ISSUE DATE:

Oct. 08, 2009

PL090692

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

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

Appellant:	Peter Meier
Subject:	Proposed Official Plan Amendment No. 90
Municipality:	City of Niagara Falls
OMB Case No.:	PL090692
OMB File No.:	PL090692

IN THE MATTER OF subsection 17(45) of the *Planning Act*, R.S.O. 1990, C. P. 13, as amended

Motion Request By:	1149948 Ontario Ltd. (applicant)
Purpose of Motion:	Request for an Order Dismissing the Appeal
Appellant:	Peter Meier
Subject:	Proposed Official Plan Amendment No. 90
Municipality:	City of Niagara Falls
OMB Case No.:	PL090692
OMB File No.:	PL090692

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

Parties	**Counsel**
1149948 Ontario Ltd.	E. P. Lustig
Peter Meier	
City of Niagara Falls	K. Beaman

DECISION DELIVERED BY M.G. SOMERS AND ORDER OF THE BOARD

1. Context

1149948 Ontario Ltd. ("the Applicant") has brought a motion to dismiss the Appeal filed by Peter Meier ("the Appellant") without holding a full hearing pursuant to subsection 17(45) (a) (i)-(iii) of the *Planning Act.*

It was the Applicant's position that the Appeal was frivolous and that there were no legitimate land use planning grounds upon which the Board could allow the Appeal. In addition, the Applicant was seeking costs against the Appellant.

The City supported the Applicant's motion to dismiss.

It was the Appellant's position that the Appeal disclosed apparent, genuine and legitimate land use planning grounds upon which the Board could allow the Appeal in whole and/or in part and that the Appeal was not frivolous.

The Applicant proposes a future development of a 57-storey hotel adjoining the existing Loretto Christian Life Centre and a 42-storey hotel and/or hotel/residential tower and a 32-storey hotel and/or hotel/residential tower ("the Development") at 688 Stanley Avenue ("the Subject Property") in the City of Niagara Falls ("the City"). As a result, the Applicant submitted an Application for an Official Plan Amendment to amend the City of Niagara Falls Official Plan and redesignate the Subject Property from "Tourist Commercial (4-storey maximum)" to "Tourist Commercial with special policy to permit high-rise buildings".

The Council for the City approved the Application on June 8, 2009. On June 29, 2009, the City passed By-law No. 2009-104 adopting Official Plan Amendment No. 90 ("OPA 90"). The Appellant filed an Appeal against OPA 90 pursuant to subsection 17(24) of the *Planning Act.*

In support of the motion, the Applicant filed a motion record, which included an Affidavit from Richard Brady, a professional land use planner, dated August 28, 2009 (Exhibit 1, Tab 2). The City filed an Affidavit from Alex Herlovitch, the Director of Planning and Development for the City dated September 18, 2009 (Exhibit 2(b)).

The Appellant filed a Notice of Response dated September 16, 2009 (Exhibit 3).

2. Motion to Dismiss

The Board in considering the planning grounds found in the subject Appeal is mindful of the significant body of case law that has developed in recent years in relation to subsections 17(45) and 34(25) of the *Planning Act*. It is no longer sufficient for appellants to raise triable issues couched in planning language to survive a motion brought under this subsection. The Appeal must disclose planning grounds that warrant a hearing. It is not sufficient to simply raise apprehensions as members McLoughlin and Lee stated in *City of Toronto v. East Beach Community Association*:

> The Board is entitled to examine the reasons stated to see whether they constitute genuine, legitimate and authentic planning reasons. This is not to say that the Board should take away the rights of appeal whimsically, readily and without serious consideration of the circumstances of each case.

Mr. Lustig argued that the Appellant has not identified any specific impact from or objected to any particular aspect of the Development in the Appeal. Further, Mr. Lustig argued that the reasons identified by the Appellant did not provide any legitimate planning ground on which the Board could allow in the Appeal in whole or in part. Furthermore, he argued that the Appeal was frivolous, in so far as the Appeal was vague and unsubstantiated. Mr. Lustig maintained that the Appeal is lacking in good faith, since the Appellant did not take any steps to obtain or fully consider expert advice with respect to his concerns.

On the other hand, the Appellant argued that the Appeal consisted of legitimate and genuine planning concerns. He noted that OPA 90 was adopted prior to the completion of any studies regarding heritage, environmental, social and economic impacts. It was his view, that this was wrong, and did not protect the surrounding lands. He submitted that authorizing OPA 90 before the completion of the aforementioned studies is contrary to the Official Plan. In his view, “it was putting the cart before the horse”.

