

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: July 31, 2015

CASE NOs: PL140921

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

Appellant: Juch-Tech Inc.
Appellant: The Hamilton Teleport Ltd
Subject: By-law No. 14-180
Municipality: City of Hamilton
OMB Case No.: PL140921
OMB File No.: PL140921
OMB Case Name: Juch-Tech Inc. v. Hamilton (City)

PROCEEDING COMMENCED UNDER subsection 51(39) of the *Planning Act*,
R.S.O. 1990, c. P.13, as amended

Appellant: Juch-Tech Inc.
Appellant: The Hamilton Teleport Ltd
Subject: Proposed Plan of Subdivision
Property Address/Description: 420 First Road West
Municipality: City of Hamilton
Municipal File No.: 25T-200901
OMB Case No.: PL140921
OMB File No.: PL140922

PROCEEDING COMMENCED UNDER subsection 97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c.O. 28, as amended

Request by: 706870 Ontario Limited and Red Hill Creek
Developments
Request for: Request for an Order Awarding Costs
Costs sought against: Juch-Tech Inc. and The Hamilton Teleport
Ltd.

Heard: June 16, 2015 in Hamilton, Ontario

APPEARANCES:

Parties

Counsel

706870 Ontario Limited and Red Hill
Creek Developments

P. DeMelo and K. Jennings (student-at-law)

Juch-Tech Inc. and The Hamilton
Teleport Ltd.

C. Pye

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

[1] 706870 Ontario Limited and Red Hill Creek Developments (“Red Hill”) seeks costs of \$60,905.15 and an Order that the Appellants, Juch-Tech Inc. and The Hamilton Teleport Ltd. (“Hamilton Teleport”) pay the costs of Red Hill with respect to this Motion on a solicitor and own client scale arising from an appeal filed by Hamilton Teleport on August 14, 2014 against approval of applications for a Zoning By-law Amendment (“ZBA”) and Draft Plan of Subdivision (“Draft Plan”) granted by the City of Hamilton (“City”) in relation to the development of lands at 420 First Road West (“subject lands”).

[2] Hamilton Teleport’s appeal requested the following relief:

That Hamilton Teleport Ltd. seeks revisions of the Special Conditions of Draft Plan of Subdivision Approval for Red Hill Developments Phase 1, at 430 First Road West, Stoney Creek, as per its submissions to the Planning Committee, requiring the Owner of Blocks 14 and 16 to convey a strip of land 3.7m wide immediately abutting the current westerly boundary of the Hamilton Teleport Ltd. property at 50 Green Mountain Road West, Stoney Creek.

[3] Hamilton Teleport gave no planning rationale for such a requirement, and disclosed no grounds upon which its request could be authorized by the Ontario Municipal Board (“Board”).

[4] Red Hill maintains, and the Board agrees, that the Board does not have the authority to require a property owner to gratuitously dedicate lands to a neighbouring

land owner unless the lands are to be dedicated to a municipal authority for purposes specified under the *Planning Act* (“Act”).

[5] Red Hill and the City advised Counsel for Hamilton Teleport on several occasions that no legitimate planning issues had been raised in his client’s appeal and that the Board did not have the authority to grant the relief requested. Despite this, Hamilton Teleport continued to pursue its appeal, withdrawing it only at 3:31 p.m. on Friday, February 20, 2015 – effectively on the eve of the hearing, which was scheduled for two days commencing Monday, February 23, 2015.

[6] In fact, the evidence before the Board shows that Hamilton Teleport’s appeal really had little or nothing to do with the Red Hill development, but rather with other matters unrelated to the subject lands. The issues upon which Hamilton Teleport based its appeal relate to the clearing of conditions on another development, the Victory Ridge subdivision (“Victory Ridge”), constructed by the same Applicants.

[7] In a letter to Counsel for Red Creek, Mr. DeMelo, “**Re: Red Hill Developments Phase 1, Zoning By-law No. 14-180. 420 First Road West, Stoney Creek**”, dated August 6, 2014 (Exhibit 1, Tab 2), Counsel for Hamilton Teleport, Mr. Pye, writes:

Pursuant to our presentation to the Planning Committee, the Committee understood our obligation to our underwriter and strongly recommended that Empire fulfil its obligations and pay all outstanding invoices for independent monitoring of blasting conducted at Victory Ridge at the Hamilton Teleport. Interest continues to accumulate and the amount outstanding is now \$57,728.00. We trust that your client would prefer not to accumulate further interest.

