ISSUE DATE:

Jan. 30, 2009

Ontario

PL050290

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c.O.28, as amended, with respect to applications for costs relating to a series of approvals obtained by Kimvar Enterprises Inc.
OMB File Nos. O050040, O050041, O070018, R050124-25, S050036

A P P E A R A N C E S :

Parties	**Counsel**
Kimvar Enterprises Inc.	Jeffrey Davies Susan Rosenthal Nupur Malaviya Michael Miller Sam De Caprio Jeffrey Shankman
Nextnine Limited, Innisfil District Association Inc. and 2025890 Ontario Inc.	Derek Bell Leanne Rapley David Rainsberry
Gilberts LLP, Tim Gilbert, David Donnelly	Jeffrey Cowan April Brousseau
Environmental Defence Canada	Clayton Ruby Tanya Thompson
Town of Innisfil	Quinto Annibale Mark Joblin
Sandycove Acres Homeowners Association and Residents of Innisfil Association	Ira Kagan
Ministry of Municipal Affairs and Housing	Kenneth Hare Adam Lawlor

DECISION DELIVERED BY J. de P. SEABORN AND ORDER OF THE BOARD

Application

Kimvar Enterprises Inc. (Kimvar) seeks costs of approximately $3,200,000 against Nextnine Limited, 2025890 Ontario Inc., Innisfil District Association Inc. (referred to collectively as “Nextnine”), David Donnelly, Tim Gilbert and Gilberts LLP (referred to collectively as Gilberts) on a joint and several basis, with any apportionment to be determined by the Board. Kimvar’s motion for costs arises out of a proceeding before the Board known as the Big Bay Point hearing. In its decision issued December 14, 2007, Kimvar’s appeals were allowed and the planning instruments approved, subject to numerous conditions. By letter dated December 21, 2007 the Board was advised of Kimvar’s intention to seek costs as against Nextnine and Gilberts.

The Town of Innisfil (Town), the Sandycove Acres Homeowners Association (SAHA) and the Residents of Innisfil (RIA), parties at the Big Bay Point hearing, support Kimvar’s application for costs. The County of Simcoe (County), also a party at the hearing, did not participate in the motion for costs. The Ministry of Municipal Affairs and Housing (MMAH) attended all phases of both the main hearing and the costs hearing, but did not take a position on the application for costs or make submissions. Environmental Defence Canada (EDC) obtained intervenor status on the motion for the purpose of opposing an award of costs on public policy grounds.

In response to Kimvar’s application for costs, Nextnine originally sought its costs, estimated at $350,000, from Kimvar. However, following the procedural portion of the costs proceeding Mr. Bell withdrew that application. Mr. Cowan requested from the outset that the application be dismissed, and that Kimvar (and any other party supporting Kimvar’s claim) pay the costs incurred by Gilberts in defending the claim, on a substantial indemnity basis.

A series of pre-hearing conferences dealt with a variety of motions (several Board decisions were issued: March 13, 2008; May 21, 2008; October 6 and 9, 2008) in advance of the main argument, which concluded in December 2008.

Costs are sought on a substantial indemnity basis for legal and consulting costs incurred by and on behalf of Kimvar, the County and the Town against Nextnine and Gilberts on a joint and several basis, with the issue of liability to be determined first, leaving matters of quantum and apportionment to a second phase, if required.

Issues

The application requires determination of whether the conduct of Nextnine and Gilberts during the Big Bay Point proceeding warrants an award of costs. When distilled, three main issues emerge from Kimvar's application. First, can the Board, as a matter of law, award costs against Gilberts, the law firm that represented Nextnine during the hearing. Second, was the conduct of Nextnine (and Gilberts, if the answer to the first issue is yes) unreasonable, frivolous or vexatious or in bad faith such that an award of costs should be made in favour of Kimvar. Third, should an award of costs be denied on the basis that Kimvar's application has been brought for improper purposes and, as a matter of public policy, should costs be awarded in any event. Prior to responding to the issues, a brief summary of the applicable law is set out below.

Law on Costs

(a) Statutory Jurisdiction

The Board's jurisdiction to award costs is found in two statues.

First, pursuant to section 97(1) of the *Ontario Municipal Board Act* (OMB Act) the costs of any proceeding before the Board are discretionary and may be fixed or assessed. The OMB Act goes on to provide in section 97(2) that the Board "may order by whom and to whom any costs are to be paid".

