

ISSUE DATE:

March 8, 2013



PL120552

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13,
as amended

Appellant: Stanton Bros. Limited
Subject: Proposed Official Plan Amendment No. OPA28
Municipality: Township of Middlesex Centre
OMB Case No.: PL120552
OMB File No.: PL120552

IN THE MATTER OF subsection 97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c.o. 28, as
amended

Request by: Township of Middlesex Centre
Request for: Request for an Order Awarding Costs
Costs sought against: Stanton Bros. Limited

Parties

Counsel

Municipality of Middlesex Centre	A. Wright P. Lombardi
Stanton Bros. Limited	A. Patton

DECISION DELIVERED BY J. P. ATCHESON AND ORDER OF THE BOARD

[1] The Board on January 8, 2013 conducted a prehearing in the matter of appeals filed against a decision of the Council of the Municipality of Middlesex Centre (Municipality) to pass Official Plan Amendment No. 28 ("OPA No. 28") to the Middlesex Centre Official Plan. One of the appellants to OPA No. 28 was Stanton Bros. Limited (Stanton Bros.). The substance of the Amendment is to enlarge the Settlement Areas of Ilderton and Komoka-Kilworth while reducing the Settlement Area boundaries of Ava, Birr, Popular Hill, Coldstream, Denfield and Melrose. In a decision dated April 24, 2012 the County of Middlesex, the Approval Authority, approved OPA No. 28 with modifications.

[2] Counsel for the Municipality, prior to the prehearing, brought a motion seeking an order of the Board that:

1. Stanton Bros. has no status to appeal on the basis that Stanton Bros. failed to make oral submissions at a public meeting nor did they make any written submissions to Council prior to Middlesex Centre's adoption of Official Plan Amendment No. 28 as required by the *Planning Act*. R.S.O. 1990, c. P.13, as amended.
2. The purported appeal by Stanton Bros. of OPA No. 28 dated May, 11, 2012 is not a valid appeal and is therefore dismissed; and
3. Such further and other relief as the Board may deem just.

[3] The Board's office was advised in a communication from Counsel for Stanton Bros. dated January 4, 2013 that his client had withdrawn their appeal to OPA No. 28. This portion of the appeal file is now closed.

[4] Counsel for the Municipality, in a letter dated January 7, 2013, indicated an intention to seek costs against Stanton Bros. in the amount of \$4,300.00. The Board gave directions to the parties at the prehearing that if the Municipality wished to proceed with its cost motion that the Board would proceed in the manner set out in Rule 98(ii) (a) to (d) of the *Board's Rules of Practice and Procedure* and directed Mr. Wright to file, within 35 days of that decision being issued, any cost motion material he deemed appropriate. The Board did not direct any response from Stanton Bros. pending receipt of any cost material from Mr. Wright and until the Board had considered the filings following which time the Board would provide further directions.

[5] The Board on February 13, 2013 received the additional cost motion materials filed by Counsel for the Municipality. The Municipality now in its motion seeks costs of \$5644.70 as partial indemnity for its cost in preparing a motion to have the Board determine whether Stanton Bros. had right of appeal OPA No. 28, the cost of this motion and such further relief as the Board deems just.

[6] The Board makes the following determination after having reviewed all of the submissions filed by Mr. Wright with respect to his request for costs and having considered those submissions within the context of the Board's decision issued on January 23, 2013.

[7] The Board will not be reviewing all of the facts of the case, as set out in its Decision dated January 23, 2013 in making its determination regarding costs. So this decision on the merits of this cost request should be read in conjunction with the previous decision of the Board.

[8] In considering a motion for costs, the Board's *Rules of Practice and Procedure* state that:

103. Circumstances in Which Costs Order May be Made The Board may only order costs against a party 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 conduct can include, but is not limited, to:

- (a) failing to attend a hearing event or failing to send a representative when properly given notice, without contacting the Board;
- (b) failing to give notice without adequate explanation, lack of co-operation with other parties during prehearing proceedings, 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.

[9] Counsel for Middlesex Centre submits that this is a proper case for the Ontario Municipal Board ("Board") to exercise its jurisdiction and award costs on a partial indemnity basis on the basis;

1. That the conduct by Stanton Bros. in precipitating the need for Middlesex Centre to bring an unnecessary motion, in unreasonably failing to provide the information requested and in unreasonably putting the Municipality to

the expense of preparing for the argument of the motion by withdrawing its appeal on the eve of the return of the motion.

