ISSUE DATE:

Aug. 26, 2009

PL090011

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Pemic Komoka Development Corp.
Subject:	By-law No. BL 2008-097
Municipality:	Municipality of Middlesex Centre
OMB Case No.:	PL090011
OMB File No.:	PL090011

IN THE MATTER OF subsection 34(25) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Motion by:	1571145 Ontario Limited
Purpose of Motion:	Request for an Order Dismissing the Appeal
Appellant:	Pemic Komoka Development Corp.
Subject:	By-law No. BL 2008-097
Municipality:	Municipality of Middlesex Centre
OMB Case No.:	PL090011
OMB File No.:	PL090011

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

Parties	**Counsel**
1571145 Ontario Limited	A. Patton
Pemic Komoka Development Corp. and Southmoor Development Corp.	B. Card

DECISION DELIVERED BY S. J. STEFANKO ON A MOTION FOR COSTS AND ORDER OF THE BOARD

1571145 Ontario Limited ("Developer") brought a motion pursuant to s. 34(25) of the *Planning Act* to dismiss the appeal taken by Pemic Komoka Development Corp. ("Pemic") and Southmoor Development Corp. ("Southmoor") of By-law No. 2008-097 passed by the Municipality of Middlesex Centre ("Municipality") on December 3, 2008, and by decision issued May 11, 2009 ("Decision") was successful in so doing. The Developer has now brought a motion in relation to that hearing event seeking costs on a

partial indemnity basis totalling $5,000. The Municipality, although a party to the motion to dismiss the proceeding, did not appear on this costs motion.

Positions of the Parties

The Developer argues that the Appellants were sophisticated Parties familiar with the planning process including the reality that costs could be awarded against them. Specifically, the Developer submits that clearly unreasonable conduct is evidenced by the manner in which the Appellants dealt with sewer capacity, by their indirect revisitation of OPA 19, and by the Decision itself which concluded that the appeal of the Designated By-law by the Appellants did not disclose any apparent land-use planning ground upon which their appeal could be allowed, in whole or in part.

Pemic and Southmoor ("Appellants") on the other hand, take the position that their appeal was based on additional factors not referred to in the Developer's request for costs, that the request for costs does not satisfy the Board's requirements to award costs and that, in any event, the amount claimed is excessive for the nature of the proceeding in question.

Issue

The Decision included a finding that the evidence presented on the motion to dismiss fell far short of showing that the Appellants had acted frivolously, vexatiously, not in good faith, for purpose of delay or had commenced proceedings that constituted an abuse of process. As a result, the only issue to be determined on this motion is whether the Appellants exhibited clearly unreasonable conduct in pursuing their appeal of the Designated By-law?

Analysis

Since the Board's Rules of Practice and Procedure no longer contain any commentary as to what may constitute clearly unreasonable conduct, it is in my view,

important for counsel to present, in matters of this type, an appropriate dictionary definition of the word unreasonable or a prior Board or Court decision which has done so. Earlier Board decisions which make reference to commentary in the Board's Rules of Practice and Procedure (" Board's Rules"), which commentary has now been eliminated, are not nearly, in my view, as compelling as they once were. Having said that however, a recent Board decision (" Kimvar Decision") by Vice-Chair Seaborn in the Kimvar Enterprises Inc. case did canvass, in a detailed fashion the issue of costs in Board proceedings. Certain comments made by Vice-Chair Seaborn are, in my opinion, particularly helpful.

At page 5, she states:

> "… 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."

And at page 6, she comments:

> " 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)"

Although Mr. Howe's testimony in this case regarding OPA 19 creates a cloud of suspicion regarding the appeal motives of the Pemic and Southmoor, it cannot, in my view be said, that there was a reckless or capricious quality to their grounds of appeal. Moreover, I do not believe their conduct was either unfair or fell within one of the behaviour *indicia* set out in s.103 (a)-(h) of the Board's Rules. The dismissal of a Zoning appeal because it did not disclose any apparent land use planning ground does not necessarily equate with the type of conduct which gives rise to an award of costs. To suggest otherwise would be to ignore the comments of Vice-Chair Seaborn at page 19 of the Kimvar Decision:

> " 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…"

Disposition

Based on all of the foregoing, I am not satisfied that this is a case for costs. Accordingly, the Developer's motion for costs is hereby dismissed.

It is so Ordered.

"S. J. Stefanko"

S. J. STEFANKO
MEMBER