Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: July 05, 2017 **CASE NO(S).:** PL080049

PROCEEDING COMMENCED UNDER subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Town of LaSalle
Appellant:	Anna Lynn Meloche
Subject:	Proposed Official Plan Amendment No. OPA 67
Municipality:	City of Windsor
OMB Case No.:	PL080049
OMB File No.:	PL080049
OMB Case Name:	Meloche v. Windsor (City)

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

Appellant:	Town of LaSalle
Appellant:	Anna Lynn Meloche
Appellant:	Nancy Pancheshan
Subject:	By-law No. ZBL 232-2007
Municipality:	City of Windsor
OMB Case No.:	PL080049
OMB File No.:	PL080050

PROCEEDING COMMENCED UNDER subsection97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, as amended

Request by:	1223244 Ontario Ltd. & Coco Paving Inc.
Request for:	Request for an Order Awarding Costs
Costs sought against:	Anna Lynn Meloche Nancy Pancheshan

Heard: By written submissions

APPEARANCES:

Parties	Counsel
1223244 Ontario Limited ("Applicant")	M. Bull
City of Windsor ("City")	W. Vendrasco
Nancy Pancheshan ("Appellant Pancheshan")	E. Gillespie
Anna Lynn Meloche ("Appellant Meloche")	Self-represented

DECISION OF THE BOARD DELIVERED BY BLAIR S. TAYLOR AND ORDER OF THE BOARD

INTRODUCTION

[1] The Board has before it a Motion for Costs by the Applicant against Appellant Pancheshan and Appellant Meloche (collectively the "Appellants"). The City took no position with regard to the motion.

[2] On December 4, 2015, this panel of the Board issued the Final Decision with regard to a two-week hearing that had been held in the City. That decision allowed the appeal in part by the Town of LaSalle, and the Board approved a modified Official Plan Amendment and Zoning By-law Amendment for the Applicant's lands and its proposal to develop a big box commercial centre of about 450,000 square feet, but otherwise wholly dismissed the appeals by the Appellants.

[3] By letter dated December 29, 2015, counsel for the Applicant wrote to the Board seeking costs against the Appellants.

[4] Contemporaneously a request to review the Board's December 4, 2015 Final Decision pursuant to s. 43 of the Ontario Municipal Board was received from one of the Appellants.

[5] By letter dated April 26, 2016, the Section 43 Request for Review was dismissed by the Executive Chair without seeking responding submissions from any other party to the proceeding.

[6] On September 1, 2016, the Board directed that the Request for Costs be conducted *via* written submissions pursuant to Rule 98(ii) of the Board's *Rules of Practice and Procedure* ("Rules").

NOTICE OF MOTION/APPLICATION FOR COSTS

[7] The Applicant seeks an Order from the Board granting the following costs against the Appellants:

(a) costs incurred by the Applicant in connection with the Board Decision/Order issued June 30, 2015 (Motion to Dismiss), on a full indemnity basis, fixed in the amount of $216,260.19 payable forthwith;

(b) costs incurred by the Applicant in connection with the Board Decision/Order issued December 4, 2015 (Final Decision), on a full indemnity basis, fixed in the amount of $503,545.12 payable forthwith;

(c) the costs of preparing the written submissions, fixed in the amount of $36,613.13 payable forthwith; and

(d) interest on all costs payable forthwith.

[8] Additionally, the Applicant seeks an Order that all Bills of Costs submitted in support of the written submissions be returned to counsel for the Applicant, or destroyed, immediately following the Board's decision on the application for costs.

DECISION

[9] For the reasons that are set out below, the Board allows the motion in part and fixes the costs awarded against Appellant Pancheshan at $4,500 plus interest payable forthwith, as of the issuance date of this decision. With regard to Appellant Meloche, the Board fixes the costs at $6,500 plus interest, payable forthwith, as of the issuance date of this decision.

[10] With regard to the requested relief that all Bills of Costs materials submitted in support of the Motion be returned to counsel, the Board orders that the invoices and records of this motion are to be maintained as confidential and returned to the counsel for the Applicant forthwith.

BACKGROUND AND CONTEXT

[11] This matter has a lengthy history.

[12] The lands that are the focus of this matter are 19.2 ha, being the easterly portion of the former Windsor Raceway ("Subject Lands") and are located in the City, but in close proximity to the Town of LaSalle.

[13] More specifically, the Subject Lands are located at the corner of Matchette Road and Sprucewood Avenue. As a part of the former Windsor Raceway, the Subject Lands contained the practice track and stables, while the main track, grandstand, and parking areas were located to the west and in different ownership.

[14] The land use planning context of the Subject Lands was central to the hearing on the merits.

[15] To the north of the Subject Lands is the Ojibway Nature Centre and Park: owned by the City and 65 hectares ("ha") in area. To the east is the Ojibway Prairie Provincial Nature Reserve: owned by the Province of Ontario and about 90 ha in area and

designated as an Area of Natural and Scientific Interest (“ANSI”). To the south is the Ambassador Golf Club, and further south are the Town of LaSalle and a residential area. To the immediate west is the aforementioned track, grandstand, and parking area for the former Windsor Raceway, and moving further west are commercial uses fronting onto the Ojibway Parkway (four lanes), then the Essex Terminal Railway, and then industrial and port uses closer to the Detroit River.

[16] The issue before the Board was the proposed redevelopment of the Subject Lands for a big box commercial development in an urban area which had a direct interface with the Ojibway Nature Centre and Park to the north, and the Ojibway Prairie Provincial Nature Reserve to the east.

PROCESSING

[17] In November 2003, the Applicant made a development application to amend the City’s Official Plan and Zoning By-law to permit a retail/commercial centre on the Subject Lands.

