

ISSUE DATE:

February 13, 2014



PL050096

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Allto Investments Holdings Inc. have appealed to the Ontario Municipal Board under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Minister of Municipal Affairs and Housing to approve the Official Plan for the Township of Amaranth
Approval Authority File No. 22-OP-5450
OMB Case No.: PL050096
OMB File No.: O050177

IN THE MATTER OF subsection 97(1) of the *Ontario Municipal Board Act*, R.S.O.1990, c. O.28, as amended

Request by: Township of Amaranth
Request for: Request for an Order Awarding Costs
Costs sought against: Allto Investments Holdings Inc.

WRITTEN SUBMISSIONS

Parties

Township of Amaranth

Counsel

J. J. Wilker

DECISION DELIVERED BY SUSAN de AVELLAR SCHILLER AND ORDER OF THE BOARD

[1] The Township of Amaranth ("Township") has brought a motion seeking an order of the Board for costs totalling \$69,332.17, which includes \$2,500.00 for the costs of this motion, against Allto Investments Holdings Inc. ("Allto").

REASONS FOR DECISION

Background

[2] This matter has been the subject of several appearances, with decisions issued by the Board over a number of years.

[3] Allto mined peat from its lands without obtaining the necessary permits and approvals.

[4] Allto appealed a section of the Township Official Plan ("OP") dealing with peat extraction.

[5] The Township and Allto reached a settlement to have a separate section of the OP dedicated to peat extraction.

[6] In its February 25, 2010 decision, the Board modified the OP to insert the section dealing with peat extraction operations. The section included clear criteria and requirements to be met by proponents prior to the designation of lands for peat extraction.

[7] The final language of the OP in this regard, and the requirements to be met by a proponent, were consented to by Allto. With the consent of both Parties, the Board set out a schedule Allto was to meet if Allto intended to have certain of its lands designated for peat extraction.

[8] Allto advised the Board that it intended to undertake the necessary studies and move with dispatch to meet the criteria of this section such that its lands would be designated for peat extraction and its peat operations regularized.

[9] Peat fields are ecologically sensitive and several environmental issues arose as a result of the illegal peat extraction.

[10] If Allto did what its Counsel advised the Board that Allto intended to do, these environmental issues would be addressed through compliance with the OP requirements regarding peat extraction.

[11] In October 2010, the Board was advised that Allto would no longer pursue the regularization of its peat operation and intended instead to rehabilitate the subject site and restore the peat fields.

[12] On February 4, 2011, the Board issued its decision and order setting out clear directions for the rehabilitation of the peat site.

[13] Allto's conduct from February 2011 to the final completion of work to restore the peat fields and rehabilitate the site by July 2013 is cited by the Township as the grounds for the motion for costs now before the Board.

Counsel Appearing for Allto

[14] At an appearance of November 4, 2011, the Township brought its initial motion for costs against Allto.

[15] William Stutz appeared as Counsel to Allto at that appearance.

[16] The Board heard oral submissions and directed the Township to provide supporting documentation. The Township provided that documentation on November 8, 2011.

[17] On November 18, 2011, Allto provided submissions on that cost request.

[18] Mr. Stutz retired effective November 30, 2011. Mr. Stutz's firm continued to represent Allto and Stephen Christie assumed carriage of the file and was solicitor of record until January 6, 2012. Douglas Laframboise assumed carriage of the file thereafter.

[19] The Board deferred its decision on the initial request for costs until the matters before the Board were completed.

[20] In an August 2012 teleconference appearance, the Township advised the Board and Allto that the Township intended to bring forward an amended motion for costs once the rehabilitation and restoration of the peat fields were complete.

[21] Matters before the Board were finally complete in July 2013.

Service of Motion Materials

[22] The Board directed that the amended motion for costs would proceed in writing by way of Board *Rules of Practice and Procedure* ("Rules") 98(ii), 99, 100 and 103 except that the deadline for submitting the motion in writing was set at September 30, 2013.

