Case Name:

Correia v. Wasaga Beach (Town)

IN THE MATTER OF subsection 53(19) of the Planning Act, R.S.O. 1990, c. P.13, as amended
Appellant: Richard Correia
Subject: Consent
Property Address/Description: 33 Frank Street
Municipality: Town of Wasaga Beach
IN THE MATTER OF subsection 97(1) of the Ontario Municipal Board Act, R.S.O. 1990, c.O. 28, as amended
Request by: Joseph Hamilton
Request for: Request for an Order Awarding Costs
Costs sought against: Richard Correia

[2014] O.M.B.D. No. 39

Municipal File No.: B-15/12

OMB Case No.: PL130099

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Ontario Municipal Board

Panel: Sylvia Sutherland, Member

Decision: January 16, 2014.

(15 paras.)

Appearances:

Joseph Hamilton: Victor Vandergust, counsel.

Richard Correia: Aynsley Anderson, counsel.

DECISION DELIVERED BY SYLVIA SUTHERLAND AND ORDER OF THE BOARD

1 Joseph Hamilton seeks costs against Richard Correia arising from a hearing in which Mr. Correia appealed against a severance granted to Mr. Hamilton by the Committee of Adjustment ("COA") for a property at 33 Frank Street ("subject property") in the Town of Wasaga Beach ("Town"). In a decision issued on May 28, 2013, the Board found in favour of Mr. Hamilton. The amount Mr. Hamilton is seeking is not stated directly in his Motion, but his counsel, Victor Vandergust, indicates in accompanying documentation that Mr. Hamilton claims it is $8,241.57 in legal and planning expenses.

2 Mr. Hamilton maintains in his written Motion on Costs that Mr. Correia's conduct was "unreasonable...causing unnecessary expense" in that Mr. Correia caused him to hire experts for the hearing.

3 Mr. Vandergust states in a letter dated May 23, 2013 that "the Appellant's (Mr. Correia's) objection and appeal to the Ontario Municipal Board claimed that he would provide 2 *(sic) expert witnesses*; on a former Council member. NO expert witness attended." The other expert witness Mr. Correia indicated in his appeal that he would call was related to "Business".

4 Mr. Vandergust maintains that:

> ... based on the assumed truth and veracity that the Appellant would provide '2 (sic) expert witnesses', the Appellant was obliged to engage counsel, and a professional planner, anticipating these expert witnesses. Clearly, had this not been mentioned, the Appellant could have succeeded, absent any planning evidence being presented, without Counsel and only the evidence of the Town of Wasaga Beach Zoning Administrator...

5 However, at no point did Mr. Correia indicate that he would call a witness, expert or other, related to land use planning.

6 Counsel for Mr. Correia, Aynsley Anderson, argues in Mr. Correia's Response to Mr. Hamilton's Motion, that "as a sophisticated party, the Applicant is well aware that a hearing before the Board is a hearing *de novo* and that the Applicant is required to provide evidence in support of the appeal." She submits that the legal and planning costs sought by Mr. Hamilton "are the bare minimum that an Applicant would be expected to incur". Mr. Hamilton is described as "a sophisticated party" since he was represented by counsel. Mr. Correia represented himself.

7 Under Board Rule 103, the Board "may only (award 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." In his May 23, 2013 letter, Mr. Vandergust refers to a 1994 Board decision, *Trilea Centres Inc. v. Ottawa-Carleton* [1994] O.M.B.D. No. 1356, in which the Board awarded costs "while the course of conduct may not have been unreasonable or even unusual in the legal community, it did result in inconvenience and financial loss for other parties." Be that as it may, today's rules do not afford that leeway, even if the Board cared to take it, which this Member does not. Rule 103 is clear, "the Board may *only* (emphasis added) award costs ...if the course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith." The Board finds that Mr. Correia did none of these things.

8 Mr. Correia was under no obligation to provide expert witnesses. Further, he never indicated that he would provide a planning witness. To suggest that the indication on his appeal form that he would have two witnesses, a former councillor and a business witness, would necessitate hiring an expert land use planning witness is, in the Board's view, disingenuous at best. It may have been prudent on the part of Mr. Hamilton, through his counsel, to follow up with Mr. Correia regarding the exact nature of the evidence he intended to present at the hearing, given the suggested expertise of the two witnesses he indicated he would call. In any event, Mr. Hamilton, as the Applicant, was mandated to present evidence supporting the merits of his application, whether or not Mr. Correia presented any expert planning evidence.

9 Mr. Correia had every right to appeal a decision. The subject property abuts the rear of his property upon which he and his wife operate a rest home for senior citizens. At the rear of his property are a swimming pool and gardens enjoyed by the residents of the rest home. He had concerns about the impact of Mr. Hamilton's application upon his rest home, which represents his and his wife's livelihood. Among his concerns were whether the proposed lot is in an appropriate location for infill development, the size of the lot relevant to the established character of the neighbourhood, and whether the Applicant had fully explored other possible severance configurations that would have fit in better with the existing lot fabric. These were, in his mind, legitimate planning issues. The fact that he failed to convince the Board of his case is neither here nor there so far as the awarding of costs is concerned.

10 In the Response to the Motion, Ms. Anderson maintains that the Applicant's conduct in bringing his motion "has been both clearly unreasonable and vexatious, and is deserving of an award of costs for the expense incurred by the Respondent in responding to this motion." The amount sought is $1,983.15.

11 She states that the Applicant's motion "is an example of vexatious behaviour, intended to punish the Appellant for bringing this appeal, resulting in the frustration of allegedly having to "suffer months of delay."

12 Any applicant should expect that his or her proposal might have to be defended before the Board if it is granted by the municipality. Delay should be factored into any such application.

13 So too, however, should the possibility that costs will be sought as a result of a Board hearing. Mr. Vandergust informed the Board at the conclusion of the hearing that he retained his right to seek costs. He has not, in the Board's view, made his case, but the Board cannot find his behaviour, or his client's, such that costs should be awarded against the client. His language when characterizing the Appellant's appeal as "an advertisement as to the care and quiet that the residents enjoy ... nothing to do with the planning merits of the severance whatsoever" may be ill-considered, but not to the point where it constitutes a reason to award costs.

14 At the core of Mr. Hamilton's motion is the suggestion that Mr. Correia failed to present evidence. Failure to present evidence can be considered to constitute frivolous or vexatious behaviour and worthy of the awarding of costs. The Board cannot agree that this applies in this instance, but it is a legitimate argument to make, however indirectly or insufficiently.

ORDER

15 For the reasons outlined above the Board orders that both motions for costs are dismissed.

"Sylvia Sutherland"
SYLVIA SUTHERLAND
MEMBER