEARANCES:**

**Parties**

DiCenzo Construction Company Ltd. ("Applicant")

**Counsel**

S. Zakem  
M. Helfand

Carlo Silvestri (“Appellant”)

S. Tangri

## **DECISION DELIVERED BY S. TOUSAW AND ORDER OF THE TRIBUNAL**

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### **INTRODUCTION**

[1] The Applicant filed a Motion for costs in the amount of \$18,560.25 against the Appellant for his conduct throughout these proceedings.

[2] The Responding Motion Record of the Appellant was filed by his counsel but does not contain submissions. The Response is limited to a sworn Affidavit of the Appellant and related attachments, including references to case law.

[3] No Reply was filed by the Applicant.

[4] In the absence of issues raised by the Applicant to the Appellant’s Response, the Tribunal will cautiously accept the case law contents of the Appellant’s Affidavit for the Tribunal’s consideration when assessing the Motion.

### **Applicant**

[5] In support of the Motion, the Applicant submits as follows.

[6] Unnecessary costs were incurred due to the unreasonable, frivolous, vexatious, and bad faith conduct of the Appellant before, during, and after the hearing event.

[7] Prior to the Applicant filing its Motion to dismiss the appeal, which the Tribunal granted in its Decision of May 13, 2022, Anthony Diczno, principal of the Applicant, was advised by Douglas Burns, then counsel for the Appellant, in a telephone conversation that the Appellant would be prepared to withdraw the appeal in exchange for a sum of money “in the five figures.” Mr. Diczno was advised by his planning consultant that the Appellant said that the Applicant could “make the matter go away with the right dollar amount.”

[8] In response to the Motion to dismiss, the Appellant failed to file evidence in support of his planning concerns with the proposed development. He simply reiterated his concerns filed on appeal, despite claiming experience and understanding of the planning appeal process, including as a realtor and his involvement as a member of the (former) Regional Municipality of Hamilton-Wentworth Land Division Committee and Committee of Adjustment.

[9] During the Motion to dismiss hearing, Mr. Diczno believes that the Appellant inferred through his oral statements that the Applicant had connections to organized crime.

[10] Following the Tribunal's dismissal of the appeal, Mr. Diczno emailed the Appellant requesting a phone call to discuss costs, and that if a response was not made within 48 hours, the Applicant would file a Motion for costs. Mr. Diczno received a telephone call from the Hamilton Police Department ("Police") advising him that the Appellant had lodged a criminal complaint arising from the email. After hearing Mr. Diczno's contextual explanation, the Police closed their enquiry.

[11] The Applicant cites the Tribunal's *Rules of Practice and Procedure* ("Rules") and related Tribunal and Court decisions upon which the following submissions are based.

[12] The Appellant's failure to prepare a proper case for the Motion to dismiss – which was limited to the filing of emails and an oral recitation of the issues on appeal as well as adding new issues – represents unacceptable conduct as cited in Rule 23.9. The Applicant incurred costs to prepare and present evidence at a hearing where the Appellant contravened the Tribunal's directions through its Rules.

[13] The Applicant argues that the evidence is clear that the Appellant was willing to withdraw his appeal in exchange for a sum of money. Appeals under the *Planning Act* ("Act") must be rooted in land use planning and are not for the financial harm of an Applicant or to extract a personal financial gain. The Applicant has incurred costs for both the Motion to dismiss and this cost Motion, but seeks a reasonable compensation

only for the Motion to dismiss.

[14] Mr. DiCenzo considers certain comments of the Appellant during the Motion to dismiss hearing to malign the character of the Applicant, and that the Appellant's unsubstantiated report to the Police occurred for the same reason. The Applicant submits that such behaviour attempts to intimidate, is offensive to the Parties and land use planning generally, and should be dissuaded by a cost award.

### **Appellant**

[15] In response, the Appellant requests that the Motion be denied on the grounds that: he and his family live near the development site; throughout the application process, the neighbourhood expressed concerns including density, traffic and parkland; he was not aware that professional evidence would be helpful to sustain a Motion to dismiss; he could not afford to obtain professional evidence; and he has not attempted to disrespect or malign the character of the Applicant.

[16] The Appellant asserts that his appeals were partially successful given that one of the Zoning By-law Amendments ("ZBA") was amended by the Decision.

[17] By reference to various Tribunal and Court decisions, the Appellant emphasizes that costs may be awarded for inappropriate behaviour as referenced in Rule 23.9 but are not the norm in Tribunal proceedings. In this case, the Tribunal's Decision dismissing the appeal cautioned the Applicant on its potential filing of a cost Motion, having concluded that the Appellant's intentions were not frivolous, vexatious, or for the purpose of delay. The Appellant submits that other legislation, such as the *Court of Justice Act*, enables and encourages individuals to express themselves on matters of public interest.