The Appellant advised the Board that he had retained a planner named Rick Jones from Barrie. The Board notes that the Appellant did not file an Affidavit from Mr. Jones to oppose the motion to dismiss. The Appellant stated that it was Mr. Jones’ opinion that the Application did not represent good planning. However, the Appellant could not elaborate at all on the evidence and/or planning polices that would support the

Appeal. He advised the Board that he would be having further discussions with Mr. Jones and that the evidence would be presented at the Appeal hearing.

Mr. Beaman submitted that the Applicant was in his right to first propose an amendment to the Official Plan and then try to implement the amendment through an Amended By-law, if certain conditions were met. The Appellant stated in reply that the Applicant did not have the right to proceed in this fashion. The Appellant did not provide any authority to support his position.

Mr. Beaman noted that the Appellant would still be able to oppose the Development, even if the Appeal was dismissed, as the Applicant would have to amend the Zoning By-law to implement the Development. Mr. Beaman maintained that such an amendment would require a public process.

In addition, Mr. Beaman argued that the Board, pursuant to subsection 2.1 of the *Planning Act,* has to have regard to any decision made by a municipal council that related to a planning matter. Mr. Beaman further argued that the Appellant did not disclose any apparent land use planning ground upon which the Appeal could be approved by the Board. Furthermore, Mr. Beaman argued that the City's Planning Department provided a strong detailed report that supported the Development subject to a number of conditions and that all regulatory and commenting agencies and bodies during the planning process supported the Development subject to a number of conditions.

Mr. Brady and Mr. Herlovitch maintained in their Affidavits that the requirement included in OPA 90 for various studies including: a Heritage Impact Study, an Archaeological Impact Study, a Tree Study, an Architectural Peer Review and other studies including wind and shadowing studies to be completed before Council would consider a Zoning By-law Amendment to implement the Development, would ensure that the intent of the Official Plan is complied with.

Mr. Brady stated in his Affidavit that there was no professional planning evidence that confirmed the Appellant's contention that amending the City's Official Plan prior to conducting and tabling all of the aforementioned studies, contravened the City's Official Plan. In fact, both Mr. Brady and Mr. Herlovitch stated in their Affidavits that the Application complied with the City's Official Plan.

Mr. Brady stated that in Part 8 of the Appellant Form, the Appellant made a number of statements that were not supported by any information and did not disclose any apparent land use planning grounds upon which the Board could allow all or part of the Appeal. Mr. Brady maintained that all of the statements contained in Part 8 were simply statements without any reason, explanation or connection given to the Application. For example, Mr. Brady noted that "Local, Regional, Provincial and National interests" mentioned in Part 8 of the Appellant Form did not say or mean anything in connection to the subject Application. He maintained that there were no known Local, Regional, Provincial or National interests that were being violated by the Application. Mr. Brady stated that no one other than the Appellant has brought forward any issues in relation to these interests. He maintained that the same was true regarding the rest of the statements in Part 8 of the Appellant Form.

The Appellant argued that the grounds for the motion were based on speculation and unsubstantiated accusations. He stated that the evidence and planning reasons would be provided at the Appeal hearing. In his view, the process and time spent on the motion would have been better served by allowing him the opportunity to resubmit a more detailed Appellant Form.

The Board has carefully reviewed the motion material and case law filed by the Parties, and the submissions of Counsel and the Appellant. The Board notes that it is incumbent on persons who invoke the appeal process to be prepared to have genuine, legitimate and authentic planning reasons and have cogent evidence for the hearing. The Board finds that the Appellant tried to merely recite some planning jargon to buttress the Appeal. The Board finds that the reasons set out in the Appeal did not disclose any apparent land use planning ground upon which the Development or part of the Development could be allowed by the Board.

The Appellant did not produce any expert reports or any specific planning evidence in support of the Appeal. The Board acknowledges that the Appellant stated that he had retained a land use planner for this matter. However, the Appellant did not produce an Affidavit from the planner and/or have the planner present at the motion. As this motion will determine whether the Appeal is to proceed to a hearing or not, the Board would have expected the Appellant to file Affidavit material from the retained planner in support of the Appeal and/or have the planner give *viva voce* evidence in

support of the Appeal. Further, the Appellant could not inform the Board as to the general evidence that the planner would rely upon in support of the Appeal, other than the reports mentioned in OPA 90 should have been completed before the Official Plan was amended.

In addition, the Board finds that the Applicant and the City presented uncontradicted land use planning evidence by way of affidavit material that the Application complied with the Official Plan. Further, the Board finds that the requirements included in OPA 90 for various studies to be completed before Council would consider a Zoning By-law Amendment to implement the Development, would ensure that the intent of the Official Plan is complied with.

The Board also finds that the Application had been through an extensive review process and that OPA 90 addresses issues raised by the Municipality and other regulatory and commenting agencies and bodies during that planning process.