[18] In November 2007, the City adopted Official Plan Amendment No. 67 (“OPA”) and Zoning By-law No. 232-207 (“ZBA”) to permit the proposed development.

[19] In December 2007, the Appellants and the Town of LaSalle appealed to the Ontario Municipal Board. These appeals lead to a number of hearing events before the Board.

OMB HEARING EVENTS

[20] The first Prehearing Conference (“PHC”) concerning this matter was held on October 1, 2008, and the second PHC was held on January 13, 2009, which *inter alia* directed that March 25 and 26, 2009 would be motion dates to deal with the Issues List and that the hearing on the merits was set for eight weeks commencing on July 6, 2009.

[21] Subsequently, the Applicant brought a Motion to Dismiss the Town of LaSalle's appeals of the OPA and the ZBA with regard to Market Impact issues. The Board in a written Decision dated August 12, 2009, allowed the Applicant's Motion, dismissed the Town of LaSalle's appeals with respect to the Market Impact issues and otherwise ordered that the draft Issues List be the Issues List to be attached to the Board's Procedural Order.

[22] Thereafter, the Town of LaSalle brought a Motion that the date of the OPA and the ZBA applications was no earlier than May 24, 2007, and secondly that the applications must be consistent with the 2005 Provincial Policy Statement ("PPS"). This Motion was dismissed in the Board's written decision of November 17, 2009.

[23] The record shows that although the hearing had been set down to proceed on January 11, 2010, counsel for the Applicant sought an adjournment in light of the Ministry of Natural Resource's position respecting species at risk on the Subject Lands. The hearing had been adjourned by the Hearings Coordinator on the consent of all parties on January 4, 2010, which was followed by a telephone conference call ("TCC") on January 11, 2010, where the Board set a new date for the hearing to commence on December 6, 2010, for two weeks and then to resume on Monday, January 10, 2011. The issued decision dated January 21, 2010, notes that the Appellants raised access to the Subject Lands for further analysis, and that the counsel for the Applicant confirmed access was available but was to be coordinated through her office and that the Board expected the parties to be granted access through that protocol, and if difficulty were to arise the Board could be spoken to.

[24] The record reveals that there were two PHCs by TCC on May 21, 2010, and June 11, 2010. The Board's decision issued June 18, 2010, reveals that a further requested adjournment (*sine die*) for analysis of the natural environment in conjunction with the Ministry of Natural Resources ("MNR") was sought by the Applicant, and access was denied pending completion of MNR's analysis. The Board noted that

fundamental issues were raised that could not be dealt with through a TCC and the Board set a two-day hearing of a motion or a Motion for Directions for July 27, 2010.

[25] The Board's decision of August 25, 2010, deals with that Motion. The Applicant sought the adjournment of the hearing on the merits in order to permit MNR (who has jurisdiction over species at risk matters) to complete its investigation in respect of both plant and snake species on the site. Additionally, MNR had issued a detailed maintenance plan dated May 28, 2010, which the Applicant was following. Appellant Pancheshan's counsel agreed with the Applicant that her expert witnesses could have additional access to the site in September 2010 and on that basis gave consent to the adjournment. Appellant Meloche filed a responding motion seeking *inter alia* that all site alteration, including maintenance, cease, and argued that the adjournment was agreed to but not without further site visits and essentially preventing site alteration and/or maintenance even under the terms prescribed by MNR.

[26] The Board found that there was no basis to deny the adjournment. Counsel for the Applicant sought costs against Appellant Meloche. The Board ruled that no costs would be awarded as the motion was directed by the Board's decision of June 18, 2010, but noted that while no costs would be awarded in that instance, the parties must always proceed with caution and prudence before launching procedural matters where there is little, if any basis for either opposing relief sought or seeking unnecessary Orders from the Board and therefore Appellant Meloche was cautioned "… to proceed with the utmost caution".

[27] From 2010, the next procedural event of the Board did not occur until the issued decision of January 23, 2015. At this point in time, the decision notes that MNR had issued the requisite permit pursuant to the provisions of the *Endangered Species Act* ("ESA"). The record also indicates that all the issues with the Town of LaSalle, one of the original Appellants, had been resolved through modifications to the OPA and ZBA, and that the Town of LaSalle would not be participating further in the Hearing. The decision cites that both Appellants had filed a list of issues which the Board found

required refinement. The decision further notes that the Applicant's view is that there is no basis for the appeals given the work that is carried out over the past four years and the agreement reached with the Town of LaSalle, but the two remaining Appellants believe otherwise. The Board then set a TCC for February 18, 2015, with a requirement that the Appellants were to provide their revised issues lists no later than February 11, 2015, and that the length and date of the hearing would be set at the PHC as well as the timelines for the exchange of witness statements.

[28] In the decision of the Board dated March 4, 2015, arising out of the February 18, 2015 TCC, the Board observed the following:

> The issues and the number of witnesses proposed suggest that a two-week hearing would, in the normal course, be an insufficient amount of time. However, the Board will strictly impose time limits as set out in the attached Procedural Order and place appropriate limits on the time allocated for each witness. **Pre-filing evidence means that the position of witnesses and the opinions offered will be known in advance and reviewed by the presiding Member**. On this basis, all counsel must be efficient in how they organize their respective cases. The Appellants should cooperate as much as possible, especially given the similarity of several of their issues, and duplication must be avoided... (Emphasis added)

[29] The Board then set the hearing for 10 days commencing on August 24, 2015 and it attached the Procedural Order with the Issues List with the notation that there were some issues that were needed to be refined by the Appellants.

[30] The Board's issued decision of June 30, 2015 marks the last pre-hearing event. It arose out of the Applicant's Motion to Dismiss several issues of the Appellants. The basis for the Applicant's Motion to Dismiss was that detailed investigations and studies requested by MNR had been conducted on the site and the adjacent road allowance and were completed in 2013, and on August 14, 2014, a permit was issued pursuant to the provisions of the ESA to permit the development to proceed. Additionally, following the issuance of the permit pursuant to the ESA, the Applicant and the Town of LaSalle settled all their issues which were reflected in a modified OPA and modified ZBA for which the Applicant would seek approval at the hearing.

