

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: November 5, 2015

CASE NO(S): MM120031

PROCEEDING COMMENCED UNDER subsection 11(5) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended

Referred by: Ministry of Natural Resources
Objector: Gerald & Janice Brown
Objector: Ministry of Natural Resources
Applicant: Preston Sand and Gravel Company Limited
Subject: Application for a Class A licence for the removal of aggregate
Property Address/Description: Part Lots 23 and 24, Concession X
Municipality: Township of North Dumfries
OMB Case No.: MM120031
OMB File No.: MM120031
OMB Case Name: Brown v. North Dumfries (Township)

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

Appellant: Gerald Brown, et al
Subject: By-law No. 2526-12
Municipality: Township of North Dumfries
OMB Case No.: MM120031
OMB File No.: PL121250

PROCEEDING COMMENCED UNDER section 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended

Motion By: Jeff Wilker/ David Germain
Purpose of Motion: Motion for Directions
Appellant: Gerald Brown, et al
Municipality: Township of North Dumfries
OMB Case No.: MM120031
OMB File No.: MM120031

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

Request by: Preston Sand and Gravel Company Limited
("Preston")
Request for: Request for an Order Awarding Costs
Costs sought against: Concerned Residents of North Dumfries
("CRAND") and the individual appellants:
Gerald and Janice Brown, Richard and Lucy
Matiasz, Brian and Diane Houston and
Christopher and Temara Brown

Heard: September 22, 2014 in Toronto, Ontario

APPEARANCES:

Parties

Counsel*/Representative

Preston Sand and Gravel Company
Limited

D. Germain* and J. Wilker*

Concerned Residents Association of
North Dumfries

T. Brown

DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD

INTRODUCTION

[1] Preston Sand and Gravel Company Limited ("Preston") brought a motion for costs against the Concerned Residents Association of North Dumfries ("CRAND") and the individual appellants and referrers, Gerald and Janice Brown, Richard and Lucy Matiasz, Brian and Diane Houston, Christopher Brown and Temara Brown ("individual appellants"), following my disposition wherein I dismissed the appeals and directed that the licence under the *Aggregate Resources Act* be issued for Preston's Henning Pit, in the Township of North Dumfries ("Town").

[2] The Board's *Rules of Practice and Procedure* ("Rules") set out the process for a Motion for Costs. Rules 96 to 104.01 state as follows:

96. Who May Request an Order for Costs

Only a party may ask for an award of costs at the end of a hearing event. If the request for costs is not made before the Board renders its decision at the end of the hearing event, the party must notify the Board within 30 days after the written decision is issued that the party will be seeking costs, against whom the costs are sought, and an indication of the approximate amount of costs being sought.

97. Disposition of Request Where Request Made Before Issuance of Written Decision

If the request for costs is made before the end of the hearing event and prior to a Decision, the Board may:

- (a) make an order on the basis of oral submissions made at the hearing event, or
- (b) direct that the request be considered at a later date in the manner directed by the Board.

98. Disposition of Request Where Request Made After Issuance of Decision

If the request for costs is made within 30 days after the written decision is issued, or if the Board directs at the hearing event that the request for costs is to be considered at a later date, the Board may direct the party or parties requesting costs to:

- (i) attend before the Board, on notice to the party or parties against whom costs are sought, on a date fixed by the Board, and make oral submissions with respect to the application for costs provided that the party or parties against whom costs are sought shall also be permitted to make oral submissions with respect to the application for costs;

or

- (ii) within thirty five days of the Board's direction, file written submissions on the application for costs and serve each party against whom costs are sought, provided that, in addition to any other document the Board directs be provided, the documentation shall include:
 - (a) the reasons for the request and the amount requested;

- (b) an estimate of any extra preparation or hearing time caused by the conduct alleged to attract costs;
- (c) copies of supporting invoices for expenses claimed or an affidavit of a person responsible for payment of those expenses verifying that the expenses were properly incurred; and
- (d) an affidavit verifying that the costs claimed were incurred directly and necessarily for the time period in question;

or

- (iii) within thirty five-days of the Board's direction, file and serve a notice of motion for costs in accordance with the Board's Rules on Motions. A motion for costs shall proceed as an oral or electronic hearing, as directed by the Board, and the notice of motion must contain the following information:
 - (a) the reasons for the request and the amount requested;
 - (b) an estimate of any extra preparation or hearing time caused by the conduct alleged to attract costs;
 - (c) copies of supporting invoices for expenses claimed or an affidavit of a person responsible for payment of those expenses verifying that the expenses were properly incurred; and
 - (d) an affidavit verifying that the costs claimed were incurred directly and necessarily for the time period in question.

99. Response by Other Party

Where the Board directs a proceeding in writing in accordance with Rule 98, the party or parties against whom the request for costs is made shall provide a written response to the Board and the other parties to whom the request for costs relates, within fifteen days of service of the documentation from the party requesting costs.