[23] Further to the Board's request, the Board received an affidavit of service on October 25, 2013, with respect to the delivery of the Township's notice of motion and motion record.

[24] Based on the affidavit, the Board is satisfied that Allto has had full notice of this motion.

[25] Electronic delivery of the motion materials was sent to Mr. Laframboise, as solicitor of record for Allto in these proceedings, on September 30, 2013.

[26] Overnight delivery of hard copy of these materials was sent to Mr. Laframboise at the following address:

Douglas Laframboise
DDH Law Firm
501-77 City Centre Drive, East Tower
Mississauga, Ontario, L5B 1M5

[27] The hard copy of the materials was signed for on delivery.

[28] The Board understands that this address in Mississauga is the address that is on file for Mr. Laframboise with the Law Society of Upper Canada.

[29] The Board received no response to the motion from Allto.

Motion before the Board

[30] The amended motion now before the Board is for an order of the Board:

1. That Allto pay to the Township costs in the amount of \$66,832.17 for expenses incurred as a result of Allto's conduct from February 10, 2011 to July 17, 2013, which the Township asserts has been unreasonable, frivolous and vexatious.
2. That Allto pay the Township's costs of this motion in the amount of \$2,500.00.
3. That such Order include interest in accordance with s.129 of the *Courts of Justice Act*, R.S.O. 1990, c.43 as amended, from the date of the Board Order.

[31] The \$66,832.17 includes a claim for costs for unnecessary expenses incurred by the Township and paid to:

1. the Township solicitors, Thomson, Rogers and to Stovel and Associates Inc., its environmental planning consultants from February 10, 2011 to November 4, 2011 in the amount of \$10,000.00, as previously requested in its costs submissions as of November 4, 2011 and its responding costs submissions of November 30, 2011;
2. an additional claim for costs for unnecessary expenses incurred by the Township and paid to the Thomson, Rogers November 4, 2011 to July 17, 2013, in the amount of \$34,946.52;
3. a claim for costs for unnecessary expenses incurred by the Township and paid to Stovel and Associates Inc., its environmental consulting planner, from November 5, 2011 to November 30, 2012, in the amount of \$16,531.74;
4. a claim for costs for \$5,353.91, being the amount expended by the Township in addition to the \$5,000.00 deposit for the services of R.J. Burnside & Associates Limited as the environmental inspector (acknowledging that the \$5,000.00 deposit has already been expended).

Authority to Award Costs

[32] The Board's authority to award costs is set out in s. 97(1) of the *Ontario Municipal Board Act*, R.S.O. 1990 c. O.28:

Costs

97. (1) The costs of and incidental to any proceeding before the Board, except as herein otherwise provided, shall be in the discretion of the Board, and may be fixed in any case at a sum certain or may be assessed.

[33] Rule 103 of the Board's Rules outlines the general principle followed by the Board in dealing with motions for costs:

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.

[34] Rule 104.01 of the Board's Rules addresses interest on costs awards:

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*.

Analysis and Findings

Consistent Pattern of Delay, Failure to Comply, False and Misleading Advice

[35] In February 2011, the Board issued certain directions regarding the environmental studies necessary to rehabilitate the site. Extensive delays occurred and Allto conceded that the Board's directions were not adhered to.

[36] Allto's Counsel contacted the Board in May 2011, to seek an adjustment of some of the deadlines for the environmental work as a result of what was explained to the Board and the Township as requirements of the Grand River Conservation Authority ("GRCA"). The Board and the Township were led to believe that work was underway but a small delay had occurred.

[37] On June 24, 2011, the Board issued its decision accepting the explanation of Allto's Counsel that the reason for the delay was the requirement of the GRCA for certain work and allowing for some extension of the deadlines.

[38] None of the now revised deadlines for production of the necessary studies were met.

[39] The full environmental report was to have been completed and filed with the Township of Amaranth and the GRCA by September 2, 2011. No such report was filed.