[31] The Board then dealt with five specific potential issues.

[32] The first was Market Impact issues and the Board stated the following:

> The Appellants did not raise market impact as an issue until the revised Issues list was filed in February 2015, when it included a policy from the City's Official Plan ("OP") associated with the issue. Neither Appellant raised market impact as part of their original appeals. More significantly, when market impact was raised by the Town as part of its appeal, the Applicant was successful before a different panel of the Board in dismissing the issue from the Town's Issues List.

[33] The Board then accepted the submission of the Applicant's counsel that market impact was not a proper issue for the hearing and struck it from the Issues List and provided this comment:

> **To raise the issue again is frivolous and vexatious and the Appellants are estopped from including it on the Issues List or calling any evidence with respect to market impact.** (Emphasis added)

[34] The second issue dealt with Traffic Impact and the Board decided that the issue could be addressed at the hearing and observed that Appellant Meloche intended to raise issues with respect to road mortality for wild life.

[35] The third matter was the *Species at Risk Act* ("SARA") which both Appellants raised, but which is federal legislation. Counsel for Appellant Pancheshan acknowledged that SARA did not apply to the Applicant's site and agreed to remove it from the Issues List. Secondly, with regard to species at risk, concerns were raised by the Appellants surrounding the Minister's Decision to issue the ESA permit and the permitting process itself. In its decision, the Board acknowledged that it had no jurisdiction to issue ESA permits or to interfere with the conditions of any permit and the Board cannot and will not interfere or second guess the Minister's decision. Further the Board's written decision stated …

> … it is clear to me that each Appellant understands and appreciates that the agreement reached with the Town and the issuance of the ESA permit have necessarily narrowed the issues for the hearing. **In this**

> **regard it is important to emphasize that the hearings before the Board are quasi-judicial proceedings grounded in legislative requirements. They are not public inquiries into local issues.** (Emphasis added)

[36] Next, the Board dealt with several policies of the PPS that had been listed as being on the Issues List which would require the Applicant to prepare evidence and call witnesses to address matters that had already been determined or would be finalized through the conditions following detailed design at the site plan stage. The Board removed those policies from the Issues List.

[37] With regard to ground water, storm water issues and lightening impacts, they were removed from the Issues List on the basis that each were matters to be addressed at the site plan approval stage if the Applicant were to succeed in obtaining approval.

[38] Lastly, the decision observes that the Applicant sought costs of its motion including legal fees and consultant fees on a full indemnity basis. The Board stated that awards of costs are rare and only made in specific circumstances on certain criteria and a request for costs, if any, could be made in writing in accordance with the Board's Rules.

[39] The hearing on the merits proceeded on August 24, 2015 and was the only hearing event conducted by this member of the Board.

[40] The decision was issued December 4, 2015, allowing the appeal by the Town of LaSalle in part, and wholly dismissing the appeals by the Appellants.

JURISDICTION

[41] The Board's jurisdiction with regard to a matter of costs arises out of s. 97(1) of the *Ontario Municipal Board Act* which provides that the costs of and incidental to any proceeding before the Board, except as otherwise provided, shall be at the discretion of the Board, and may be fixed in any case at a sum certain or may be assessed.

[42] The Board's Rules set out in Rule 103, the circumstances in which the Board may award costs:

> The Board may only order costs against the 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 …

[43] As none of those terms are defined in the Rules, Rule 103 then provides the following examples where costs may be considered:

(a) Failing to attend a hearing event;

(b) Failing to give notice without adequate explanation;

(c) Failing to act in a timely manner;

(d) Failing to prepare adequately for hearing events;

(e) Continuing to deal with issues … taking steps that the Board has determined to be improper;

(f) Failing to make reasonable efforts to combine submissions;

(g) Acting dis-respectively or maligning the character of another party; and

(h) Knowingly presenting false or misleading evidence.

[44] Finally, Rules 104 and 104.01 provide that the Board has the power to deny or grant an applicant for costs or award a different amount and that an award of costs will bear interest in the same manner as those made under section 129 of the *Courts of Justice Act*.

JURISPRUDENCE

[45] A request for costs before an administrative tribunal such as the Ontario Municipal Board is unlike a request for costs in the courts where costs usually follow the outcome.

[46] At the Ontario Municipal Board, applications for costs are not customary and awards are rare. Generally there is no expectation that a successful party will recover its costs. Nevertheless the practice before the Board is that parties are accountable for their conduct and if that conduct or course of conduct is such that it is “unreasonable, frivolous, vexatious, or in bad faith”, then the Board may award costs.

[47] *Midland (Town) Zoning By-law 94-50. Re:* (1995), 32 O.M.B.R. 4, 1995 CarswellOnt 5227 (“*Midland*”) notes that the terms “frivolous”, “vexatious”, and “unreasonable” are not synonyms but reflect different types of inappropriate conduct. The terms are further defined as meaning respectively: “characterized by lack of seriousness”, “instituted without sufficient grounds for the purpose of causing trouble or annoyance”, and lastly “not in accordance with good sense”. Alternatively and succinctly, they were regarded as: the “silly”, the “nasty”, and the “foolish”.

[48] The Board suggested a relatively simple test to be applied when determining whether an order of costs should be made:

> … would a reasonable person, having looked at all the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board’s procedure, exclaim “that’s not right; that’s not fair; that person ought to be obligated to another in some way for that kind of conduct”.

SCALE OF COSTS

[49] Generally, the Board’s jurisprudence would establish a descending order of the scale of costs: full indemnity, substantial indemnity, partial indemnity, and nominal.

