Ontario Municipal Board
Commission des affaires municipales de l'Ontario

ISSUE DATE: August 26, 2015 **CASE NO(S).:** PL120820

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	1960 Queen Street East Ltd.
Subject:	By-law No. 772-2012
Municipality:	City of Toronto
OMB Case No.:	PL120820
OMB File No.:	PL120820
OMB Case Name:	1960 Queen Street East Ltd. v. Graff

PROCEEDING COMMENCED UNDER section 97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended, and Rule 63 of the Board's Rules of Practice and Procedure

Request by:	1960 Queen Street East Ltd.
Request for:	Request for an Order Awarding Costs
Costs sought against:	Brian Graff

Heard: Written Motion

APPEARANCES:

Parties	**Counsel**
Reserve Properties Limited (190 Queen Street East Limited)	David Bronskill
Brian Graff	Dennis Wood

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

MOTION FOR COSTS

[1] Reserve Properties Limited ("Reserve") brought a written motion for costs against Brian Graff personally in the amount of $63,900 arising from a hearing concerning events leading up to and at a Board hearing held on February 5-6, 2013, related to a rezoning application by 190 Queen Street East Ltd., a subsidiary corporation owned and controlled by Reserve. The amount being sought represents Reserve's legal costs, the retainers of three expert witnesses and the costs of securing an off-site venue, the Sheraton Centre Toronto Hotel. Three days, February 5-7, 2013, had been set aside for the hearing.

[2] On June 8, 2012, the Council of the City of Toronto ("City") approved Reserve's rezoning Application and passed Zoning By-law No. 772-2012 ("ZBL") to facilitate the redevelopment of a site at 1960 and 1092 Queen Street East into a six-storey condominium building.

[3] Two appeals were received by the Board with respect to the passage of the ZBL, one of which was, the "Cramer Appeal", the Board was informed at the commencement of the hearing, had been withdrawn.

[4] This left the appeal of the Beaches Residents Association of Toronto ("BRAT"), launched on July 10, 2012, to be heard by the Board. In a communication dated February 4, 2013, Mr. Graff, who had incorporated BRAT on July 5, 2012, informed the Board that he had resigned as a Board member of BRAT and no longer had any formal role in BRAT's appeal.

[5] Mr. Graff stated in his e-mail to the Board that he still wished to play a role in the proceedings and that he wanted to be added as a Party to the appeal as the chair/president of a new non-profit community group, the Save Queen Street Association ("SQS"), which was incorporated on January 25, 2013. He said that SQS would be asking for (or supporting) a request that the hearing be adjourned since he had been unable to adequately prepare for the case. He did not copy this request for Party status to counsel for Reserve, or any other parties to the Board proceedings.

[6] That Mr. Graff played the critical role in the establishment and operation of BRAT is, in the Board's view, beyond question. Suzanne Giblon, in an affidavit contained in Mr. Graff's response to the Reserve's cost motion stated that, at a meeting held at 1963 Queen Street East (St. Louis Bar) following The Toronto and East York Community Council meeting held on May 15, 2012, regarding Reserve's rezoning application, "the discussion was run by Brian Graff." It was out of that meeting that BRAT was formed, with Ms. Giblon and Wayne Clutterbuck agreeing to sit as directors on the BRAT board along with Mr. Graff. Mr. Graff's home address was listed as the corporate head office for BRAT. Mr. Graff was chairman of the BRAT board and acted as the spokesperson for BRAT until he resigned from BRAT on January 12, 2013. He did not at that time inform either the Board or Reserve of his resignation; in fact, he responded to a January 12, 2013 e-mail from Reserve requesting a list of BRAT's witnesses for the upcoming hearing within half an hour. The response advised that BRAT was still finalizing its team, and inquired whether Reserve would be willing to consider an adjournment of the hearing.

[7] Reserve replied that it was not amenable to an adjournment of the hearing and again requested that BRAT list its witnesses. Council for Reserve received no response to this request.

[8] By responding to Reserve's January 12, 2013 e-mail, Mr. Graff clearly indicated that he had the authority to act on behalf of BRAT. A subsequent letter to Mr. Graff on January 21, 2013 again requesting that Mr. Graff provide confirmation of BRAT's intended witnesses at the hearing went unanswered. Reserve sent the e-mails to Mr. Graff's e-mail address, which was listed as the e-mail address for BRAT. At no time, did Mr. Graff notify Reserve that this was no longer the correct address for BRAT, something one would reasonably expect him to do. It was, in the Board's view, his responsibility to notify Reserve of the change in BRAT's Board, since he was the only member of BRAT in e-mail correspondence with Reserve.