Further, the Board finds that if the Appellant still has concerns regarding the Development, he will have the right to participate in the public process regarding a future Zoning By-law Amendment that will be required by the Applicant if the Development is to be implemented.

Based on the above reasons and findings, the motion to dismiss is granted. As such, the Appeal of Council's decision to approve OPA 90 is dismissed without holding a hearing pursuant to subsection 17(45) of the *Planning Act*.

3. Request for Costs

The Board now turns to the Applicant's request for costs against the Appellant.

Mr. Lustig argued that the conduct of the Appellant in bringing this Appeal was unreasonable and frivolous pursuant to subsection 103 of the Rules of Practice and Procedure. Mr. Lustig filed a number of billings regarding the motion to dismiss and the Appeal (Exhibit 6).

Mr. Beaman advised the Board that the City would not take a position regarding the Applicant's request for cost. Further, that the City would not be seeking cost against the Appellant.

As noted above, Mr. Lustig argued that the Appellant did not disclose any legitimate planning grounds in the Appeal. He noted even at this late date, the Appellant did not identify any specific impact from or objection to any particular aspect of the Development or what planning policies he would be relying upon. Mr. Lustig further argued that the Appeal was frivolous, in so far as it was vague and unsubstantiated.

In response, the Appellant stated that he had acted properly and in good faith and that his actions were not unreasonable or frivolous. Further, he argued that he had legitimate concerns regarding the Council's granting of OPA 90. In addition, he argued that the threat of costs should not be permitted to serve as a deterrent to a concerned citizen, as himself, who has a different but sincerely held view regarding the subject Application.

The Board notes that it has a broad discretion to award costs under section 97 of the *Ontario Municipal Board Act*. The Board's Rules, specifically Rules 96 to 104, provides guidance and gives examples as to what type of conduct will attract costs (Rule 103). The Board notes that Rule 103 states that the Board is not bound to order costs when any of these examples (section 103 (a)-(h)) occur, as the Board will consider the seriousness of the misconduct.

In addition, the Board notes that parties to an appeal are exercising a statutory right and therefore, unlike court proceedings, recovery of costs is not standard. In short, a successful party appearing before the Board should have no expectation that it will recover its costs. In *Westfield Place Inc. v. Blandford-Blenheim (Township) Pit Application*, [1996] O.M.B.D. No. 1252, at p. 19, the Board states that it "does not award costs lightly and it does not award costs automatically. In decision after decision, the Board has expressed sensitivity to the right of appellants to bring matters before this Board". Nevertheless, the Board has also concluded that parties must be accountable for their conduct and if that 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 a Board's decision 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 Caswell Ontario 5296).

In considering whether a course of conduct has been clearly unreasonable, the Board has held that it is entitled to consider the sophistication or familiarity with the Board's processes, of the party against which costs are sought (*Wal-Mart Canada Corp*. v. *Peterborough* (City), [2004] O.M.B.D. No. 1234). The Appellant did not have any specific training or education, which would suggest that he had any great understanding of the Board's processes. His lack of familiarity with the Board processes was evidenced by his response to the submissions of Counsel for the Moving Parties. The Board finds that the Appellant is not accustomed to the Board's practice or procedure to a degree to consider him as a sophisticated party.

Further, the Board finds that there was no evidence or other indication that the Appellant was acting in bad faith, that he was ill-motivated or that he was only trying to delay OPA 90.

The Board turns to the amount of preparation undertaken by the Appellant. As noted above, the Board concluded in the Appeal did not have any genuine planning grounds. Did the amount of preparation undertaken by the Appellant amount to clearly unreasonable and merit cost against him? The Board notes that the Appellant stated that he had spoken to and retained Mr. Jones, a planner in Barrie. In addition, the Appellant advised the Board that he spoken to a number of lawyers regarding the Application, but did not retain one. He further advised the Board that he contacted Board's Citizen Liaison Office for assistance in respect to the Board's policies and procedures. The Board finds that the Appellant's preparation for the Appeal is at best minimal. Were it not for the fact that there had been no evidence presented in relation to an abuse of process, or practices demonstrated persuasively to cause undue delay or obfuscation, the Board might have found cost against the Appellant. Rather, the Board has reviewed all of the submissions and case law filed at the motion, as well as weighed all the factors and concerns before concluding that as frustrating and wanton the Appellant's conduct, performance and preparation was, it did not breach the requisite bar as called for under the Rules. The Board finds that the Appellant did not act in a vexatious or frivolous manner. The Board finds that overall the Appellant acted in good

faith and tried to the best of his knowledge to generally follow the procedures and direction of the Board.

As such, the Board is not satisfied that the conduct of the Appellant was clearly unreasonable and therefore, the Board is not prepared to exercise its discretion to award costs.

The Board so Orders.

"M. G. Somers"

M. G. SOMERS
MEMBER