Second, the *Statutory Powers Procedure Act* (SPPA) provides that a tribunal 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" (subsection 17.1(1)). Under subsection 17.1(2) a tribunal shall not make an order to pay costs under section 17.1 unless the conduct of a party has been "unreasonable, frivolous or vexatious or a party has acted in bad faith"; and "the tribunal has made rules under subsection (4)". Subsection (4) of 17.1 provides that a tribunal may make rules with respect to both the "ordering of costs"; "the circumstances in which costs may be ordered"; and the amount. Pursuant to section 23 of the SPPA, a tribunal may "make such orders or give directions in proceedings before it as it considers proper to prevent abuse of its processes" (s. 23(1)).

(b) Board's Rules of Practice and Procedure

The Board's jurisdiction to make general rules regulating its practice and procedure is found in section 91 of the OMB Act. In addition, section 25.1 of the SPPA gives tribunals a general power to determine its own procedure, and make rules for that purpose. The power to make rules conferred under the SPPA is in addition to any power to adopt rules that a tribunal may have under any other statute, which in the case of the Board, is found in the OMB Act.

The Board has made Rules of Practice and Procedure (Rules) pursuant to the OMB Act and the SPPA, the most recent version issued August 11, 2008, which replace those issued on September 30, 2000 (as amended March 31, 2006). The cost provisions set out in the new Rules are unchanged; however, commentary or practice directions found in earlier versions do not accompany them.

The Rules (the section numbers of the 2008 version are used throughout) outline the circumstances in which an order for costs may be made, and are summarized as follows:

1. Only a party may ask for an award of costs (Rule 96).

2. The Board may make a costs award for conduct at any time during a proceeding (Rule 102).

3. The Board may order costs against a party only 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. Clearly unreasonable, frivolous, vexatious or bad faith can include, but is not limited to:

    a) failing to attend a hearing event;

    b) failing to give notice, lack of co-operation with other parties during the pre-hearing process, changing a position without notice to the parties, or introducing an issue or evidence not previously mentioned or included in a procedural order;

c) failing to act in a timely manner or failing to comply with a procedural order or direction of the Board where the result is undue prejudice or delay;

d) a course of conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;

e) failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Board has determined to be improper;

f) failing to make reasonable efforts to combine submissions with parties of similar interest;

g) acting disrespectfully or maligning the character of another party; and

h) knowingly presenting false or misleading evidence (Rule 103 (a) to (h)).

4. Rule 103 also indicates that the Board is not bound to award costs when any of these examples occur, and if the party requesting costs has also conducted itself in an unreasonable manner, the Board may decide to reduce the amount awarded.

5. Last, the Board may deny or grant the application for costs or award a different amount (Rule 104).

(c) Board Decisions on Costs

There is a body of case law that addresses the issue of costs and in what circumstances the Board has awarded them. In this regard, it is important to note that first, each case is specific to its own facts and for this reason no attempt will be made to summarize all of the cases provided during argument of the motion. Second, unlike the courts, applications for costs are not routine, and cost awards are rare. In short, a successful party appearing before the Board should have no expectation that it will recover its costs. The Board "does not award costs lightly and it does not award costs automatically. In decision after decision, the Board has expressed a sensitivity to the right of appellants to bring matters before this Board" (*Westfield Place Inc. v. Blandford-Blenheim (Township) Pit Application*, [1996] O.M.B.D. No. 1252 at p. 19). Nevertheless, the Board has also concluded that parties must be accountable for their conduct and if

that conduct or course of conduct has been unreasonable, frivolous or vexatious, or if the party has acted in bad faith, then the Board may order costs.

The test for clearly unreasonable conduct that is most often cited in Board decisions is: would a reasonable person, having looked at all of the circumstances of the case, conclude the conduct was not right, the conduct was not fair and that person ought to be obligated to another in some way for that kind of conduct (*Midland (Town) Zoning By-law 94-50* (1995), 32 O.M.B.R. 4; *Customized Transportation Ltd. v. Brampton (City),* [2002] O.M.B.D. No. 832; *Barrie Paintball Adventure Club Inc. v. Essa (Township),* 2006 CarswellOnt 5296). In considering the appropriate test for unreasonable conduct, Mr. Bell was fair and acknowledged that parties should not enjoy total immunity from cost claims and it is conceivable that in particularly egregious cases awards of costs can be made. In short, there was no dispute that the Board can award costs based on an assessment of the conduct complained of, or where there is a finding of bad faith. Accordingly, the difference in position was not so much the appropriate test to be applied based on past Board decisions and the Rules, but whether on the facts of this case, taking into account all of the circumstances, was the conduct exhibited by Nextnine (and/or its Counsel) during the proceeding was such that Kimvar is entitled to recover the costs it incurred both on its own behalf, and on behalf of the Town and the County.