[50] Nominal and partial indemnity costs are self-explanatory.

[51] *Customized Transportation Ltd. V. Brampton (City)* [2002] O.M.B.D. No. 832; 44 O.M.B.R.197 (“*Customized Transportation*”) is illustrative of circumstances where the Board will award costs on a full indemnity basis. There the alleged conduct included *inter alia* an expensive, time consuming and exhaustive approach by Mr. McKinlay

intended to delay development, increase the cost of development in the hope or expectation that the developer would be forced to sell all or part of its lands to Mr. McKinlay. The Board awarded costs on a full indemnity basis as it appeared to the Board that counsel were instructed to oppose by any means, for any reason, at any stage, and at any step of the proceedings.

[52] *719299 Ontario Inc. v. London (City)* Committee of Adjustment [2006] O.M.B.D No. 398, ("*719299 Ontario Inc.*") considered an award of costs for substantial indemnity. There the Board stated:

> The Board pursuant to s. 97 of the OMB Act, has the discretion to determine the amount of the costs to be awarded, including the discretion to prescribe a scale upon which costs shall be assessed…In the *Wal-Mart Canada Corp.v. Peterborough Signum Corp.*.. case and in this case, the Board adopts the test used by the courts in determining whether a costs award should be made on a substantiive indemnity basis: was the conduct of the party against which costs are sought reprehensible, scandalous or outrageous?

BASIS FOR THE COSTS

[53] The Applicant seeks Costs against the Appellants for a number of grounds. Common to both are the following:

1. Unreasonable to require a full hearing;
2. Refusal to scope issues;
3. Continuing to raise species at risk as an issue;
4. Specific to Appellant Pancheshan is the assertion that Appellant Pancheshan's environmental planner failed to adequately prepare for the Hearing.

[54] Specific with regard to Appellant Meloche are the following grounds:

5. Abuse of the Board’s process with respect to the summons to witnesses;

6. Failure to comply with the Procedural Order;

7. Trespass contrary to the Board’s directions and Order;

8. Conduct at the hearing was disrespectful.

APPELLANT PANCHESHAN

[55] Turning to the grounds advanced against Appellant Pancheshan, the Board notes the following:

- Ms. Pancheshan retained counsel;

- Ms. Pancheshan retained independent experts in their fields;

- Ms. Pancheshan sought to add Market Impact issues to the Issues List after the Board had previously struck market issues from the Issues List of the Town of LaSalle;

- The Motion to Dismiss by the Applicant was partially successful resulting in some of the Appellant’s Issues being scoped but the Board allowed Traffic Impacts to continue as a live issue between the parties.

[56] The Board juxtaposes the actions of Appellant Pancheshan versus the findings that are found in *Midland,* where the Board states the following:

> It is important that the Board put its discussion of costs in proper context; that is, the actual conduct of the appellant in this case.
>
> It was obvious to the Board that the Appellant put virtually no effort into his appeal, other than filing it and appearing for mediation and at the hearing itself. He made no attempt to contact the Town, the proponent, or the college to obtain information about the by-law or to ask them to

> respond to the concerns he had about it. This resulted (among other things) in being mistaken as to important questions of fact. Indeed, on the only two issues which the Board required further evidence after hearing from the appellant, it turned out that his testimony was based on incorrect information (in the case of public transportation) and incomplete information (in the case of the supply of industrial land).
>
> The Appellant's case consisted entirely of a statement that he prepared before the hearing, which he read to the Board under oath. He called no other evidence, expert or otherwise, in support of his appeal.

[57] None of the circumstances of that case are apparent in the case as called on behalf of Appellant Pancheshan.

[58] But here the Applicant places considerable emphasis on the comments apparently made by Appellant Pancheshan to the Windsor Essex County Environmental Committee in 2013. There she is quoted in the minutes as stating:

> N. Pancheshan advised if Coco Paving receives a permit from MNR, it could negatively impact the decision at the OMB. It is likely the OMB will approve the development if the MNR has approved the permit.

[59] From this quote, the Applicant submits that Appellant Pancheshan acted unreasonably by requiring a full hearing and by not scoping her issues.

[60] The Board finds the comment (if accurately captured in the committee minutes) to be a candid assessment of the circumstances in which the Appellant found herself: in a contested hearing where the City had approved the development proposal in 2007, there was a settlement with the Town of LaSalle, the local conservation authority was not in opposition, and now it appeared that a permit might be issued by MNR. Appellant Pancheshan was opposed by all levels of government authorities.

[61] Does the opposition or potential opposition of governmental agencies make it unreasonable for a resident or ratepayer to require a hearing, or a fuller hearing?

[62] In these circumstances, the Board does not find it so.

[63] As noted above, the locational context of this case was most unusual. The Subject Lands are in the urban area of the City, part of the former Windsor Raceway, and were literally across a municipal road from the Ojibway Prairie Provincial Nature Reserve (to the east) and abutted the Ojibway Nature Centre and Park (City owned) to the north. This was the direct interface of the urban area with an Area of Natural and Scientific Interest, and the proposed redevelopment of the Subject Lands.

[64] The concerns raised by Appellant Pancheshan were with regard to the natural environment and were put forward by her expert witnesses and done so in a timely and efficient manner, bearing in mind the direction the Board had made with regard to the hearing, where in 2015 it noted that the issues and number of witnesses proposed suggested that a two week hearing would be insufficient, but the Board would impose strict time limits and require pre-filing of evidence which was done by Appellant Pancheshan.

[65] The Board does not find it to have been unreasonable, frivolous, or vexatious for an appellant in such a contextual setting as this, where significant environmental issues were being addressed, to have brought forward her concerns through expert witnesses, and assisted by counsel.