[9] On January 29, Mr. Graff was copied on a letter to the Board from Reserve advising that BRAT had not replied to three requests to identify its witnesses for the

hearing and that it is unreasonable conduct for an appellant to not respond to a fair request for a list of potential witnesses for that Reserve could properly prepare for the hearing of BRAT's appeal.

[10] At the outset of the hearing, Mr. Graff advised the Board that he had resigned as a director of BRAT, and requested Party status for SQS, the corporate documents for which are virtually identical to the corporate documents for BRAT found at Schedule C in the Respondent's Application for Costs.

[11] To have played a critical role as head of BRAT in initiating the appeal against the ZBL on July 10, 2012, Mr. Graff cannot reasonably claim, as does his counsel in the Written Response to Application for Costs, that the preparation for the hearing was in the hands of the new Board of BRAT, appointed on January 12, 2013, a few short weeks before the hearing was to commence.

[12] On September 12, 2012, Harold Elston of Elston's Barristers and Solicitors informed the Parties that he had been retained to represent BRAT at the hearing. On December 11, 2012, Mr. Elston informed all Parties that his firm no longer represented BRAT. During the period in which Mr. Elston represented BRAT, there was orderly and productive communication between BRAT and Reserve, which led to obtaining a hearing date without the necessity of a Prehearing Conference. Knowing that the hearing was to commence February 5, 2013, BRAT had a responsibility to obtain another solicitor if it wished one. BRAT had since July 10, 2013, to obtain the services of expert witnesses. Indeed, it had a responsibility to do so if, as it inferred, it was going to call them. In the end, BRAT presented no evidence at the hearing. Until, and including January 12, 2013, the public face of BRAT was Mr. Graff. There is no real evidence to suggest that he was not also the private face of BRAT when it came to the appeal of the ZBL. He had, in the Board's view, responsibility regarding the preparation of the hearing, which should have been largely in place by the time he resigned from BRAT, supposedly on January 12, 2013.

[13] In seeking Party status for SQS at the hearing, Mr. Graff told the Board that his intention was "mainly to afford us the opportunity to cross-examine the witnesses, in

particular the City's planner." In requesting Party status for both BRAT and SQS, Mr. Graff had a responsibility to see that he and his corporations were properly prepared for the hearing. This he did not do. Mr. Graff is no stranger to the Board's processes, and he should have known better. He said SQS "might call witnesses", but had no witnesses to call at that time. He said he would ask for or support a motion to adjourn the hearing. Such a motion was filed by BRAT's recently acquired new counsel, Ian Flett on February 1, 2013, on the basis that Mr. Flett had been retained only on January 30, 2013 and had no time to prepare for a full and fair hearing before the Board. The Board denied the motion to adjourn. It also denied Mr. Graff and SQS Party status, offering instead Participant status so he could address issues of concern to SQS. Mr. Graff failed to take up this offer and left the hearing. In leaving the hearing, Mr. Graff did not relinquish the issues he raised. At no point did he relinquish those issues, which were left to Reserve to answer.

[14] It is well settled law that the Board may award costs both under s. 97(1) of the *Ontario Municipal Board Act* and the *Statutory Power Procedure Act, R.S.O. 1990, c.S. 22.* Rule 103 of the Board's *Rules of Practice and Procedure* states that the Board "may only order costs against a party if the conduct of a party has been unreasonable, frivolous or vexatious or if the party had acted in bad faith. Clearly unreasonable, frivolous, vexatious or bad faith conduct and include but is not limited to:

b) failing to give notice without adequate explanation, lack of c-operation with other parties during prehearing proceedings, changing a position without notice to the parties...;

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 necessitation unnecessary adjournments or delays or failing to prepare adequately for a hearing; and

e) failing to present evidence...;

[15] The Board does not routinely award costs because the Board does not want to discourage parties from bringing legitimate land use planning matters to a hearing; however, the Board holds that parties must be accountable for their conduct, and if, during the course of the proceedings determines that conduct has been unreasonable, frivolous or vexatious, or if a party has acted in bad faith, then the Board may exercise its discretion to order costs.

[16] It is rare that the Board awards costs against a non-party, but it has done so under unusual circumstances.