Issues and Findings

As indicated at the outset, the fundamental issue is whether the conduct complained of is such that an award of costs should be made in favour of Kimvar. As submitted by Counsel, if the answer is no, then the application for costs should be dismissed, all other issues are rendered moot, and it is unnecessary for the Board to reconvene and hear argument on the matter of quantum and apportionment.

Issue (a) Was the conduct of Nextnine and/or Gilberts during the proceeding unreasonable, frivolous or vexatious or in bad faith such that an award of costs should be made in favour of Kimvar.

Liability for costs is sought on a joint and several basis and in this regard Kimvar argued that the Board has the ability to award costs against legal counsel in the same way it has the jurisdiction to award costs against a party. Mr. Davies submitted

(supported by Mr. Annibale and Mr. Kagan) that Kimvar cannot know the degree of responsibility for improper conduct that should be borne respectively by Nextnine and Gilberts; however, their conduct and behaviour both leading to the hearing and at the hearing itself was, at various times, frivolous, vexatious, unnecessary, improper, unreasonable, in bad faith or a combination thereof (Kimvar Motion Record, para. 15).

The hearing process generally, the evidence heard and the findings of the Board are set out in the Big Bay Point decision issued December 14, 2007 and need not be repeated. However, in light of the arguments made and in order to assess the conduct complained of, there are certain facts that are particularly significant:

1. The first pre-hearing conference in respect of Kimvar's appeals (and the appeals by others of the Town's zoning by-law amendment) was held in July 2005, approximately two years before the hearing commenced.

2. In addition to Nextnine, the Province, the County and the SAHA/RIA were all initially opposed to the planning instruments under appeal. Consequently, the Issues List, included in the Board's October 2006 Procedural Order, was comprised almost exclusively of issues identified by the County and the Province. Nextnine had identified one issue for the hearing and that was included on the Issues List.

3. In the spring of 2007 negotiations took place (with the assistance of the Provincial Facilitator) resulting in the execution of a Memorandum of Agreement between Kimvar, the Town, the County, the Province and the SAHA/RIA. Nextnine did not sign the agreement, and shortly thereafter it elected to retain Gilberts as its new Counsel of record.

4. On June 4, 2007, about two months before the commencement of the hearing, Gilberts appeared before the Board at a pre-hearing conference and indicated that its client, Nextnine, was adopting all of the issues proposed by others, expanding one issue and adding another issue. During July 2007 there was some indication that Nextnine would scope or reduce the issues for the hearing; however, that did not occur. The list of issues that was formulated originally by the Province and the County remained largely unchanged and formed the issues

for the hearing. The Board, in its Decision on the merits, set out this series of events (see Big Bay Point Decision issued December 14, 2007, at p. 4).

5. Witness statements were exchanged in accordance with the terms of the Procedural Order, and experts in similar fields met to agree on facts and issues that were not in dispute. Between Kimvar, the Town, the County and the SAHA/RIA there were expert reports from forty-three (43) potential witnesses. Nextnine filed five (5) expert witness statements. The Procedural Order stipulated that Kimvar, as the main appellant (and applicant) would call its case first, followed by those in support (the Town, the County, the Province, SAHA/RIA) and lastly Nextnine, the only party and also an appellant to the zoning by-law who remained opposed to the approvals sought; and the only party that had not executed the Memorandum of Agreement following negotiations with Provincial Facilitator.

6. The hearing was scheduled to commence on August 8, 2007. Nextnine launched an unsuccessful motion to adjourn the hearing (Board Decision issued August 20, 2007). Argument on the motion consumed five (5) hearing days and the evidence commenced on August 21, 2007, approximately two weeks after the date the hearing was originally scheduled to begin.

7. As contemplated by the Procedural Order the evidence began with Kimvar's case. After nine (9) witnesses had testified on behalf of Kimvar, the Board suggested, and the parties agreed, that it would be more efficient to re-order the evidence and hear from the witnesses on behalf of Nextnine, the only party opposed to the approvals. Accordingly, Nextnine's five (5) expert witnesses and two (2) lay witnesses testified and Kimvar, the County, the Town and the SAHA/RIA coordinated their response to that case by calling two planning witnesses; one from the County and one from the Town. In addition, the Board convened an evening session to hear from participants.

8. The re-ordering of the evidence had the effect of limiting the number of expert witnesses who otherwise would have testified on behalf of Kimvar (and the Town and the County) and substantially reduced the number of hearing days required to complete the evidence and argument (see Big Bay Point Decision issued

December 14, 2007, at pp. 3-5). While the re-ordering of the evidence necessitated a short break in the hearing all Counsel, recognizing that it would result in a more efficient hearing, endorsed the proposal.