[66] The next ground is that Appellant Pancheshan refused to scope some issues and it appears to the Board that this ground is directed to the Appellants motion to re-insert Market Impact issues in the Issues List after the Board had already struck Market Impact issues off the Issues List of the Town of LaSalle, and the continued reference to SARA, notwithstanding it was federal legislation that was not applicable to the Subject Lands.

[67] The Board's decision of June 30, 2015 made this finding with regard to the market issues:

> To raise the issue again **is frivolous and vexatious** and the Appellants are estopped from including it on the Issues List or calling any evidence with respect to market impact. (Emphasis added)

[68] With regard to SARA, the decision of the Board notes that the counsel for Appellant Pancheshan agreed to remove the issues related to SARA.

[69] The action by the Appellant with regard to the motion to re-insert the Market Impact issue was found to be frivolous and vexatious by the presiding member.

[70] In hindsight, it is apparent that a reasonable person would say: "that it not right; that is not fair". That issue had already been raised and dealt with in a previous motion.
.

[71] It is apparent to the Board that the proximity of the Subject Lands to the nearby Ojibway Nature Centre and Park and the Ojibway Prairie Provincial Natural Reserve raised concerns to the Appellants with regard to both the natural features and the species.

[72] This level of concern ultimately led to the investigation by MNR and the permit issued by MNR under the ESA.

[73] The Board would note that in the decision of the Board dated June 30, 2015, the Board left open the issue of road mortality for wild life for the hearing on the merits. As such the Board does not find this action to be worthy of costs.

[74] The Board turns with regard to Appellant Pancheshan to the assertion that her environmental planner failed to adequately prepare for the hearing.

[75] The Applicant submits that Appellant Pancheshan had asked for her planning expert to be qualified as an expert environmental planner. He was so qualified and part of his evidence before the Board was that the proposed development was not consistent with the PPS as there was no buffer to the restoration area created pursuant to the ESA permit, which he considered a natural feature.

[76] Under cross-examination, the environmental planner admitted that he had not reviewed or considered the Natural Heritage Reference Manual which represents the Province's recommended technical criteria approaches for being consistent with the PPS in protecting natural heritage features.

[77] The Board noted in its decision dated December 4, 2015, the following:

> The Board finds it incongruous that an expert witness qualified as an environmental planner would fail to have considered the Natural Heritage Reference Manual in the preparation of his opinion. The Board finds that there is no requirement for a buffer to the Restoration Area. Rather the Restoration Area provides the buffer to the natural heritage feature of Ojibway Park, and the settlement agreement provides for the ownership of the Restoration Area to be conveyed to the City, who in turn has advised the Minister that the City intends to include and maintain the Restoration Area as part of the Ojibway Prairie complex.

[78] The Board does not find in these circumstances that costs are appropriate, but rather that the *viva voce* hearing process where expert witnesses may be cross-examined, enabled those facts to arise which ultimately went to the credibility of the witness and his opinion. Thus, the Board does not find these circumstances appropriate toward costs against Appellant Pancheshan.

APPELLANT MELOCHE

[79] The Board will now turn to the specific assertions made against Appellant Meloche.

[80] Firstly, it is argued that Appellant Meloche did not comply with the Board's Rules for Responses. If the Response was late, it was marginally so, and the Board does not find this to have been prejudicial to the Applicant and a matter for costs.

[81] The next reason advanced against Appellant Meloche concerns an alleged abuse of the Board's process with regard to summons of witnesses.

[82] The Board dealt with this extensively in its December 4, 2015 Decision.

[83] The Board found that it was not appropriate for Appellant Meloche to have requested summonses for Jonathan Choquette and Dr. Michael Weis as it was apparent to the Board that Mr. Choquette was actually a paid consultant of Ms. Meloche and Dr. Weis had agreed to appear as a witness.

[84] This is contrary to Rule 45 of the Board's Rules which provide:

> A party who wishes to compel the appearance before the Board of a person in Ontario **who has not agreed to appear as a witness** for that party may serve a summons on that person for that person to attend any hearing event before the Board… (Emphasis added)

[85] Additionally, while the Procedural Order for the hearing on the merits required witnesses to produce witness statements, expert witnesses who were under summons but not paid to produce a report do not have to file an expert witness statement; but the party calling them must file a brief outline of the expert's evidence. Neither Mr. Choquette nor Dr. Weis produced the expected witness statement as required by the Procedural Order. Rather the "will say" statements were prepared by Appellant Meloche.

[86] In her Response, Appellant Meloche states in paragraph 48 that:

> Chair S. B. Campbell required at a Motion Hearing to Dismiss Market Issues, that all my witnesses be under summons. This was an oral request.

[87] The Board has examined the record and finds that the "Market Impact" issues decision issued by then Vice-Chair Campbell was issued August 12, 2009.

[88] The Board has reviewed the decision of Vice-Chair Campbell and agrees there is nothing in the decision that relates to the summonsing of witnesses. However, the Board would also note that Vice-Chair Campbell's decision dates from 2009, and predates the adjournment in 2010, and the issuance by MNR of the ESA permit.

[89] The Board has examined the decision of Vice-Chair Seaborn dated March 4, 2015 paragraph 4, wherein she states:

> Anna Lynn Meloche, also an appellant, has filed a list of issues. Ms. Meloche has attempted to link her witnesses to the issues. **Further refinement and narrowing will likely occur once her witness statements are filed.** However, for the purpose of completeness all issues have been listed as part of the Procedural Order. (Emphasis added)

[90] Further, the Board stated in paragraph 5:

> The issues and the number of witnesses proposed suggest that a two-week hearing would, in the normal course, be an insufficient amount of time. However, the Board will strictly impose time limits as set out in the attached Procedural Order and place appropriate limits on the time allocated for each witness. **Pre-filing evidence means that the position of witnesses and the opinions offered will be known in advance and reviewed by the presiding Member**. (Emphasis added)

[91] Vice-Chair Campbell provided her last disposition in this matter on November 17, 2009. There is no indication on the record with regard to any direction concerning the summons of witnesses.