2. Middlesex Centre requested that the Board dismiss, as an administrative matter, the appeals brought by Stanton Bros. (“Stanton Appeal”) on the basis that Stanton Bros. failed to make oral submissions at a public meeting nor did they make written submissions to Council prior to the adoption of Official Plan Amendment 28 (“OPA No. 28”) as required by s.17(36) of the *Planning Act*.
3. Stanton Bros. took the position before the Board that it was inappropriate that its appeal be dismissed as an administrative matter and required Middlesex Centre to go to the expense of bringing a Notice of Motion before the Board to seek the dismissal of the Stanton Appeal.
4. Despite requests that Stanton Bros. show how it met the requirements of the *Planning Act*, prior to bringing the Notice of Motion, Stanton Bros. failed to provide any information or details as to how it fulfilled the requirements of s. 17(36) of the *Planning Act*.
5. Middlesex Centre is seeking costs against Stanton Bros. to indemnify Middlesex Centre for its expenses thrown away in the circumstances that Stanton Bros. knew or ought to have known that it had no status to appeal and yet, by its deliberate conduct, caused Middlesex Centre the unnecessary expense of proving that which ought reasonably to have been conceded.

[10] The substance of the motion is that Stanton Bros. had no right of appeal as they during the municipal consideration of OPA No. 28 did not make representation to the Municipality as prescribed by the *Planning Act* and as set out at s .17(36) which states:

Appeal to O.M.B.

[\(36\)](#) Any of the following may, not later than 20 days after the day that the giving of notice under subsection (35) is completed, appeal all or part of the decision of the approval authority to the Municipal Board by filing a notice of appeal with the approval authority:

1. A person or public body who, before the plan was adopted, made oral submissions at a public meeting or written submissions to the council.
2. The Minister.
3. In the case of a request to amend the plan, the person or public body that made the request. 2006, c. 23, s. 9 (6).

[11] The Board would note that s.17 (44) of the *Planning Act* gives to Board jurisdiction to add a party to a hearing when it states;

Restriction re adding parties

[\(44.1\)](#) Despite subsection (44), in the case of an appeal under subsection (24) or (36), only the following may be added as parties:

1. A person or public body who satisfies one of the conditions set out in subsection (44.2).
2. The Minister.
3. The appropriate approval authority. 2006,c. 23, s. 9 (7).

Same

[\(44.2\)](#) The conditions mentioned in paragraph 1 of subsection (44.1) are:

1. Before the plan was adopted, the person or public body made oral submissions at a public meeting or written submissions to the council.
2. The Municipal Board is of the opinion that there are reasonable grounds to add the person or public body as a party. 2006,c. 23, s. 9 (7).

[12] The evidence in this case is that Stanton Bros. determined prior to the prehearing event for reasons best known to them to withdraw their appeal to OPA No. 28. nor did they respond to the motion material brought by the Municipality to have their appeal not allowed on the administrative grounds that they did not meet the fundamental requirements of the *Planning Act* in making submission either at the public meeting orally or in writing to the Council.

[13] There is no requirement for an appellant to prove they made submissions either orally or in writing. The record of the statutory public meeting is a responsibility that vests with the Municipality and the Approval Authority. An appellant might challenge the record of the public meeting if it was felt that there was an error in the record as to whom made submissions, but beyond that the certified municipal record of the statutory public meeting is the *prima facie* evidence as to what submission were made.

[14] A fair reading of s.17(44.2) of the *Planning Act* gives the Board a wide discretion to add a party to a proceeding when in the Board's opinion there are reasonable grounds to do so. The Board also has wide discretionary powers to establish its own procedures as set out in s. 27, 41, and 97 of the *Ontario Municipal Board Act R.S. O. 1990* as amended and the Board's *Rules of Practice and Procedure*. These matters were not tested in this case due to the determination of Stanton Bros. to withdraw its appeal prior to the Board's prehearing.

[14] Similarly the Board made not determination regarding whether Stanton Bros. had a right to appeal as they withdrew their appeal prior to any hearings of the Board with respect to OPA No. 28

[15] The substantive issues for the Board in considering whether to order cost in this case is whether the "conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith."

[16] The Board does not find the filing of an appeal to an Official Plan Amendment and subsequently abandoning the appeal prior to any hearing of the Board rises to the level for the award of cost.