9. Final argument took place in November 2007 and the Board's decision was issued on December 14, 2007, approximately one month after the evidence concluded. Between the commencement of the hearing in August 2007 and the completion of final argument in November 2007, there were approximately thirty (30) hearing days. Kimvar's appeals were allowed and each of the planning instruments before the Board were approved, subject to detailed conditions, which were recommended to the Board by the parties. Nextnine had not taken issue with the conditions of approval, as its position was that the project should not proceed. The Board's decision was neither reviewed nor appealed.

Kimvar argued that the course of conduct exhibited by Nextnine/Gilberts during the proceeding (which, for the purpose of costs, it defines as commencing in June 2007, when the final pre-hearing conference was held to December, 2007 when the Board's decision was issued) was unreasonable, frivolous, vexatious and in bad faith such that an award of costs should be made in favour of Kimvar.

There is no dispute that Kimvar, as the main appellant, was required under any scenario to obtain its approvals from the Board. Mr. Davies acknowledged that a hearing event of some duration was required. However, the position advanced on the motion for costs was that but for the conduct of Nextnine, that hearing would have taken a matter of days, not weeks. Nextnine (or its Counsel) engaged in unreasonable conduct, as defined in the Board's Rules and past decisions, without regard to cost. The behaviour complained of by Kimvar relates primarily to the approach taken in respect of: the Issues List; conduct during the hearing; improper motivation for the opposition; and the adjournment motion (including the grounds upon which it was made).

Dealing first with the matter of the issues for the hearing, the crux of the complaint can be traced to the spring of 2007 when Kimvar settled with the parties with the exception of Nextnine. The County and the Province had originally provided all of the issues identified for the hearing. Gilberts was retained in late May 2007 and Nextnine adopted the entire list as the issues for the hearing. Because the list of issues

normally forms the roadmap for any hearing, Kimvar submits that it had to mount a case (as did the County and the Town) to respond to each of these issues, or risk not obtaining the approvals that it required. Mr. Davies argued that the course of events that happened after the June 2007 pre-hearing conference dictated the need for Kimvar to marshal all of its resources. Kimvar, in its Motion Record, set out the chronology of events and the facts presented are not substantially in dispute. The Board made requests for Nextnine to narrow the list and identify which issues would be addressed by their expert witnesses. The list was never substantially narrowed, and Kimvar argued that Nextnine called no credible evidence of legitimate concerns about the matters on the Issues List and for some issues no evidence was led at all. It was Kimvar's submission that this type of conduct was clearly unreasonable and Nextnine proceeded without any regard to cost.

In addition, Kimvar was critical of the actual evidence called by Nextnine, claiming that the witnesses were both unprepared and ill informed with respect to certain aspects of the project, including the detailed terms and conditions. In this regard the Town submitted that Nextnine's participation was aimed at delay and intended to drive up the costs of the other parties. Kimvar alleges that the behaviour of Nextnine and Gilberts unduly and unnecessarily extended the length, complexity and expense of the hearing preparation undertaken by Kimvar, the Town and the County.

There is no question that the opposition to Kimvar (and by extension, all other parties) extended the length and expense of the hearing. However, the Board does not agree that the hearing was extended unnecessarily or that the conduct exhibited should attract an award of costs. The reasons for this conclusion are relatively simple. When Gilberts was retained and subsequently adopted all of the issues originally provided by the County and the Province, Kimvar did not object. Kimvar wanted to move ahead to a hearing as quickly as possible. While there were discussions ongoing about scoping the issues, Kimvar did not take the position that the issues were not genuine. Rather, it prepared and mounted a case designed to respond to all of the issues. Kimvar argued that it had no choice but to prepare for all of the issues and it fully intended on calling a complete case (along with the Town, County and SAHA/RIA) to address each issue. However, it did so when it knew precisely what the case was that Nextnine intended to call. Following the exchange of witness statements in July 2007 it must have been apparent to Kimvar (and the other parties) that the case in opposition was weak.

Nextnine filed five (5) very short witness statements. No additional conditions or amended conditions of approval were recommended. The evidence filed by Nextnine did not include additional reports that required detailed analysis. The scope of the evidence led by Nextnine and the Board's findings in respect of that evidence are set out in the Board's decision on the merits. Suffice to say that the case failed to convince the Board that the planning approvals sought should be rejected. However, it does not follow that the case presented was frivolous, vexatious or that the opposition exhibited bad faith. The Board does not accept the argument that Kimvar did not know until the experts on behalf of Nextnine testified the extent of the weakness of the case in opposition. As a result, Kimvar argued that to ensure success it (and the Town and the County) had no choice but to expend resources to mount a full case.