[92] However, it is abundantly clear that the intent and direction of the Procedural Order and the decision of the Board dated March 4, 2015, pointed clearly to necessity of witness statements being provided so that the positions of the witnesses and the opinions offered would be known in advance.

[93] That did not occur.

[94] Appellant Meloche acknowledges at paragraph 51 of her Response that Mr. Choquette did not prepare a witness statement and associated report. At paragraph 56 Appellant Meloche says:

> The will say statements were derived from a series of conversation with each witness.

[95] Appellant Meloche relies on her status as a non-lawyer and ratepayer to explain her unfamiliarity with the Ontario Municipal Board process.

[96] The Board does not agree.

[97] The Board finds that it was an abuse of process to request a summons for a consultant that had been previously retained by Appellant Meloche and for a witness who apparently had previously agreed to appear. Furthermore, the preparation of the will say statements by Appellant Meloche for these witnesses was not in accord with the Procedural Order and did not result in the required pre-filing of witness statements which would have outlined the position of the witnesses and their opinions well in advance so as to enable the City and the Applicant to know their respective cases. This was an abuse of process that prejudiced the Applicant.

[98] The second reason the Applicant submits the Board should award costs against Ms. Meloche is her failure to comply with the Procedural Order including the failure to provide expert witness statements, visual evidence, document books in accordance with Procedural Order, and that such conduct was clearly unreasonable, frivolous, vexatious and/or in bad faith. This reason overlaps with the first ground dealt with above.

[99] The Applicant submits that Appellant Meloche was to provide her expert witness statements on or before May 29, 2015. The Applicant reviewed the “will say statements” and determined that it needed the underlying data to Mr. Choquette’s road mortality study, requested that underlying data on June 15, 2015, further requested the data on July 28, 2015 and August 5, 2015 and it was only provided on August 22, 2015, just a few days prior to the hearing. Furthermore, the Applicant states that Appellant Meloche failed to provide her visual evidence in advance. The document books and visual evidence were not provided until several days into the hearing. This, the Applicant states caused prejudice by having to divert resources to review the materials during the course of the hearing and incur additional costs. As well, the Applicant had to prepare and make submissions with regard to those matters and to try and prepare to cross-examine Mr. Choquette and Dr. Weis without the benefit of actual witness

statements provided by them in advance in order that they would know the case it had to meet.

[100] The Board has reviewed Appellant Meloche's Response and finds that there is no direct response to this other than outlined above.

[101] Next the Applicant states that Appellant Meloche arrived late on several occasions after the hearing had begun, that she frequently engaged in long-winded speeches and diatribes against the proposed development, repeatedly attempted to give evidence herself rather than calling evidence from her witnesses, failed to represent a well-prepared and focused cross-examination, that notwithstanding the Board assisting Appellant Meloche by explaining proper procedure, that this was largely ignored by Appellant Meloche, and that ultimately her conduct in failing to act in a timely manner, adequately preparing for the Hearing, and acting disrespectfully, lengthened the Hearing and increased costs to the Applicant.

[102] Appellant Meloche responded as follows:

> With no prior experience, my case fell seriously behind time estimates causing stress. In a letter from my physician, Dr. Dobosz, I was instructed to check back with her the next day, possibly on a daily basis … for an arrhythmia … I chose to take a bit more time off daily and keep going.
>
> My visual evidence and document books, missed deadlines, however the most elements would be mailed before the case by August 23, 2015, and the physical copies were brought in later.
>
> I had the misfortune of running over my second document book placing it by the trunk of my car and forgetting it was there … I also managed to forget my brief case in the parking lot at Windsor City Hall. Luckily it was returned, and also left boxes, series of documents in the hallway … outside the meeting room.
>
> With everything else I was plagued by chronic computer problems and spent hours leading up to the case with online IT personnel, restoring whatever function had just been restored … see Exhibit M.

[103] The Board has several concerns with these explanations. Firstly, this matter commenced with appeals by Ms. Meloche in 2007. There was more than adequate time for preparation.

[104] The explanations acknowledge that visual evidence and document books missed deadlines. The issues of running over documents, losing documents, and having IT problems are not adequate responses to the prejudice that was put to the Applicant in the preparation of its hearing and the unnecessary time and expense that it went to in order to properly prepare for the case that Appellant Meloche had appealed. The Board finds that Appellant Meloche failed to comply with the Procedural Order, that such conduct is unreasonable, that such conduct led to the unnecessary prejudice and the unnecessary expense of the Applicant.

[105] The next ground against Appellant Meloche is her conduct at the hearing which the Applicant describes as being disrespectful by failing to act in a timely manner, failing to adequately prepare for the hearing, and acting disrespectfully towards the Board and other parties.

[106] Appellant Meloche responds that the hearing on the merits was scheduled for 10 days and the hearing was concluded within the 10 days that had been set aside. She admits that she was a novice at the Ontario Municipal Board and that while she had watched other Ontario Municipal Board cases, that she was not a lawyer and that it was unrealistic to suggest that she be held to a higher standard. With regard to the conduct of the case she says:

> This case was a new experience where I had a fast learning curve, made mistakes, and received a lot of guidance from the OMB Chair through procedures, bottle necks, and boiling points.

[107] The Board finds that the hearing on the merits had been set down for 10 days and it was completed within the 10 day period. The Board finds that Appellant Meloche was in her words “a novice at the Ontario Municipal Board”, and that some degree of

latitude must be provided to self-represented parties which the Board attempted to do while balancing the rights of the other parties.

[108] The Board will not award costs on this ground.