[8] In this letter, Mr. Pye continues to make reference to conditions regarding Victory Ridge, concluding:

Hamilton Teleport/Juch-Tech Inc. have been more than patient in waiting for your client to respond to outstanding matters, but our patience is not limitless. If we do not receive a satisfactory response from your client in (sic) regarding abovementioned (sic) matters by August, 12, 2014 at 5:00 p.m., Hamilton Teleport/Juch-Tech Inc. will have no choice but to file a Notice of Appeal respecting the captioned by-law.

[9] In his response to this letter, dated August 11, 2014 (Exhibit 1, Tab 2), Mr. DeMelo concludes:

As we have noted repeatedly in the past we believe that all issues which your client has identified as items of concern have been (sic) addressed or responded to in the past. The items, which you have raised, relate to prior OMB approvals and in some cases items which were not the subject of the OMB approval in any event or related to planning concerns. In our view any appeal, which you appear to threaten and may attempt to file with the OMB in relation to our client's latest approvals, is simply an attempt to delay and obstruct our client's continued development of its lands. The pattern of submissions by your client to the Court, to the OMB and to the City have repeatedly shown a lack of full disclosure of the facts and our client's efforts to resolve all matters, as well as an attempt to raise non-existent issues, and have clearly been intended as means of delay for the purpose of trying to force our client to pay for costs which your client needlessly incurred by threatening further appeal and delays. In our view any such appeal would clearly be a vexatious proceeding that is intended to inappropriately use the OMB process and one that we will defend as well as seeking all appropriate remedies on behalf of our client.

[10] In defense of its appeal, Hamilton Teleport states that it raised concerns about the proposed By-law and Special Conditions of Approval of Draft Plan for the Red Hill subdivision at a meeting of the City's planning Committee on July 8, 2014 (Exhibit 5, Tab A). These concerns "mirrored land use planning concerns that had been resolved by Order of the Ontario Municipal Board in respect of development at 22 Mountain Road West." 22 Mountain Road West is Victory Ridge.

[11] In its Response to Notice of Motion (Exhibit 5, Tab A), Hamilton Teleport states that all these concerns "save for the transfer of 3.7 metres abutting the westerly boundary of the HTL property mirror a similar transfer in the Order of the Board dated December 9, 2010, were addressed in the Special Conditions of Draft Plan of Subdivision Approval for Red Hill Creek Development Phase 1 by Hamilton City Council on July 11, 2014."

[12] Hamilton Teleport goes on to say that the City did not confirm until February 20, 2015 that the lands in question were to be transferred to it, thus rendering its appeal moot.

[13] In a letter to Mr. Pye, dated August 25, 2014 (Exhibit 1, Tab 2), Mr. DeMelo writes:

With regards to your client's request that the Board direct that as a condition of the plan of subdivision it transfer a 3.7 m strip of land along the western boundary. As an initial point the Ontario Municipal Board has no jurisdiction to make such an order. The ability to require lands to be transferred are (sic) limited by the Planning Act and do (sic) not apply to transferring lands to a neighbouring landowner. The basis of your appeal is without merit, and is a remedy that cannot be found in the jurisdiction of the Ontario Municipal Board. In addition as we have noted earlier much of the lands which your client is (asking to be transferred) ... are not lands owned by our client. It is impossible for us to transfer lands belonging to another party....

[14] Mr. DeMelo goes on to say that, "notwithstanding all of this, our client is prepared to transfer a strip of land 3.7 m in width along the westerly edge of the boundary between lands which it owns, and which form part of the draft plan of subdivision, and your client's lands." He then questions whether Hamilton Teleport really wants the strip under its control since it would then have to maintain it, and states, "The lands...are currently anticipated to the City, who then would be responsible for same."

[15] That was on August 25, 2014. On September 16, 2014, Mr. Pye responded to Mr. DeMelo, writing. "Your client's offer to transfer the land demonstrated your client's recognition of the need for that transfer so that Hamilton Teleport and your client can both assure the safety and security of Red Hill's future residents."

[16] On that same day, Mr. DeMelo responded to Mr. Pye:

Our client's willingness to transfer the strip of land is not based on any planning ground or any issues of land use compatibility, as that has already been (sic) established at the OP and Secondary Plan stages, but rather was an attempt to avoid the costs and time wasted by a hearing. Given that the only relief requested in your appeal related to the conveyance of this strip we fail to understand why the appeal was launched given our client's willingness to address a matter that the Ontario Municipal Board could not address.