As indicated above, a simple reading of the witness statements in July would have revealed to Kimvar the limited evidence that Nextnine was intending to present. Yet Kimvar prepared for an extensive hearing and until the Board suggested that it need not hear all of the elements of Kimvar's case in order to reach a decision on the appeals, the clear intention of Kimvar was to call a comprehensive case, assisted by the Town and the County. Mr. Davies indicated that as of August 8, 2007, there were expert reports from forty-three (43) witnesses (27 for Kimvar; 9 for the Town; 2 for the County; 1 for SAHA/RIA) in support of the project and five (5) witness statements filed in opposition to the approvals. The submission was that these numbers speak volumes about the time and effort involved by Kimvar and others. However, much of this work was required to satisfy both the County and the Province, as their issues were not resolved until the spring of 2007. To suggest that all of this evidence and work was required because of Nextnine's opposition is an unfair characterization. Simply put, prior to the commencement of the evidence, Kimvar made little effort to scale back its plan of attack even when it knew the case in opposition. The Board is not critical in any way of the approach taken by Kimvar in this regard; but Kimvar's choices about how it approached the hearing cannot then be used as a basis for it to claim substantial indemnification. In re-ordering the evidence, the Board was mindful of the expense for all of the parties and sent a clear signal to counsel that the hearing could be streamlined. In this regard, all counsel, including Gilberts, were cooperative and responsive to the Board's direction.

Kimvar complained that the witnesses were unprepared and their evidence was weak. The Board is not prepared to conclude that because the case called by Nextnine was unconvincing on the merits, there should be an award of costs. The standard to be applied in Board hearings is completely different from civil disputes that are litigated in court. Given the size and notoriety of the Big Bay Point project, the complexity of the planning instruments and the numerous conditions, a case in opposition that included five expert witnesses, two lay witnesses, and occupied just under ten hearing days, including evidence in chief and cross-examination, does not amount to an unreasonable case nor unreasonable, frivolous or vexatious conduct. It makes little sense to argue that if the intervention by Nextnine had included a more convincing evidentiary basis and the witnesses were better prepared, then the opposition was legitimate and the issue of costs would not arise. The fact that Nextnine focussed its evidence to particular concerns (which are addressed in the Board's decision on the merits and need not be repeated) should not be used against it in a claim for costs. To conclude otherwise suggests that Kimvar would have preferred a better case in opposition or to conclude that the Board will not tolerate opposition. The Board's findings on the evidence presented by Nextnine are set out in the Board's decision and contrary to Kimvar's submission, the Board cannot conclude that no meaningful evidence was provided. The Board weighed the evidence presented and made its findings, which at the end of the day, resulted in an endorsement of the project from a planning perspective. This decision was consistent with Kimvar's position at the outset of the hearing which was we have a good project, we are going to prove to the Board just how good it is and the widespread support the proposal enjoys in the community.

With respect to the adjournment motion, the Board is not prepared to conclude that there was bad faith or unreasonable conduct as alleged by Kimvar. There is no question the motion was ill conceived. As subsequent events attest, it was unsuccessful. However, in the scheme of the hearing it resulted in a delay of about two weeks in the commencement of the evidence. Applying a standard employed by the courts in respect of costs, Kimvar would be entitled to compensation as there is no question that it had to expend considerable resources to respond to the motion. The adjournment motion was unconvincing and that is why it failed. It did however have the effect of allowing the Board to address issues in advance that no doubt would have been raised in the evidence at the hearing. There were occasions during the course of

the evidence that counsel was able to point to the Board's decision on the adjournment motion to avoid duplication. As the test for costs is neither success nor failure, and taking into account all of the circumstances, the motion to adjourn alone is not a basis upon which the Board is prepared to find that costs are warranted. In the final pre-hearing held in June 2007, reference was made to the prospect of an adjournment motion. It was not a complete surprise.

What is at issue then is whether the approach adopted by Nextnine in respect of the adjournment motion, the Issues List and their general conduct and behaviour at the hearing amounts to unreasonable conduct, frivolous or vexatious conduct, or evidence of bad faith. In considering all of the circumstances, the Board finds that the approach taken by Nextnine (or Gilberts as Counsel) does not amount to improper conduct that should attract an award of costs. The Board also rejects that there is evidence of bad faith on the part of either Nextnine or Gilberts. While it is clear that Kimvar was successful in each of its appeals, unlike disputes handled by the Courts, there is no entitlement or even an expectation that an applicant will recover its costs. Kimvar, as the main appellant and applicant, was before the Board because the County and the Town had initially failed to adopt the planning instruments Kimvar required to proceed with its project. The Province also had concerns with the project, shown by their contribution to the Issues List. The project was under consideration for several years before the Memorandum of Agreement was executed. So, although the appeals were eventually settled with the municipal interests, the Province and Mr. Kagan's clients, (the main ratepayers groups in the vicinity of the project), a Board hearing was necessary for Kimvar to secure its approvals.

