

ISSUE DATE:

May 2, 2005

DECISION/ORDER NO:

1124



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL030382

Philip Arber, Tina Hopson, Bruce Meness and others have appealed to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the United Counties of Prescott and Russell to approve Proposed Amendment No. 4 to the Official Plan for United Counties of Prescott and Russell
County File No. 020-OPA-02-002
OMB File No. O030069

Francosc nie Inc. 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 490 of the City of Clarence-Rockland (former Clarence Township) to rezone lands respecting Lots 26, 27 and 28, Concession 3 from Conservation (CON) to include an outdoor amphitheatre and accessory uses as permitted uses
OMB File No. Z030081

APPEARANCES:

Parties

Francosc nie Inc.

Tina Hopson and Bruce Meness

Ghislaine Rozon, Gerry Rozon, Sylvian Prevost, Dr. Erik Petersen and Donna Petersen

Phil Arber

Counsel

P. Champagne
K. D. Yelle

M. Swinwood

P. A. Webber

DECISION ON A MOTION FOR COSTS DELIVERED BY R. G. M. MAKUCH AND ORDER OF THE BOARD

The Board issued Decision/Order No. 1920 on December 14, 2004 dismissing all appeals against the decision of the Council of the United Counties of Prescott and Russell to approve Proposed Amendment No. 4 to the Official Plan for the United Counties of Prescott and Russell as well as allowing Francoscenie Inc.'s appeal against the City of Clarence-Rockland's Council's refusal to approve an amendment to permit the proposed use on the subject lands. At the conclusion of the hearing of this matter, Counsel for Francoscenie Inc. had reserved the right to make a request for costs

against the appellants pending issuance of the Board's decision. Such a motion has now been filed in accordance with the Board's Rules as well as with specific directives from the Board.

The materials before the Board on this motion consist of Francoscenie Inc.'s Motion Record supported by the affidavit of Karina Yelle sworn January 17, 2005, the Response to Motion filed by counsel for Sylvian Prevost, Erik Petersen, Donna Petersen, Ghislaine Rozon and Gerry Rozon, the Response To Motion filed by counsel for Tina Hopson and Bruce Meness, the Response to Motion filed by Phil Arber and finally the Reply by counsel for Francoscenie to each of the appellants' Response to Motion for Costs.

In his Reply, counsel for Francoscenie Inc., indicated that he was abandoning his motion for costs against Gerry Rozon and Donna Petersen, consequently, the Board will not be considering the submissions and will not be making an award with respect to costs as against those individuals.

The total claim for costs is in the amount of \$137,032.22, which includes the amounts of \$121,614.75 for legal fees, \$6,460.92 for disbursements as well as \$8,956.55 for GST. The claim does not include any costs associated with the preparation of the various experts' reports or the attendance by these experts at the hearing.

The claim for costs is being advanced on the grounds that the appellants were constantly attempting to delay the hearing by: bringing frivolous and vexatious motions and requesting adjournments; constantly asking repetitive questions while cross-examining Francoscenie Inc's witnesses simply for the purpose of delay; asking questions on cross-examination of the Francoscenie Inc. witnesses for the purpose of attacking their credibility, knowing full well that the evidence of their own witnesses would confirm the evidence of the Francoscenie Inc. witnesses; persisted in trying to adduce evidence relating to issues that had previously been ruled irrelevant; the appellants were cautioned during the course of the hearing that their conduct could attract cost consequences; and finally, that their general conduct throughout the hearing was abusive, unreasonable, as well as frivolous and vexatious.

Counsel for Francoscenie Inc. in his Reply submission suggests that while it has been very difficult to properly estimate an exact number of hours by which the hearing was extended as a result of the conduct of the appellants, there is no question that this conduct did extend the hearing and resulted in additional preparation time expended on behalf of his client. Mr. Champagne estimates that 44% of the time spent at the hearing was needless additional time required to complete the hearing by reason of the appellants' unreasonable conduct.

The Board has carefully considered all these materials and finds that it should, under the circumstances, exercise its discretion to make an award of costs against the appellants Ghislaine Rozon, Sylvian Prevost, Erik Petersen, Tina Hopson and Bruce Meness.