[17] In *Tempo Foundation v. Owen Sound (City)* [1997] O.M.B.D. No. 1162, the Board held that:

> In addition to representing Tempo in this proceeding, Mr. Harrison is the President of Tempo Foundation. In this case, the City argues that cost should be awarded against Mr. Harrison personally because Tempo Foundation and Mr. Harrison are essentially one and the same, and without Mr. Harrison there would be no Tempo Foundation.
>
> I have already found that Tempo Foundation, a party to this proceeding and the appellant of record, engaged in improper conduct sufficient to attract an award of costs. The issue to be decided here is whether costs should be awarded against John Harrison as a non-party to this proceeding. The answer depends on whether John Harrison, who is not the named appellant, is the actual appellant in this proceeding.

[18] That, in essence, is the question now before the Board.

[19] In her affidavit, Ms. Giblon states that Mr. Graff did not support many of the decisions made by BRAT, but her statements in this regard refer to BRAT's role on the Queen Street East Visioning Study, not to BRAT's activities related to the ZBL appeal, where Mr. Graff certainly appears to be the real plaintiff. This appeal was the catalyst that led him to establish BRAT in the first instance, whatever else its peripheral activities later came to be. BRAT, in essence, became the "man of straw" referred to in the following from *Sturmer v. Beaverton (Town)* [1912] O.J. No. 184; 25 O.L.R. 566, 2 D.L.R. 501 (DIV. CT.):

> ...where the real party litigant puts forward another person in whose name proceedings are taken, the Court has jurisdiction to impose costs against the real litigant... It has been

> said and shewn that it is his suit and that he has been guilty of something in the nature of barratry and maintenance, because, desiring to try his own right, he has procured this man of straw to allow the litigation to be brought in his name....

[20] And, in *Young v. Young,* [1993] 4 S.C.R. 3:

> The rule is that a non-party who has put forward another person in whose name the proceedings are taken cannot escape liability from costs in putting forward another.... The test when determining whether an award of costs against a non-party is appropriate is whether the person is the "real litigant in the manner."

[21] The reason for Mr. Graff leaving BRAT on or at some point after January 12, 2013, has never been made clear. It is interesting to note, however, that his departure was at or around the same time that Reserve refused to accede to his request for an adjournment.

[22] Reserve maintains that the February 5 - 6, 2013 hearing would have been unnecessary had BRAT not brought its appeal against the ZBL, the other appellant, Ms. Cramer, having withdrawn her appeal. Reserve states that it believed that Ms. Cramer's appeal could be resolved without a hearing before the Board, as indeed proved the case.

[23] Mr. Graff had responsibilities to prepare for the hearing that he in fact initiated. That BRAT was unprepared for the hearing by the time he apparently left its Board on January 12, 2013, can be laid at his doorstep. He did, in the Board's view, play games with both the Board and Reserve. He did not tell Reserve, with whom he was the sole contact for BRAT, when he stepped down from BRAT. He left Reserve with no other contact name for BRAT. He did not inform Reserve that he was subsequently seeking Party status for another entity with which he was involved, SQS. Curiously, he did not bother in the end to stay or participate in the hearing at all, even though he was offered Participant status. He never revealed to Reserve the fact that BRAT was calling no expert witnesses even after three inquiries. He did not afford Reserve the opportunity to know for what case it had to prepare. Reserve consequently had to engage three expert witnesses in order to cover all eventualities. Mr. Graff did not step away from these realities and responsibilities simply by leaving BRAT; nor did his departure make them

the responsibilities and liabilities of the "straw man" he had left holding the bag, namely BRAT. Mr. Graff was the real litigant in this matter. Being the soul of BRAT, and of its reincarnation, SQS, Mr. Graff was *de facto* a Party in this matter.

[24] The Board finds that Mr. Graff should, at a bare minimum, cover the costs of the expert witnesses in land use planning, urban design and transportation engaged by Reserve in order to meet an unknown case against it, which totalled $28,693.22. This excludes legal costs of $29,895.90 and rental costs of the Sheraton Hotel of $5,341.53. The Board does not wish to impose costs which may prove punitive and prohibitive for an individual, however egregious his behaviour. Reserve elected to hold the hearing off-site in order to allow the hearing to take place on the scheduled date, and some of the legal costs may well have involved other issues such as those related to the Cramer withdrawal.

ORDER

[25] The Board orders that Brian Graff pay $28,693.22 forthwith to Reserve Properties Limited. In accordance with Board Rule 101.01, this award of costs will bear interest in the same manner as those made under s. 129 of the *Courts of Justice Act*.

"Sylvia Sutherland"

SYLVIA SUTHERLAND
MEMBER

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