There was also considerable local interest in the project given its scope, notoriety and sheer size. Kimvar was sensitive to this interest and was intent from the outset of the hearing in demonstrating in detail the various positive attributes of the Big Bay Point project. The Board was persuaded by the evidence that sufficient safeguards were built into the planning instruments in the form of conditions, including requirements for all necessary approvals and permits that fall outside the jurisdiction of the Board and must be secured prior to the project proceeding (Big Bay Point Decision, December 14, 2007). While it is correct that but for Nextnine's opposition the hearing would have been substantially shortened, it does not follow that the hearing was unreasonable in length, given all of the circumstances. For all of these reasons, the Board finds the conduct

complained of, whether attributable to Nextnine or its Counsel, should not attract an award of costs.

Issue (b) Does the Board have the jurisdiction to award costs against legal counsel.

It was the position of Mr. Cowan on behalf of Gilberts that as a matter of law, the Board simply has no jurisdiction to award costs against a non-party and specifically, against the legal counsel who represented Nextnine at the Big Bay Point hearing. For this reason, Mr. Cowan submitted that Kimvar's motion for costs as against his clients must be dismissed, regardless of any disposition on the matter of conduct. That is, if the Board concludes that the conduct was unreasonable an award can only be levied against a party to the proceeding for which costs are claimed. Mr. Cowan argued that David Donnelly, Tim Gilbert and Gilberts LLP were not parties to the hearing and as such, there can be no award of costs made against them.

The issue of whether an award of costs can be made against legal counsel representing a party is, on the facts of this case, moot in light of the decision regarding conduct. However, given the novelty of the claim against Gilberts and in light of the arguments presented, some comment is required.

On the issue of what constitutes a "proceeding" for which costs can be claimed, the Board agrees with Mr. Davies that the "proceeding" was complete when the Board's decision was issued. Kimvar's application for costs is a separate proceeding, authorized by the OMB Act and decided under a separate procedure delineated in the Board's Rules.

Mr. Davies submitted that the Board's Rules do not explicitly contemplate - or preclude - the awarding of costs against legal counsel. First, because the jurisdiction to award costs comes from section 97(2) of the OMB Act which does not restrict "by whom" or "against whom" costs can be claimed it was submitted that the Board has the discretion to award costs against a non-party. The Board has a broad jurisdiction under both the OMB Act and the *Statutory Powers Procedure Act* (SPPA) to order a non-party to pay costs, a power that is essential for the Board to control its process and to prevent abuse. Second, the fact that the Board's Rules are silent on the matter does not fetter the discretion to award costs. The Board has the ability to rely on the Ontario Rules of

Civil Procedure (Rules of Civil Procedure) in circumstances where matters are not covered by the Board's Rules. In this regard, Mr. Davies placed reliance of Rule 57.07 on the Rules of Civil Procedure, which provides that costs can be ordered to be paid personally by solicitors. Consequently, the Board was told it would be an error of law to decide simply that it does not have the ability to award costs against a legal counsel on the basis Gilberts was not a "party" to the "proceeding".

In the courts the authority to award costs is conferred by section 131 of the *Courts of Justice Act* (CJA) and costs are a procedural matter governed by the law of the forum (*Somers v. Fournier* et al 2002 CanLII 45001 (Ont.C.A.)). The wording of the CJA is almost identical to what is found in section 97(2) of the OMB Act; that is, the court may determine by whom and to what extent costs shall be paid. In considering the wording of section 131, the Court of Appeal has found that "by whom…the costs shall be paid" means "by which parties to the proceedings before the court or judge" shall be liable for costs (*Television Real Estate Limited v. Rogers Cable Limited et al*, 1997 CanLII 999). Mr. Cowan submitted that, by analogy to section 131, where section 97(2) of the OMB Act stipulates "by whom and to whom any costs are to be paid", it can only mean that the Board is also restricted and may only award costs against a party. The Court of Appeal also determined in *Television Real Estate* that a non-party could only be liable to pay costs where it is found to be the real litigant. In these instances the courts (and the Board) have found that the non-party against whom costs are sought was "calling the shots" or the non-party was the real appellant or *de facto* party (see for example *Davis v. Ottawa (City)*, 2005 CarswellOnt 4149 (OMB) where the Board found that the persons against whom costs were sought were the real appellants as they had instructed the agent and controlled the conduct of the hearing; *Innisfil (Township) Restricted Area By-law 78-80 (No. 1)*, 1981 CarswellOnt 444 (OMB) where costs were awarded against a municipality because it was found to be the real proponent).