The Board is not prepared to exercise its discretion to make an award of costs against the appellant Phil Arber. While Mr. Arber, who acted on his own behalf, did at times, carry out repetitive cross-examination, this did not result in an inordinate amount of time being added to the hearing. He was generally co-operative and heeded any cautions given him by the Board and did not persist in a course of conduct which should attract cost consequences against himself. The Board recognizes that Mr. Arber had similar interests as the other appellants represented by Mr. Swinwood at the hearing and could have made a better effort of combining his efforts with those appellants, but given their conduct, it was probably a wise decision by Mr. Arber to keep some distance from these individuals and their counsel. While there is also no doubt that Mr. Arber, as an appellant could have expended a little more time informing himself as to the procedure before this Board prior to the hearing, his conduct and demeanor throughout the hearing however, was nevertheless respectful of the parties and of the Board.

With respect to the conduct of the other appellants, the Francoscenie Inc. Motion Record and Reply contains a fair and accurate detailed account of the proceedings. The accuracy of this account of the facts throughout the course of the hearing was not challenged or contradicted by the appellants. The appellants through their counsel, continued on a path of conduct which was clearly unreasonable, frivolous, vexatious and in bad faith by: changing their position without notice respecting the risk of forest fires and introducing a new issue respecting same during the course of the hearing; they failed to act in a timely manner and to comply with the procedural order in not

having all of their witness statements filed within the prescribed time frames; they were not adequately prepared for the hearing resulting in delays; they continued to deal with issues and asked questions regarding these issues, which the Board had previously ruled to be improper or irrelevant; their counsel acted disrespectfully and attempted to malign the character of the witnesses who gave evidence in support of Francoscenie Inc.'s position; and, they knowingly presented misleading evidence.

The Board does not accept Mr. Webber's argument that because the conduct complained of and attributed to the appellants as a whole was by Mr. Swinwood, acting as their counsel, any claim for costs resulting from that conduct should have been made against Mr. Swinwood personally. The appellants were present throughout the hearing either feeding questions to their counsel while he was cross-examining witnesses or simply consulting with him. The Board may only assume that he was acting under instructions from his clients throughout the proceeding. These appellants are responsible for his conduct, and, if they now hold the view that he was acting outside the scope of their retainer with him, they may very well have the right to seek redress for any losses incurred by them as a result of that conduct in another forum. The Board must note that Mr. Swinwood's conduct and demeanor throughout the hearing as described in the Francoscenie Inc. Motion Record and Reply submission could only be described as simply lamentable for an officer of the *Superior Court of Ontario*.

It was also evident during the course of the hearing that Mr. Swinwood was not familiar with the process before this Board and had very little knowledge of the governing legislation (*Planning Act*) under which these appeals were brought.

The Board accepts the estimate of 44% provided by Mr. Champagne as reasonably accurate with respect to the additional time required to complete the hearing as a result of the appellants' conduct. This estimate represents \$53,510.49 for legal fees plus \$3,745.73 for GST in additional legal fees incurred by Francoscenie Inc. as a result of the conduct of the appellants throughout the proceeding. There is no evidence before the Board as to what the additional disbursements incurred are as a result of the appellants' conduct.

It must be noted that orders for costs are a rare occurrence in these proceedings and it is only where a party's conduct is so clearly unreasonable that the Board will

exercise its discretion to make such an award. The Board's traditional test for "clearly unreasonable" conduct has been described as:

... would a reasonable person, having looked at all the circumstances of the case, the conduct or course of conduct of a party proven at the hearing and the extent of his or her familiarity with the Board's procedure, exclaim, "that's not right; that's not fair; that person ought to be obligated to another in some way for that conduct.

Rule 106 provides a non-exhaustive list of examples of the type of conduct, which might attract cost consequences.

The appellants through their counsel engaged in almost every example of such conduct throughout the course of the hearing. The appellants adopted a strategy of "win at all costs" without regard for the truth. Mr. Swinwood continued to advance his position on certain issues even after his own witnesses freely admitted that the facts relied on by the appellants to support that position did not exist or were proven to be based on inadequate/incomplete research and false assertions.

Although the Board finds the costs as submitted by counsel for Francoscenie Inc. to be very reasonable under the circumstances, it is not prepared to make an award, which would compensate Francoscenie Inc. for 44% of its legal costs. The Board finds after having regard to all of the facts, that an award in the total amount of \$15,000.00 would be appropriate under the circumstances to compensate Francoscenie Inc. for the additional legal costs incurred by it as a result of the appellants' frivolous, vexatious and unreasonable conduct.

Accordingly, the Board hereby orders the appellants Ghislaine Rozon, Sylvian Prevost, Erik Petersen, Tina Hopson and Bruce Meness to pay forthwith to Francoscenie Inc. the sum of \$15,000.00 in costs.

It is so Ordered.

"R. G. M. Makuch"

R. G. M. MAKUCH
MEMBER