[17] Counsel for Middlesex Centre in his submission notes that the Municipality put Stanton Bros. on notice that it in their opinion they were not a qualified appellant on October 30, 2012 when Middlesex Centre wrote to the Board, copying all of the parties to the appeal and providing an affidavit from Middlesex Centre's land use planner, advising that at no time did Mr. Stanton or any person appearing on his or his company's behalf make any oral submissions at a public meeting or make any submissions to Council for Middlesex Centre prior to the adoption of OPA No. 28.

[18] There is no compelling evidence from the Board's review of the submissions filed that Stanton Bros. did anything to delay to normal proceeding of the Board other than to say that if their status as an appellant was to be challenges that the Municipality should file the appropriate motion material with the Board.

[19] The Approval Authority in this case is the County of Middlesex .Any appeal in this case flow from the decision of the County and appeals are filled with the County. The County is initially the "gatekeeper" on any appeals filed from its decision and as is the

practice in many jurisdictions made no determination regarding the validity of the Stanton Bros. appeal but merely forwarded the documents as prescribed by the *Planning Act* to the Board. Similarly the Board staff in this case took no administrative action but directed that if Middlesex Centre has a concern about the validity of the Stanton Bros. appeal it should be dealt with by way of motion. This is a procedure within the Board's jurisdiction and authority, and was the path followed by the Municipality.

[20] The Board would note that Stanton Bros. appeal was one of several filed against OPA No. 28 as set out in the Board decision issued on January 23, 2013. The Board's office was advised in a communication from Counsel for Stanton Bros. dated January 4, 2013 that his client had withdrawn their appeal to OPA No. 28. This notice of withdrawal by Stanton Bros. predated the Board's prehearing. This portion of the Board's appeal file was closed.

[21] The issue of who determines whether a valid appeal has been filed in the case where the approval authority is different from the initialling Municipality is not clear. In this case that determination of the appellant's status would have vested with the Board if the original motion had been heard.

[22] The simple fact is that Stanton Bros. for reasons best known to them determined to abandon their appeal prior to any hearing of the Board. This action in the Board's determination was undertaken in a timely fashion. Nor does the Board conclude from the submissions that the original appeal filed by Stanton Bros. to be unreasonable, frivolous or vexatious, or that it was filed in bad faith.

[23] The substance of the *Planning Act* Amendments as they find expression in s.17 (36) is to ensure that individuals or corporations become engaged in the planning process at an early stage and that their positions are known to the Council when it arrives at its decision with respect to an Official Plan Amendment. The final determination of the form of the Official Plan Amendment In this case vests with the County of Middlesex, the Approval Authority, and find expression in its notice of decision dated April 24, 2012 which modified and approved OPA No. 28. It was this decision that Stanton Bros. appealed as found at Exhibit "B" to the affidavit of Mr. Bancroft, a land use planner, with the County of Middlesex. Mr. Bancroft in his affidavit states that the Stanton Bros. appeal had nothing to do with any modifications to the

Official Plan Amendment made by the County of Middlesex in its notice of decision. It is also clear from Mr. Bancroft's affidavit that there were other appeals to OPA No. 28 beyond the Stanton Bros. appeal that the Municipality needed to address.

[24] The simple fact in this case is that Stanton Bros. determined prior to any proceedings of the Board to withdraw their appeal. Whether the Board would have granted the motion of the Municipality or exercised its authority under s.17(44.2) and granted party status to Stanton Bros. is moot as these matters were never heard.

[25] The Board after reviewing the record and its file is satisfied that the actions by Stanton Bros. and the Municipality to be appropriate and part of the normal process one might follow in the circumstances leading up to a prehearing or hearing of the matters under appeal. The Board would note that in this case it granted party status pursuant to s. 17(44.2) of the *Planning Act* to the University of Western Ontario who had not made submissions nor appealed the decision of the Approval Authority but instead owns property next to one of the areas under appeal and has concerns with respect to the outcome of an appeal on its property which is adjacent to the lands under appeal. The Board raises this point only to establish that the Board has wide powers and discretion to grant party status for the purposes of a hearing.

[26] The Board having considered all of the written submissions received within the context of the actions taken by the parties before this panel of the Board, in the matter of an appeal by Stanton Bros. to OPA No.28 of the Municipality of Middlesex Centre and in further consideration of the Board's authority to award costs, concludes that this is not a case for an award of costs and will make no such Order for the Municipality of Middlesex Centre.

"J. P. Atcheson"

J. P. ATCHESON
MEMBER