The Board has awarded costs against a participant (*Hazelton v. Clarendon & Miller (Township) Land Division* Committee, 1996 CarswellOnt 5683). However, it did so on a basis similar to the "real litigant" approach as the Township qualified as a participant in the proceedings and was found to be a *de facto* party. The Board has rejected an application for costs on the basis that the municipality against whom costs were sought was not a party nor was it either "calling the shots" or acting as the "real litigant" (see *Ferguson v. Little*, 2001 CarswellOnt 5277 at para. 9 where the conclusion

reached was that for a motion for costs to succeed, the Board must find that the township is a party and having found so, determine that its conduct was clearly unreasonable; similarly in *Bruce (County) Official Plan (Re)* [2000] OMBD 1048 the Board stated that when costs are sought against an agent or counsel, it is incumbent on the party seeking costs to demonstrate that the agent or counsel has acted independently of the party represented). In this instance while Kimvar seeks costs against legal counsel, there is no suggestion that Gilberts was the "real appellant" or that it was acting independently of its clients. Therefore the "real litigant" exception is not applicable. In a recent decision, the Board did not distinguish between the behaviour of a consultant advising a party and the party directing the consultant. However, the finding reached was that the "party is ultimately responsible" (*Ringas v. Hamilton (Township*) 2008 CarswellOnt 883).

There has been one instance when costs have been awarded by the Board against legal counsel. In *Westfield Place Inc.*, the Board concluded that under section 97(2) of the OMB Act the Board's authority to award costs is not restricted to parties. However in doing so, it relied on Practice Direction No. 11:COSTS, issued in February 1996 which specifically indicated that "in extremely rare cases the representative of a party may be subject to costs…." This Practice Direction was subsequently replaced in 2000 when the Board issued its revised Rules with commentary, the purpose of which was to provide some explanation for the public of the intent behind the various Rules. The Practice Directions were discontinued. The commentary did not carry over the statement that a representative of a party may be subject to costs. There is nothing in the Board's Rules which stipulate that costs can be awarded against a representative, whether an agent or counsel. Therefore, the Board finds that subject to the "real litigant" exception described previously or where there is an abuse of process, the expectation of those who appear before the Board is that only parties may be subject to costs.

The Board concludes further that its costs provisions are comprehensive and the Rules of Civil Procedure should not be relied upon to augment what the Rules stipulate about costs. In *Westfield Place Inc.* the Board had reference to Rule 57.07 of the Rules of Civil Procedure, but it also placed reliance on the Practice Direction in arriving at its conclusion to award costs against a non-party. Reference to Rule 57.07 was not strictly necessary. The Practice Direction in effect at the time contemplated, albeit in extremely rare circumstances, costs against a non-party. The Board's Rules that are now in effect

have no parallel, either in the new Rules issued August 2008 or in the Rules made in 2000, including the commentary). In this regard, the Board agrees with Mr. Cowan's submissions.

Section 97(2) of the OMB Act does not specify "by whom" or "to whom" costs are to be paid. The Board is given discretion. By analogy to section 131 of the CJA a reasonable interpretation is that it means "by which parties"; however, there is no direction from the court in this regard. Nevertheless, the Board's Rules are clear on costs. The Board has stated clearly that where one party believes that another party has acted unreasonably or there is bad faith, that party can ask for costs. The Board is the master of its own practice and procedure. The Board has made a policy choice that in the event costs are at issue, it is for a party to seek costs against another party. The Board rejects the argument that because the Board's Rules do not preclude costs being sought against counsel resort must be had to the Rules of Civil Procedure. The opposite is true. The Rules are structured to provide clear direction on costs and need not be augmented.

Finally, Kimvar argued that if costs cannot be awarded against a non-party (e.g. legal counsel), the Board would lose its ability to control its own process. The Board disagrees and there is no reason to believe that unreasonable conduct will escape scrutiny. First, parties will always remain liable for conduct that attracts an award of costs and each case is considered on its own merits. The Board notes that distinguishing improper conduct as between a party and its counsel is in any event not always easy. Kimvar was clear at the outset that it could not actually know the degree of responsibility for improper conduct before and at the hearing, which should respectively be borne by Nextnine and Gilberts. Second, under the SPPA any tribunal, including the Board, can prevent abuses of process. The standard is high (see *Volfson v. Royal & Sun Alliance Insurance Co. of Canada*, 2005 CarswellOnt 5232 (Ont.Div.Ct.). Abuse of process was not the foundation of the claim against Gilberts.

Issue (c) Has the application for costs been brought for improper purposes.