[40] The Board was advised by Counsel for the Township that, after the failure to file on the deadline, Counsel for Allto advised Counsel for the Township that the studies were incomplete and additional time was required.

[41] The Board was not contacted by Allto to seek the additional time or to provide an explanation for the further delay.

[42] The Board held a teleconference with the Parties on October 28, 2011, to understand the status of matters.

[43] Counsel for Allto provided no clear answer to the Board's questions regarding the status of work.

[44] Both the Board and the Township continued to be left with the clear impression from Counsel for Allto that work was underway, just progressing more slowly than anticipated, and that Allto considered the delays to be due to the GRCA requirements and environmental constraints.

[45] The Board then set an appearance for November 4, 2011, to provide the Board with a complete update on matters. In light of the apparent inability of Allto's Counsel to provide the Board with a clear statement on the status of the environmental work or any clear explanation of the reasons for delay in the environmental work on October 28, 2011, the Board also required the attendance of Allto's environmental consultant to answer the Board's questions regarding the status of work, particularly if the explanation for delay involved claims of environmental constraints regarding access or seasonal requirements for data collection.

[46] Allto did not produce its environmental consultant at the November 4, 2011, appearance.

[47] Anticipating the appearance of Allto's environmental consultant as required by the Board, the Township ensured that its environmental consultant was in attendance at the November 4, 2011 appearance.

[48] At this November 2011 appearance, the Board was informed for the first time that Allto had directed that all environmental work cease in April 2011, prior to the May request for deadline extensions, and that work had not been resumed since that time.

[49] The matter now became a circumstance not only where the Board's orders were being disregarded but where Allto was providing the Board with false and misleading advice and information.

[50] In spite of the fact that work ceased in April and had not been resumed, Counsel for Allto insisted in submissions to the Board that Allto's environmental consultant would be able to complete the necessary work and file a completed study, in accordance with the Board's earlier decisions, by December 9, 2011.

[51] Relying on this advice from Counsel for Allto, the Board agreed to the filing date, reviewed the requirements, and set out clear directions for completion. Allto was in attendance at this appearance and Counsel for Allto confirmed to the Board that Allto fully understood and consented to the Board's requirements.

[52] The dates and deliverables directed by the Board and consented to by Allto were not adhered to, appropriate rehabilitation plans were not developed and substantial further delays have occurred.

[53] Allto's continued delay in producing appropriate rehabilitation plans led the Board to direct, on May 17, 2012, that the parties finalize the rehabilitation plans by May 24, 2012.

[54] Allto failed to adhere to this deadline.

[55] The Township continued to incur costs for its environmental planning consultant to review what plans were produced by Allto to determine if they were appropriate to rehabilitate the site in accordance with the Board's directions.

[56] Allto continued its practice of sporadic, unreliable and misleading communication while it continued to engage in delay.

[57] The Board held a teleconference on August 31, 2012 in a further attempt to understand the reasons for delay in meeting the necessary prerequisites for the proper environmental rehabilitation of the peat fields.

[58] Mr. Laframboise was now Counsel to Allto in these proceedings and appeared for Allto at this teleconference.

[59] At this teleconference, Counsel for Allto repeated several times that the rehabilitation of the site would only take two or three days and that the rehabilitation both could and would be completed as soon as the final agreements were in place for securities and the final rehabilitation and planting plans were complete.

[60] On September 27, 2012 the Board issued a further decision noting that the final revised rehabilitation plan and the final revised planting plan had been received and that the Board was satisfied with the form of the securities agreed between the parties.

[61] Relying on the advice from Counsel for Allto that the final work would now be initiated quickly and would only take two or three days, and wishing to provide a period with some flexibility, the Board ordered that the rehabilitation and planting work was to be completed within 45 days from the September 27, 2012 decision, i.e. by November 12, 2012.

[62] Allto did not complete the work by November 12, 2012 and did not contact the Board to advise of this circumstance or to explain this apparent further delay.