[109] The Board turns to the ground of the alleged trespass.

[110] The Motion for Costs indicates that while the matter was before the Board, that Appellant Meloche trespassed on the Applicant's development site on at least four occasions, that she was warned by the Applicant three times, twice verbally and once in writing that unauthorized access was not permitted.

[111] The Board's decision of August 25, 2010, deals with the matter of site access. There was at that time a Motion by the Applicant and a Responding Motion from Appellant Meloche seeking relief related to site access and site alteration. The Board Decision notes that Ms. Pancheshan appeared, although her counsel had previously consented to the adjournment of the hearing on the basis that "site access and inspection be agreed upon with his client and that these arrangements are in place." The Board continues to discuss the issue of site access and stated:

> Upon completion of the work by MNR, copies would be provided to Ms Meloche and her experts, and if Ms Meloche and her experts remained unsatisfied with the work done, the Applicant would agree to permit her expert witnesses a reasonable number of additional site visits (in accordance with a previous Order of the Board, issued January 21, 2010).

[112] That reference is found in the January 21, 2010 written disposition from the January 11, 2010 telephone conference call and that written decision reflects the following:

> Ms Meloche and Ms Pancheshan raised access to the subject property for further analysis. **Ms. Bull confirmed access is available but is to be coordinated through her office. The Board expects the Parties to be granted access through this protocol.**

> **If difficulty arises the Board may be spoken to through Ms Kwong.** A further TCC or Prehearing appearance may result if necessary at the call of any party. (Emphasis added)

[113] The Response to the trespass submission by Appellant Meloche includes the suggestion that there is an easement agreement between the owners of the Windsor Raceway and the Applicant allowing road use over the Applicant's lands by patrons, employees and suppliers of the Windsor Raceway.

[114] Simply put, Appellant Meloche does not fall into any of those categories.

[115] With regard to the trespass submission, paragraph 81 of Appellant Meloche's Response acknowledges that there are No Trespassing signs posted on isolated trees within the subject property but she alleges that the public by and large has ignored those signs and has used the private roadways for their own purposes and continue to do so including by-passing the traffic lines at the Sprucewood/Matchette corner. The Board finds that this response is irrelevant to the Procedural Order and site access that was ordered.

[116] In paragraph 95 under the heading 'Raceway Development Agreement Site Visit Protocol', Appellant Meloche states that she does not recall receiving that letter which was apparently both emailed and mailed. It confirmed that permission to go on the site was needed.

[117] In paragraph 98, Ms. Meloche states that she believed she had the right to be on the roads and in paragraph 108 she states she believed she had the right to use the raceway lanes, roads and entrances as a patron and local resident and access to the horseman's entrance.

[118] The Board disagrees.

[119] The Subject Lands were once part of the former Windsor Raceway which was established in or about 1965, closed its operation for horses in 2009, and according to paragraph 77 of Ms. Meloche's Response, burned down on July 1, 2015.

[120] The Board finds that a protocol was put in place with regard to site visits which was known to Appellant Meloche.

[121] Appellant Meloche's Response indicates that she did attend the two official site visits (see paragraph 116) and does not deny that she trespassed on the property at other times but argues that she believed she had the right to use the lanes, roads and entrances as a patron and local resident and to access the horseman's entrance.

[122] The Board disagrees.

[123] The Board finds that Appellant Meloche intentionally and for her own purposes disregarded the Board initiated protocol for site visits, trespassed on the property of the Applicant for the purposes of gathering additional evidence for the hearing (which she also failed to provide in accordance with the Procedural Order). The Board does not condone trespass and especially when the issue of site visits and a protocol had been established with the direct involvement of the Board.

[124] In summary, with regard to Appellant Meloche, the Board finds that while she had been warned by the Board in 2010 to proceed with utmost caution, she did not do so. She made inappropriate requests for summons for witnesses retained by her or who had agreed to appear on her behalf, and that was an abuse of the Board's process. The Procedural Order issued by the Board had required witness statements by experts. That was not done. Rather, Ms. Meloche herself prepared "will say statements" on behalf of Mr. Choquette and Dr. Weis. While the intent of the Procedural Order was to have a fair and transparent hearing where by the "... pre-filing evidence means that the position of witnesses and the opinions offered will be known in advance…" the actions of Appellant Meloche in that respect were contrary to that intent, and resulted in

prejudice to the Applicant and its counsel in terms of preparing for the hearing and preparing for cross-examination.

[125] The Board finds that Appellant Meloche failed to comply with the Procedural Order in terms of providing expert witness statements, providing visual evidence and document books in accordance with the timing laid out in the Procedural Order. The Board finds that Appellant Meloche's justification to be without merit.

[126] Paragraph 145 of her Response states the following:

> My visual evidence and document books missed deadlines, however, the most important elements would be **mailed** before the case by August 23, 2015, and the physical copies were brought in later. (Emphasis added)

[127] The Board simply notes that the hearing commenced on August 24, 2015.

[128] The Board finds that notwithstanding the clear directions from the Board with regard to the site visit protocol, that Appellant Meloche deliberately and willfully trespassed on the property. The Board does not condone such trespass and finds it to be unreasonable in the circumstances.

[129] With regard to Appellant Meloche's conduct at the hearing, the Board does allow a degree of latitude for the lay person and will extend that grace to her hearing conduct and make no award of costs.

[130] With regard to the grounds advanced by the Applicant, taking into account the actions of Appellant Meloche with regard to the requests for summons, the failure to provide witness statements by the expert witnesses themselves, the delay in providing document books, and visual evidence, the trespass and the flaunting of the Board's Procedural Order with regard to site visits, the Board finds that any reasonable person reviewing the facts of this case would exclaim "that's not right, that's not fair, that person ought to be obligated to another in some way for that kind of conduct". The Board finds Appellant Meloche's conduct was clearly unreasonable for the reasons set out above

which resulted in prejudice to the Applicant, wasted time, wasted resources, and additional costs.