In determining whether the Board should exercise its discretion to award costs the Board considers all of the circumstances of the case and has done so in the context of Kimvar's application. Mr. Bell submitted that one of the factors that the Board should consider is the underlying motivation for Kimvar's claim, especially in light of the amount sought and the fact that the claim is advanced against counsel. The suggestion was made that the cost claim was brought for the purpose of silencing public opposition and accordingly constitutes an improper purpose.

Similarly, Mr. Ruby argued that the public-interest impact of a costs award is a relevant factor that the Board must consider in order to properly exercise its discretion. If the Board were to award costs at anywhere near the scale requested by Kimvar the claim would have the effect of a Strategic Litigation Against Public Participation (SLAPP) suit, sending a message that opposition from the public will not be tolerated. If an award of costs is made in this instance it would create a "chilling effect" and deter public participation in its process.

Mr. Miller, Environmental Commissioner for Ontario, was called by EDC to provide evidence at the costs proceeding. Mr. Miller's testimony reinforced the message that the Board has consistently communicated with respect to costs. Awards of costs are rare and costs are not intended to be used as indemnification to a successful party. The Board has made cost awards in cases where the dispute is between commercial entities and in limited circumstances, between government and business. These awards are unusual, far from routine, each turn on their specific facts. The Board agrees with Mr. Ruby's submission that the Board takes a cautious approach to cost awards against citizens and strives to accommodate public participation in land use planning decisions. In fact, in the very limited number of cases where awards of costs have been made against citizens, amounts have always been nominal. This is entirely consistent with how the Board has typically proceeded: costs cannot be used as a threat to deter public participation; and costs will only be awarded (whether the parties are commercial entities, ratepayers or citizens) where the conduct complained of is so improper that it cannot be ignored. While Nextnine has a particular interest in the Big Bay Point project given its proximity and own development plans, the intervention was not commercially motivated analogous to other hearings (e.g. "store war" cases) where competition is the

only reason for either an appeal or intervention. The rationale for costs awards in commercial competition cases is distinguishable from the case before the Board.

The Board is not prepared to make any award of costs, nominal or otherwise against Nextnine nor is it prepared to conclude that Kimvar's claim was brought for an improper purpose. While the Board has found, for the reasons set out above, that there should not be any award of costs, it has done so based on an assessment of conduct. The Board rejects the proposition that the cost claim was brought for an improper purpose, with improper intent, to suppress public participation and to send a message to local citizens that they should not oppose Kimvar or other developers. It was clear from the submissions of Mr. Davies, Ms. Rosenthal and Mr. Miller that the application for costs was launched because Kimvar genuinely believed it was required to prepare for and participate in a proceeding that, but for the opposition of Nextnine, was unduly protracted. The legal team retained by Kimvar was clear from the outset that the opposition was weak and their case was strong. Kimvar had the support of significant local residents groups, the municipal interests and the Province.

Nonetheless, there is no question that the claim is unprecedented and the Board finds that an award of costs anywhere near the amount requested would create a chilling effect. In this regard, the Board adopts Mr. Ruby's submission that the public interest impact of a costs award is a relevant factor for the Board to consider in exercising its discretion. It is for this reason that the Board has restricted awards of costs to the clearest of cases, where the conduct complained of is unreasonable and improper. In this case, the magnitude of the costs claimed, coupled with the position that legal counsel be held equally accountable, revealed an animosity between the parties which was rarely evident during the hearing.

Decision and Order

The decision in this matter is intended to reinforce and reiterate the Board's practice that costs are not awarded lightly nor are they awarded routinely. Awards of costs are rare, especially proportionate to the number of cases decided by the Board. Potential parties and the public should not be fearful of participating in Board proceedings, a sentiment that has been expressed in decision after decision. Costs should never be used as a threat or a reason to dissuade public participation. The

Board has the statutory jurisdiction to award costs for the purpose of controlling its process. Costs before the Board have never been intended to follow “the cause” nor are they intended in any way to indemnify a successful party. Each application for costs is decided on its own merit, based on an assessment of conduct.

For all of the reasons given, the Board finds that there is no liability for the costs claimed by Kimvar against Nextnine or Gilberts. The issues of apportionment and quantum are therefore moot, and further argument is not required.

Accordingly, the application seeking legal and consulting costs in connection with the Big Bay Point proceeding incurred by and on behalf of Kimvar, the County of Simcoe and the Town of Innisfil as against Nextnine Limited, 2025890 Ontario Inc., the Innisfil District Association, David Donnelly, Tim Gilbert and Gilberts LLP is dismissed.

This is the Order of the Board.

J. de P. SEABORN
VICE-CHAIR