[63] On November 13, 2012, the Board was advised by the Township that the work had not been completed.

[64] On November 14, 2012, the Board sought formal advice from Counsel for Allto that the work set out in the decision of September 27, 2012 had been completed or, if not, that Allto file a sworn affidavit setting out the reasons the work had not been completed. The Board set November 19, 2012 as the date for the filing of the affidavit.

[65] On November 15, 2012 the Board received written advice from Counsel for Allto that the work had been started but not completed, that Larry Acchione, the principal in Allto and person authorized to provide all directions to Counsel in this matter, was in Florida for a funeral. Counsel sought, and the Board consented, to an extension for the filing of the affidavit to November 22, 2012.

[66] On November 21, 2012 Counsel for Allto wrote to the Board to advise that Mr. Acchione was staying in Florida for several more days and requested a further extension for the filing of the affidavit.

[67] On the morning of November 27, 2012 the Board received the affidavit. On the afternoon of that day, the Board held a status teleconference with Counsel for the Township and Counsel for Allto.

[68] At this teleconference, the Board was advised that the considerable passage of time at this point in the season meant that any further work would have to be put over to the spring. Given this circumstance, and with Allto's agreement, the Board directed Allto to file a protocol with the Township by December 10, 2012 for off-season monitoring of the site to ensure no further preventable degradation.

[69] Allto did not follow the Board's direction and did not prepare or file with the Township any protocol for off-season monitoring of the site.

[70] Once again, Allto did not advise the Board that it had not adhered to the requirements to which it had agreed and which were directed by the Board, nor did Allto provide any explanation to the Board as to why it failed to do so.

[71] As a result of Allto failing to adhere to the Board's directions, the Township's engineers, whom the parties agreed would act as the environmental inspectors for all the rehabilitation work on the site, were left to prepare the protocol.

Unnecessary Additional Costs Incurred by Township

[72] There are three key areas where the Township incurred unnecessary additional costs: costs for its environmental consulting planner, costs for its environmental consulting engineer and legal costs.

[73] Allto's failure to prepare proper and timely remediation plans, and the consequent delay in implementation, resulted in additional work and attendant expenses incurred by the Township and paid to its environmental consulting planner.

[74] By agreement with Allto and as directed by the Board, the Township commissioned its consultant engineers to act as the environmental inspectors on the peat remediation.

[75] The substantial delays, including the need to develop and undertake an off-season inspection and monitoring program, resulted in considerable additional costs beyond the initial estimate advanced by both parties for the work of the environmental inspector.

[76] The continued failure by Allto to advise the Township and the Board of its progress, or lack thereof, its continued failure to respond to and comply with the Board's directives and orders, and its continued provision of false and misleading advice required the continual engagement of legal services by the Township with attendant expense.

Findings

[77] The Board finds that Allto's flagrant disregard of Board orders, coupled with false and misleading advice and explanations to the Board and the Township, constitute a course of conduct that is clearly unreasonable, frivolous, vexatious and in bad faith.

[78] The Board finds that the unnecessary and excessive delay caused by this course of conduct resulted in the Township incurring costs that it would otherwise not have incurred.

[79] The Board does not award costs readily or lightly. In this case, Allto's behaviour has been particularly egregious and warrants a substantial award of costs in favour of the Township.

ORDER

[80] The Board orders that:

1. Allto Investments Holdings Inc. pay forthwith to the Township of Amaranth fixed costs in the amount of \$66,832.17 for expenses incurred as a result of Allto's conduct from February 10, 2011 to July 17, 2013.
2. Allto Investments Holdings Inc. pay forthwith to the Township of Amaranth fixed costs in the amount of \$2,500.00 for the costs of this motion.
3. These awards of costs shall bear interest in accordance with s.129 of the *Courts of Justice Act*, R.S.O. 1990, c.43 as amended, from the date of this Board order.

"Susan de Avellar Schiller"

SUSAN de AVELLAR SCHILLER
VICE CHAIR