

# **Enterprise Property Group Ltd. v. Oxford (County)**

IN THE MATTER OF Section 17(11) of the Planning Act, 1983

AND IN THE MATTER OF a referral to this Board by the Honourable Minister of Municipal Affairs for consideration of proposed Amendment No. 100 to the Official Plan for the County of Oxford Minister's File No. 32-OP-0141-100 O.M.B. File No. O 910026 [Ed. Note: and 8 other applications respecting appeals to the Board. See Appendix "A" for complete list.]

Ontario Municipal Board Decisions: [1994] O.M.B.D. No. 1048  
File Nos. O 910026, R 910332, O 900019, Z 910148

## **Ontario Municipal Board T.F. Baines, H.C. Cooper**

Oral decision: June 14, 1994  
Filed: August 8, 1994  
(7 pp.)

### **COUNSEL:**

P.L. Sanford, for Enterprise Property Group Limited.  
Kathryn I. Chalmers and J.W. Harbell, for Goff Construction.  
Marc J. Somerville, Q.C., and Jyoti V. Zuidema, and C. Firth, Student-at-Law, for County of Oxford and the Township of Blandford-Blenheim.  
Daphne E.M. Wagner, for Lehndorff Corporation, Lehndorff Investors Services Limited and Fifth Lehndorff (Canada) Limited.  
J.R. Boxma, for Oshawa Group Limited et al.  
Ronald G. Slaght, Q.C., for Aird & Berlis and Richard Arblaster.

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### **DECISION ON MOTION delivered by T.F. BAINES:--**

The Board's decision in this matter dated June 13, 1994 authorized the present hearing panel to consider the full ambit of awards available in the exercise of its Section 43 Ontario Municipal Board Act decision review on costs. This part of the decision deals solely with the discrete issue of whether the ambit of the Board's rehearing should be expanded to determine if it should embrace, as expressed in the Notice of Motion by the County of Oxford (Oxford) and the Township of Blandford-Blenheim,

"An Order of the Board pursuant to Section 43 of The Ontario Municipal Board Act permitting the applicant Oxford to seek, in response to the motions brought by Goff Construction and Enterprise Property Group Limited, confirmation of the Boards decision of April 30, 1992, or in the alternative an order against Richard Arblaster and Aird and Berlis". (Board's emphasis)

The initial part of the motion, the Board considers embraced within the ambit of the hearing presently being conducted by the Board differently constituted on the issue of whether Goff Construction Limited (Goff) and

Enterprise Property Group Limited (Big Enterprise) are liable for all or any part of the costs awarded, April 30, 1992, or should Enterprise (Woodstock) and 572257 Ontario Limited be the only parties liable.

The second part of the motion described as being "in the alternative" was separately argued at some length with input from Oxford, Blandford-Blenheim and Arblaster, Aird Berlis, the other moving parties on the first motion withdrawing from that aspect of the argument. This panel of the Board is clearly sitting in the context of assigning additional area(s) of decision review to the reviewing panel, not of determination of the result of the hearing, that jurisdiction having already been assigned to another panel Vice Chair (R.D.M. Owen) presently hearing submissions on the parties properly to be responsible for and the amount of the original cost award.

To determine first whether the cost responsibility can or should in the alternative, be assigned to Arblaster, Aird Berlis, this panel must first determine;

1) Is there an issue of:

- a) manifest error of decision or fact
- b) fraud or misrepresentation
- c) jurisdictional or procedural defects
- d) changed circumstances or new evidence
- e) any other issue of sufficient importance to justify a rehearing on all or part

2) The function of the panel hearing the motion to grant review, if it is satisfied one or more of the issues applies, must also decide that the issue sought to be reviewed by the moving party

- a) lies within the Board's jurisdiction
- b) if found to be in error will or will not be likely to have an effect on the Board's decision

The moving party rests its request on the "changed circumstances" given that it was not contemplated at the end of the hearing that Big Enterprise and/or Goff would seek to be excluded from the cost award. Further the moving party relies heavily on the fact, as confirmed by the language of the original hearing panel in its decision, that the hearing had been unduly protracted. The concession was made by Enterprise/Woodstock, that the opposing applicant for change in this "store wars" matter, would create little adverse impact and had substantial merit on its own. The moving parties had typified that conduct as close to "abuse of process". Counsel for Oxford points out the hearing was protracted when Mr. Arblaster should have advised his client to withdraw knowing the other sides case was so much stronger and meritorious.

The term "abuse of process" must be used very cautiously as the courts have indicated that it means the use of the wrong legal process to achieve a desired end, e.g. threat of criminal proceedings being taken if a debt clearly owed is not paid promptly rather than suing in the civil courts.

Counsel for Arblaster/Aird Berlis makes two fundamental points,

The moving parties here knew of Arblaster having stated at the outset of the hearing that he represented Enterprise Property Group (Woodstock) Limited and others, not Enterprise Property Group Limited and he asked that Enterprise (Woodstock) be substituted without objection from other parties or the Board. Further, late in the hearing on examination of Mr. Blandford, it was clarified that Enterprise (Woodstock) had a very small interest in the project and then only if successful. It was made clear that Enterprise (Woodstock) had no assets other than what it expected to get out of the subject proposal, if successful.