[18] To the alleged request for money, the Appellant suggests that the Applicant relies on hearsay evidence. The Appellant claims he had not retained Mr. Burns when the Applicant's telephone conversation with Mr. Burns occurred on or after March 17,

2022, and the Appellant swears that he “never provided instruction regarding a monetary amount as alleged” (Affidavit para. 36).

[19] The Appellant claims to have made no nefarious comments towards the Applicant’s character during the hearing on the Motion to dismiss. Further, the Appellant justifies his call to Police claiming not to have known the source of an email.

### **Analysis and Decision**

[20] Having carefully considered the submissions of both Parties, the Tribunal will deny the Motion for costs. While the evidence points to the Appellant being somewhat inconsistent and marginally inappropriate in his procedural approach, the Tribunal finds that such actions do not warrant a cost order under Rule 23.9. As contained in that Rule, the Tribunal is not bound to order costs when the seriousness of the misconduct is considered.

[21] In this case, while there have been indications of potential misconduct by the Appellant, the absence of clear and uncontradicted evidence leads the Tribunal to conclude that costs are not warranted. The Applicant’s allegations are not found proven in the absence of the cross-examination of involved persons (re: money requests) and the absence of an official transcript of the hearing (re: character challenge). While not often utilized in such matters, examinations and a transcript may have resulted in a different conclusion here.

[22] The Appellant is mistaken in thinking that his appeal resulted in a modification to a ZBA before the Tribunal. The modification approved at the hearing involved minor, technical alterations at the request of the Applicant and on consent of the City of Hamilton.

[23] The Appellant’s apparent absence of experience, understanding or preparation for the Motion to dismiss hearing was addressed in that Decision. Upon review of those matters again through this hearing, their existence and severity are not found to

sufficiently outweigh the opportunity for a neighbouring resident to express concerns through the planning and appeal process. The appeal was dismissed which is considered an appropriate remedy for the Applicant in this case.

[24] For this Motion hearing, the Appellant did engage counsel, albeit somewhat late, who, as implied earlier, did not employ the standard format of submissions, but simply filed the Appellant's Affidavit. Like the first hearing, the Appellant's comments are occasionally difficult to understand (e.g., Affidavit para. 18 – suggesting the appeal was successful due to the Applicant's minor amendments being approved) or may appear inconsistent (e.g., para. 44 – not knowing that an email or phone call was from Mr. DiCenzo). Nevertheless, the Tribunal is able to arrive at a fair and reasonable Decision based on the filings of both Parties.

[25] On the Appellant's references to the *Court of Justice Act*, the Tribunal finds that such Act is not applicable in this case.

[26] The issue of whether the Appellant sought a monetary payment to release his appeal is inconclusive here. First, there is no evidence from the Applicant's planning consultant on his/her conversation with the Appellant. Second, it is unclear whether Mr. Burns was representing the Appellant when his alleged comment was made to Mr. DiCenzo. Mr. Burns' letter by email of March 15, 2022 confirms his representation, but his email three days later, on March 18, 2022, notes that he may not accept the retainer due to other commitments. The same email confirms the conversation between Mr. Burns and the Applicant's counsel in the morning of March 17, 2022, being the same day, presumably, that Mr. DiCenzo spoke with Mr. Burns and when the money request was implied. The Tribunal accepts that retained counsel speak for, and on behalf of, their clients. Inconclusive here is whether Mr. Burns was officially acting for the Appellant during that conversation. In addition, the Appellant attests that he "never provided instruction regarding a monetary amount as alleged" (Affidavit, para. 36).

[27] To the character challenge, it is difficult to understand how the Appellant could not have known, or at least, deduced, that the person attempting to connect via email

and phone was Mr. DiCenzo. The Appellant's Tab C to his Affidavit appears to confirm such person. Again, partly due to the absence of cross-examination, it is difficult to know what factors may have contributed to the Appellant calling the Police. The Tribunal may be misinterpreting the somewhat unclear para. 44 of the Appellant's Affidavit, but regardless, this event alone, while unfortunate for all, is not sufficient to find an award of costs.

[28] Rule 23.9 lists examples of behaviour that represent unreasonable, frivolous, vexatious or bad faith conduct which could lead to a cost award. The matters raised here have been considered under: (c) failing to comply with a procedural order; (d) failing to prepare adequately for hearing events; (e) failing to present evidence; and (g) maligning the character of another party. While the actions of the Appellant may have "reached the line" of unacceptable behaviour and conflicting statements, they are found to not necessitate a cost award.

[29] To the Appellant, the Tribunal hopes that this process has underscored for him the importance and obligations of professional conduct throughout a planning process. To the Applicant, the Tribunal reiterates that the Appeal was dismissed, enabling this development to proceed as planned.

## **ORDER**

[30] The Tribunal Orders that the Motion for costs is denied, and the Appellant is prohibited from filing a retaliatory Motion for costs.

*“S. Tousaw”*

S. TOUSAW  
MEMBER

**Ontario Land Tribunal**

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