100. Reply by Party Seeking Costs

Where the Board directs a proceeding in writing in accordance with Rule 98, the party requesting costs may provide to the Board and other parties to whom the request for costs relates a reply to a written response, within 10 days of the service of the response.

101. Member Seized to Consider Costs Order

The Member who conducted the hearing event on the merits shall make the decision on the request for costs. If that Member is, for any reason, unable to hear or deal with the request, the Chair will direct another Member to hear the motion.

102. Period Eligible for Costs Order

The Board may make a costs award for conduct at any time during a proceeding.

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.

The Board is not bound to order costs when any of these examples occur as the Board will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Board may decide to reduce the amount awarded. The Board will not consider factors arising out of a mediation or settlement conference in determining whether there should be an award of costs.

104. Powers of Board

The Board may deny or grant the application for costs or award a different amount.

104.01 Interest on Award

Awards of costs will bear interest in the same manner as those made under section 129 of the *Courts of Justice Act*.

[3] In this case, the Motion, Response and Reply materials were filed in accordance with the Board's directions. They have been marked as Exhibits. I have reviewed all of these materials in coming to my decision on this Motion.

[4] It should be noted that these materials were submitted in 2014 following the issuance of my decision on the merits of the matter but I did not deal with this particular motion as I was aware that my earlier decision was before the Courts. I waited until the matters before the Courts were finally disposed before preparing this decision. I became aware some time mid-August 2015 that the Divisional Court had disposed of all the matters before it with respect to merits and costs.

[5] Given that circumstance, I now turn to the request before me.

[6] I preface my determination by stating that unlike the Courts, the Board awards costs when the conduct of a party is deemed to be so unreasonable that an award of

costs is warranted.

[7] Preston seeks \$220,072.82 plus interest for preparation, attendance and conduct for a hearing which CRAND continued.

[8] This amount reflects costs incurred for Preston's Planning Consultant (Mr. David Sisco in the amount of \$41,020.39), Air Quality Expert (Mr. Mike Lepage in the amount of \$28,107.61), Toxicology Expert (Dr. Glenn Ferguson in the amount of \$20,537.75) and Lawyers (Thomson, Rogers in the amount of \$130,407.07). I do not find these amounts to extraordinary, excessive or inflated.

[9] Preston also seeks \$2,500.00 for the costs of this Motion to be paid by CRAND and the individual appellants.

[10] The party before me was CRAND as at an earlier stage of the hearing process, the individual appellants had been substituted by CRAND. This is reflected in a decision of my colleague, Member Atcheson who had conducted a number of Pre-Hearing Conferences before the hearing proper began before me. That change, specifically to recognize CRAND as a party in place of the individual appellants was not objected to by Preston or the Town. As such, I will not make any Order against the individuals appellants.

[11] In this case, an award of costs is justified. I determine that an award of \$110,000.00 is appropriate. This is approximately half of what Preston seeks. Below is my analysis and rationale for awarding this amount.

ANALYSIS AND DISCUSSION

[12] The Board's Rules cite examples of conduct which would attract an award of costs. While that list is not exhaustive, in the matter before me, CRAND's conduct did fall squarely within the parameters of some of those examples.

[13] I refer specifically to the following examples under Rule 103:

- (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;
- (g) acting disrespectfully or maligning the character of another party; and
- (h) knowingly presenting false or misleading evidence.

[14] With respect to item (b) noted above, specifically, “failing to give notice without adequate explanation” and “changing a position without notice to the parties” and item (e) noted above, specifically “failing to present evidence, continuing to deal with issues,” I reference that into the sixth day of hearing and following the evidence submitted by Preston, the Agent for CRAND advised without prior notice and without leave of the Board, that she would not be calling any witnesses other than herself.

[15] At no time did CRAND seek to amend its witness list or indicate that its expert witnesses would not be called. At no time did CRAND advise the Board or the parties that it wished to scope its issues list in such a manner whereby no expert witnesses would be called despite having listed them earlier.

[16] Preston called a case based on the issues list and witness list pursuant to the Board’s Procedural Order and witness statements which had been filed. For examples, issues of air quality and planning were raised by CRAND but no expert evidence to

substantiate them was called. Preston addressed these issues. As such, Preston incurred additional expense to present evidence which it might not have had to do had CRAND been forthright with its intentions to not call a full case.

[17] In its materials CRAND submits that it informed the Board prior to Preston's case in chief that no other witness other than its Agent would be called. This is not the Board's recollection nor does it accord with Preston's submissions.

[18] The suggestion is illogical as it begs the question as to why Preston would call a case on issues if it knew CRAND did not intend to pursue those issues through witnesses.

[19] During her closing submissions, Ms. Brown indicated that the only reason CRAND stayed engaged in the hearing to the end was that so it would be in a position to appeal my decision to the Courts.

[20] This is but one indicator of frivolous and unreasonable conduct.