[17] In a letter to Mr. Pye dated September 16, 2014, Mr. DeMelo points out that two other issues Mr. Pye maintains are "outstanding" relate not to Red Hill but to Victory Ridge.

[18] So, Mr. Pye and Hamilton Teleport were aware in August of 2014 that Red Hill was prepared to transfer a 3.7 m strip upon which Hamilton Teleport was basing its

appeal, but nevertheless persisted with that appeal until 3:31 p.m. on February 20, 2015, the eve of the scheduled hearing.

[19] Mr. Pye argues that the City did not confirm that the lands in question were being transferred to it until February 20, 2015; but he clearly knew six months earlier that Red Hill was prepared to transfer the lands. If he had any doubt as to the status of the strip of land, he had ample time well before the scheduled hearing date to contact the City and/or Red Hill.

FINDINGS

[20] There is, in the Board's view, no acceptable explanation for the behavior of Hamilton Teleport in pursuing its ill-conceived appeal until the eleventh hour. Mr. Pye is no stranger to the proceedings of the Board, and should have been well aware before he was told on several occasions that the Board had no jurisdiction to deal with the issue upon which Hamilton Teleport was basing its appeal. The Board cannot, as Mr. DeMelo pointed out, gratuitously dedicate lands to a neighbouring land owner. Furthermore, Mr. Pye knew as early as August, 2014 that Red Hill was prepared to transfer the requested 3.7 m strip to the City to act as a buffer between its property and Hamilton Teleport's property, whether required or not.

[21] It is clear to the Board that Hamilton Teleport was using its appeal, and through that appeal the Board itself, as a cudgel with which to batter Red Hill into paying a debt related to an entirely different plan of subdivision it claimed was owed to it by Red Hill. Hamilton Teleport itself acknowledges this in its August 6, 2014 letter to Mr. DeMelo when it states that Red Hill, "fulfill its obligations and pay all outstanding invoices for independent monitoring of blasting conducted at Victory Ridge at the Hamilton Teleport... If we do not receive a satisfactory response from your client in regarding (sic) abovementioned (sic) matters by August 12, 2014 at 5:00 p.m., Hamilton Teleport/Juch-Tech will have no choice but to file a Notice of Appeal respecting the

captioned by-law.” The captioned by-law was the ZBL for Red Hill Developments Phase 1.

[22] This was nothing but a threat, pure and simple, stating in effect, “if you don’t pay what we think you owe us related to one development we are going to use the Board to delay your next development,” surely knowing that the issue it was prepared to bring to the Board was one over which the Board had no jurisdiction. In its appeal, Hamilton Teleport gave no land use planning issues upon which the Board could declare.

[23] There were many opportunities before the last minute for Hamilton Teleport to withdraw its appeal; and yet it persisted.

[24] Preparing for a hearing is, as Hamilton Teleport well knows, an expensive proposition. In this instance, Red Hill produced invoices related to preparation for the hearing on Hamilton-Teleport’s appeal totalling \$71,021.00, representing legal fees, fees for a professional planner, disbursements and HST (Exhibit1, Tabs 5 and 6). In addition, Mr. DeMelo estimated the cost of bringing the motion at \$15,000.

[25] It is well settled law that the Board has the jurisdiction and discretionary power to award costs. It does not do so lightly. The Board’s *Rules of Practice and Procedure* (“Rules”) provide that “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.”

[26] The Shorter Oxford English Dictionary and Black’s Law Dictionary define “vexatious” as an action “instituted without sufficient grounds for the purpose of causing trouble or annoyance” to another party. “Unreasonable” means “irrational”, or not in accordance with good sense.

[27] The Board finds that Hamilton Teleport’s behaviour has been both vexatious and unreasonable. Its behaviour was vexatious in bringing of an appeal it had to know, or if it did not know, was certainly informed, was beyond the purview of the Board. There

were no legitimate land use planning issues to be considered. Its actions in waiting to the last minute to withdraw its appeal were clearly unreasonable. Hamilton Teleport also, in the Board's view, acted in bad faith in attempting to use the Board for a purpose other than that for which it is mandated.

ORDER

[28] Hamilton Teleport's conduct calls for an award of costs. Juch-Tech Inc. and The Hamilton Teleport Ltd. is ordered to pay \$70,000.00 forthwith to 706870 Ontario Limited and Red Hill Creek Developments. In accordance with Board Rule 104.01, 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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Ontario Municipal Board

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