Therefore knowing of the impecuniosity of Enterprise (Woodstock) and knowing that Big Enterprise got off the record at the start of the proceedings, it was open to Oxford and Blandford-Blenheim to have requested the award against Arblaster/Aird Berlis in the alternative during the main argument on costs at the end of the hearing. Whether the hearing panel would have made such an award, they were clearly in the same position Oxford and Blandford/Blenheim wish us now to assign to the hearing panel on the review hearing. Mr. Arblaster would have responded to

the request for costs against him if they had been requested at the time of the argument on costs.

The courts have relatively recently developed some criteria i.e. since 1985 when the rules of civil procedure were amended in Section 57.07 to allow for an award of costs against a Solicitor for a party in certain circumstances. The most recent authoritative decision is *Young vs Young et al, Attorney General of Canada et al Intervenor*, S.C.C. 108 DLR(4th) 193. The case involved many issues including divorce, custody, determination of division of assets and the trial judge awarded costs on a Solicitor and Client basis against the husband, his lawyer and the congregation of the Church which he attended and which had funded his litigation. The cost award against the lawyer was based on prolonging the trial, bringing in of irrelevant evidence and other reasons. On appeal in the Supreme Court of British Columbia it was determined that, "the behaviour of the husband's lawyer did not amount to contempt and it cannot be said that irrelevant or fictitious material was introduced given the attacks by the wife". At the Supreme Court of Canada the decision to disallow costs was upheld with only one dissent. From the headnote:

"No order of costs should have been made against the husband's lawyer. Courts possess jurisdiction, as part of their inherent jurisdiction to control abuse of process and contempt of court, to award costs against a lawyer who has acted in bad faith in encouraging abuse of process and delay. Despite their great length and acrimonious progress, these proceedings were not characterized by such fault. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes".

It is not even alleged that there has here been an abuse of process in the proper sense or contempt of court. Given the requirements of Section 13 of the Statutory Powers and Procedure Act, the most this Board could do would be to seek the assistance of the Divisional Court. There has certainly been nothing suggested that, in this panel's view, even approaches contempt of court by Mr. Arblaster.

The worst that can allegedly be laid at his feet is the prolongation of the hearing that had little merit in the first place in the context of his clients applications and appeals. Given the Supreme Court's comments on the duty of a solicitor "to bring forth with courage even unpopular causes", it is impossible for this panel to contemplate that the review panel would make a positive finding of abuse of process or contempt of court by Mr. Arblaster or his law firm Aird Berlis.

That said, the Board considers no review of the cost award to allow of making that award against Counsel, Richard Arblaster, or his law firm Aird Berlis is reasonably likely to pass that threshold test made in the current state of the law. Such a review therefore would be a further waste of time and is therefore not warranted.

The motion of the County of Oxford and Townships of Blandford-Blenheim, to have a review of the cost award against Enterprise Property Group Limited and Goff Construction Limited rendered against Richard Arblaster or Aird Berlis in the alternative, if the cost award against Big Enterprise and/or Goff is dismissed or reduced is hereby dismissed.

No costs were requested on these motions.

H.C. COOPER, Chair

T.F. BAINES, Vice-Chair

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#### Appendix "A"

IN THE MATTER OF Section 34(18) of the Planning Act, 1983

AND IN THE MATTER OF an appeal by Enterprise Property Group Limited, 572257 Ontario Limited and Goff Construction Limited against Zoning By-law 881-91 of the Township of Blandford- Blenheim O.M.B. File No. R 910332, and

IN THE MATTER OF Section 22(1) of the Planning Act, 1983

AND IN THE MATTER OF a referral to this Board by the Honourable Minister of Municipal Affairs, on a request by Enterprise Property Group Limited, for consideration of a proposed amendment to the Official Plan for the County of Oxford Planning Area as it relates to the lands

comprising part of Lot 18, Concession 2, former Township of East-Oxford, to permit the development of a regional shopping centre Minister's File No. 32-OP-0141-A05 O.M.B. File No. O 900019, and

IN THE MATTER OF Section 34(11) of the Planning Act, 1983

AND IN THE MATTER OF an appeal to this Board by Enterprise Property Group Limited for an order amending Zoning By-law 5899-81 of the City of Woodstock to rezone the lands located on Lots 5,6,7 and 8, Registered Plan 41M-82 from "C4-14" (Highway Commercial) and "M2" (Industrial) to "C6" (Regional Shopping Centre) to permit a regional shopping centre O.M.B. File No. Z 910148, and

IN THE MATTER OF Section 43, of the Ontario Municipal Board Act, R.S.O., c. O.28

AND IN THE MATTER OF motions to rescind the decision of the Board to award costs against Enterprise Property Group and Goff Construction Limited