[21] With respect to item (c) noted above and specifically "failing to comply with a procedural order or direction of the Board where the result is undue prejudice or delay", I reference my decision on CRAND's motion to permit late evidence, wherein I determined that that motion was denied as I found that no reasonable explanation had been provided for the non-compliance of the Board's Procedural Order.

[22] That Procedural Order had been established before another Member of the Board and culminated after numerous appearances.

[23] That particular motion consumed the first day of the hearing. When an unfavourable decision was provided to CRAND, its first counsel requested, and was granted, some time to sort out his role in this hearing. That resulted in further delay of the proceedings.

[24] On the resumption of the hearing the next day, he made a request to withdraw which was granted. Despite my repeated statements that the Board had not lost confidence in CRAND's first counsel, he believed it to be so and chose to withdraw.

[25] This necessitated an adjournment so that CRAND could locate a new lawyer. Again this resulted in another delay in the hearing.

[26] Despite objections from Preston and the Town, I rescheduled the hearing to afford a reasonable amount of time for CRAND to secure new counsel for the hearing.

[27] The conduct of CRAND to permit its lawyer to withdraw in such circumstances caused an undue delay in these proceedings and resulted in unacceptable prejudice to Preston and the Town.

[28] It should be noted that CRAND was the only party remaining to oppose the quarry application that was before me.

[29] With respect to item (d) and specifically "a course of conduct necessitating unnecessary adjournments or delays" I reference the numerous motions which were brought which in my view, were only to delay or frustrate the process.

[30] Particularly, I reference the following:

- a. Motion by CRAND to permit filing of late evidence following non-compliance of the Board's Procedural Order – January 20, 2014;
- b. Motion by CRAND to adjourn to permit its first counsel, Mr. Donnelly to obtain advice from the Law Society of Upper Canada and LAWPRO – January 21, 2014;
- c. Motion by CRAND to permit Mr. Donnelly to withdraw – January 22, 2014;

- d. Motion by CRAND to permit CRAND to obtain new counsel for the remainder of the hearing – January 22, 2014;
- e. Motion by CRAND by its new counsel, Mr. Gillespie, upon the resumption of the hearing that I recuse myself on the allegation of bias – March 25, 2014;
- f. Motion by CRAND by its agent, Ms. Brown, to adjourn to permit her additional time to prepare her testimony – March 26, 2014.

[31] It should be noted that approximately half of the days the Board sat for this hearing were consumed by CRAND's various motions. This in part, is the rationale I have applied to reduce the award which Preston seeks to approximately half.

[32] At this point, I also point out that an adjournment was provided to CRAND's benefit on its submission that it needed time to find alternate counsel once Mr. Donnelly withdrew. CRAND's request was based on its assertion that continuing with the hearing without a lawyer would "be a serious miscarriage of justice" to use Mr. Donnelly's words.

[33] Upon the resumption, CRAND's second lawyer advised that he had been retained only for the Motion to Recuse and not for the remainder of the hearing. This approach did not accord with what CRAND had advised the Board earlier and upon which the adjournment had been granted. This is an abuse of process as public resources used for the Board's calendar were thrown away as a result.

[34] At no time prior to the resumption of the hearing did CRAND advise the Board that although it had secured a second lawyer, that lawyer would not be representing it for the remainder of the hearing but only for a Motion.

[35] With respect to item (g) noted above, specifically "acting disrespectfully," I reference that the Board stopped the proceedings during the evidence of Preston's witness, Mr. Lepage, as the Agent for CRAND was texting on her cell phone during the proceeding. Mr. LePage's evidence was specifically to address issues raised only by

CRAND.

[36] With respect to item (h) noted above, specifically “knowingly presenting false or misleading evidence,” I reference the fact that I pointedly asked the Agent for CRAND for the names of individuals who made up CRAND. Her response at the time was remarkably different than the information which became known near the conclusion of the hearing.

[37] To put it bluntly, her answers to the Board could be nothing less than misleading. To categorically state that she could not provide me with the names because there were so many and from all over the County was a stark contrast to what was the case: seven (7) members of which four (4) were from her own family.

[38] All in all, I find the conduct of CRAND egregious and as such, deserving of an award of costs.

[39] Finally the Board is reluctant to award costs because some individuals raise the allegation that it somehow stifles public participation and involvement. In this case, nothing could be farther from the truth. The Board made numerous accommodations for CRAND and its former counsel so that it could remain engaged. CRAND’s conduct was disrespectful of the Board’s processes and the public resources expended. Earlier rulings made by the Board differently constituted had not been followed and attacks on each of my rulings throughout the process only served to unnecessarily delay and frustrate the proceeding. In my view, there was a clear violation of a number of the provisions of Rule 103 on the part of CRAND.

BOARD ORDER

[40] Therefore for the foregoing reasons, the Board orders that the Motion for Costs is granted in the amount of \$110,000.00 payable forthwith; and

[41] Further, this Order includes interest in accordance with s. 129 of the *Courts of Justice Act*, payable from the date of this Order.

“J. V. Zuidema”

J. V. ZUIDEMA
VICE CHAIR

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please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

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