FULL OR SUBSTANTIAL INDEMNITY

[131] The Board will first deal with the question as to whether any reward of costs in this case should be at full indemnity basis or a substantial indemnity.

[132] The Board in this case finds that there is no basis for an award of costs on a full or substantial indemnity basis. The Appellants are both ratepayers motivated by concerns with regard to unique and natural heritage features in the vicinity of the Subject Lands and endangered and threatened species.

[133] The Board distinguishes the *Customized Transportation,* where the first finding of the Board was that one of the parties acted in bad faith by not disclosing that a possible motivation for its opposition was to acquire additional land and even advanced evidence that obscured those intentions. That is not the case before the Board. In *719299 Ontario Inc.* the Board found that for substantial indemnification, the actions of the party had to be characterized as “reprehensible” or “scandalous”, or “outrageous”. The Board does not so find the actions of the Appellants, and accordingly the Board will not consider full indemnity or a substantial indemnity award of costs.

[134] In this regard the Board agrees in part with the submissions of counsel for Appellant Pancheshan that the public interest must be considered when an award of costs is requested.

[135] To this panel of the Board, the *Planning Act* through its notice provisions invites public participation, and grants rights of appeal. Ratepayers and other members of the public should not be fearful of participating in the Board’s proceedings and costs should not be used as a threat or reason to dissuade public participation. To make an award of costs in this case at either the full indemnity or substantial indemnity basis would in

effect have a direct and chilling impact on citizen participation in *Planning Act* matters, and this panel of the Board will not do so.

QUANTUM OF COSTS

[136] As noted above, the Board does not find this case to warrant consideration of costs on a full indemnity or substantial indemnity basis, and pursuant to s. 97 of the *Ontario Municipal Board Act*, the Board has the discretion to determine the amount of costs to be awarded, including the discretion to prescribe the scale upon which the costs shall be awarded.

[137] Counsel for Appellant Pancheshan submits that the Applicant has failed to establish that her conduct in any way warrants costs, and that the motion should fail.

[138] Appellant Meloche also submits that the motion should be dismissed.

[139] Should the Board in these circumstances exercise its discretion and not award any costs?

[140] The Board has seriously considered whether an award of costs is appropriate in these circumstances and has found that such an award is both appropriate and necessary.

[141] To the Board dismissing the motion for costs in these circumstances would be tantamount to a license to parties appearing before the Board to:

a. Attempt to re-introduce issues that had already been adjudicated;

b. Circumvent the preparation of expert witness statements by the experts themselves, by requesting a summons from the Board;

c. Circumvent the objective of a fair and transparent hearing process through party prepared "will say" statements instead of actual witness statements;

d. Trespass, notwithstanding Board direction on how site access is to be achieved, and how such requests for site access might be processed;

e. And finally to disregard a Board Procedural Order with regard to the timely provision of visual evidence and documents books to be used in the hearing.

[142] Thus the Board is of the view that it is both appropriate and necessary for an award of costs to be made.

[143] The Board notes that the Appellants are residents, concerned with regard to the unique environmental context of the development application. In or about 2007, the Appellants would have expected to receive some support for their positions from the Town of LaSalle. No doubt that they were most disappointed to find subsequently that the Town of LaSalle and the Applicant had reached a settlement, leaving them on their own to proceed to the hearing on the merits. In these circumstances, the Board does not find it appropriate to make an award on a partial indemnity basis.

[144] With regard to Appellant Pancheshan, the Board has found that the motion to attempt to re-introduce Market Impact Issues to the Issues List was frivolous and vexatious.

[145] While the Board's decision appears to name the Appellants (collectively), based on the submissions of the Applicant, it would appear to the Board to have been the motion of Appellant Pancheshan.

[146] The Board having taken into account the status of the Appellant, the public interest, and the circumstances, in which the matter arose, fixes the costs against

Appellant Pancheshan at $4,500 plus interest payable forthwith, as of the issuance date of this decision.

[147] With regard to Appellant Meloche, the Board finds that she was warned in 2010 to proceed with caution, that the Board in 2015 made it abundantly clear that evidence would be pre-filed so the evidence and opinions of witnesses would be known in advance, and that the goal of the Procedural Order and pre-filing of evidence was to achieve a fair and transparent hearing.

[148] That goal was not achieved through the actions of Appellant Meloche by requesting summons of her own consultant, and a witness that had apparently agreed to appear, and with summons in hand, she herself then prepared “will say” statements in lieu of actual witness statements prepared by the experts themselves. This obviously was to the prejudice of the Applicant in terms of knowing the case it had to meet and preparing for the hearing.

[149] The Board finds this course of conduct was an abuse of process, was patently unreasonable, and did not satisfy the standard of a fair and transparent hearing.

[150] Further the actions of Appellant Meloche to trespass on the Subject Lands when there was a visitation protocol in place, and the opportunity to seek redress for further site visits from the Board, was unreasonable.

[151] Moreover, the failure to provide in a timely manner the document books and visual evidence upon which she would rely was contrary to the Procedural Order and unreasonable.

[152] These circumstances the Board finds warrant an award of costs, which taking into account the status of the Appellant, the public interest, and gravity of the actions, the Board fixes the costs at $6,500 plus interest, payable forthwith, as of the issuance date of this decision.

[153] Therefore, the Board allows the Motion in part for costs, as set out above and;

- no additional costs are awarded for the preparation of the Motion.

- that all Bills of Costs in support of the written submissions in this Motion are to be maintained as confidential and returned to the counsel for the Applicant forthwith.

[154] This is the Order of the Board.

"Blair S. Taylor"

BLAIR S. TAYLOR
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.