CITATION: Aware Simcoe: Environmental and Social Solutions Inc. v. Corporation of the County of Simcoe, 2015 ONSC 6895
BARRIE COURT FILE NO.: DC-15-0922
DATE: 20151110

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
AWARE SIMCOE: ENVIRONMENTAL AND SOCIAL SOLUTIONS INC. Applicant	Michael Fleischmann/Mark Donald, for the Applicant
– and –	
CORPORATION OF THE COUNTY OF SIMCOE and TECUMSETH ESTATES INC. Respondents	E. Marshall Green, for the Respondent Corporation of the County of Simcoe Ian Rowe, for the Respondent Tecumseth Estates Inc.
	HEARD: in writing

EBERHARD J.

[1] The Applicant sought Judicial Review of the decision of the Corporation of the County of Simcoe ("Simcoe County") to lift stop work order 2015-035 and confirm the Special Permit issued to Tecumseth Estates Inc. On August 19, 2015 the parties were before me on a motion by the Applicant for an interlocutory injunction to stay the decision pending completion of the Judicial Review. The stay was denied. Reasons were released August 26, 2015 and, as is my custom when reasons are reserved and later released in writing, opportunity was then given to address costs in writing.

[2] The Respondents succeeded in their arguments against a stay so rely on the general rule that costs should follow the event. The Applicant submits, citing authority, that it is not usual to order costs against a public interest litigant.

[3] I begin by referring to observations and findings in my reasons that shape my approach to the issue of costs. I stated:

[4] ....Tecumseh Estates Inc., by its principal Rizzardo, makes no secret that he is a developer who currently leases out the land for agricultural use but he cannot expect or control changes in zoning, planning or provincial policy that could eventually permit development of this land. The County, for its part, prides itself on its record of forest management and demonstrates the rigorous steps they required of Tecumseh Estates Inc. since Rizzardo applied to cut the trees in 2012 and the several environmental assessments and concessions that were accomplished before the Special Permit was granted.

[5] The Judicial Review sought is of the decision of the County Council, sitting as an appeal body of a stop work order preventing Tecumseh Estates Inc. from cutting the trees. The stop work order was issued in March 2015 when some citizens objected, even though Tecumseh Estates Inc. was fully compliant with the requirements which had been imposed. Coincidentally, it was discovered that through all the rigorous demands placed on Tecumseh Estates Inc. to qualify for a permit, notice had inadvertently not been given to abutting landowners. As this was required anyway, the municipality decided to give notice to the interested citizens also.

[7] In argument, counsel for the Applicant urged that the only question was whether there had been a denial of natural justice, that natural justice itself is the interest of the Applicant that demands the protection of this court and that in this injunction motion, the serious case to be assessed is not the merits or reasonableness of the decision made by the County Council but only whether there is a serious issue that natural justice was denied. AWARE argues that there is a serious issue whether they were denied natural justice, that the trees will be gone before that right can be determined, that Tecumseh Estates Inc. would be minimally disrupted by a stay whereas citizens interested in the fate of the trees they view as significant would be deprived of having the decision made in a fair and democratic way.

[20] Quality and significance of trees was rigorously addressed.

[21] At this point, after considerable study and full compliance and completeness by the landowner Tecumseh Estates Inc., the County realized it had failed to notify abutting landowners. Renewed cutting under the Special Permit had attracted the attention of other citizens. Some entered upon the private land and damage is alleged. In an exercise of discretion the County expanded the notice widely to such other citizens as expressed

interest and issued a stop work order until any dispute could be considered by County Council by way of appeal of the stop work order.

[22] Tecumseh Estates Inc. submits that the stop work order was a nullity as the failure to notify the abutting owners was not its error and the Town cannot issue a stop work order where there is full compliance with its Special Permit. Without deciding that point, I find that issuing the stop work order was certainly a demonstration by the Town of responsiveness to the objections of citizens who had come forward to complain.

[34] The issue before me is whether the Applicant is entitled to a stay of the order issuing the Special Permit such that the tress cannot be cut. While urging upon me that the substance or reasonableness of the decision to grant a Special Permit is not before me, and that the serious issue to be tried is not the cutting of trees but the right to natural justice, I am invited to grant the stay because if I do not, the trees will be gone and there will be no purpose in continuing to assert the right to natural justice.

[35] The simplicity of that is tempting. The responsibility though, is to determine whether the Applicant has satisfied the criteria for injunctive relief.

[67] In summary, two additional councillors are present but there is no evidence of participation in discussion. They voted when they should not have, no-one notices. Their votes make no mathematical difference.

[69] I find that the mistake of County Council falls outside the "general rule" "he who decides must hear". In doing so, I remind myself that the Applicant's only assertion of serious issue to be tried is whether they have been deprived of natural justice, carefully partitioned off from the merits of their substantive case. The clear, inept, but inadvertent mistake of County Council in recording the votes of two that did not hear the evidence, was wrong but resulted in no denial of natural justice. Everyone was heard. No external influence on the independence of the decision-makers who heard the evidence is discerned in deliberations in open session. The mistakenly recorded votes made no difference in the result. I do not find a serious case of denial of natural justice to be heard by way of judicial review.

[80] I have averted to the value of public protest in this ruling but so too did the County by issuing the stop work order when

> Tecumseh Estates Inc. was in full compliance with its requirements. The objectors were given an opportunity to put forward evidence to give pause to the County in confirming a Special Permit already based on 3 years of assessment with concessions extracted from Tecumseh Estates Inc. The objectors failed and the Applicant fails to put forward evidence of irreparable harm to trees significant in the public interest with the cutting of these trees.

[4] In all of this, one thing is clear: the Respondent landowner, Tecumseh Estates Inc., which did not prevaricate on its ultimate intention for the land if it becomes possible, was put through a considerable process by the Respondent County and has been fully compliant. Thereby faultless, the Respondent landowner also succeeded in this litigation which was generated not by its mistake but the procedural errors of the County, both in 2012 and 2015, which the Applicants used as the basis for their litigation claim. The Respondent landowner had to participate in the dispute before the court which made its position vulnerable despite full compliance with everything the County had required. The landowner should have costs for the expense of litigation it did not generate but could not stand by and simply watch for fear that its interests would be defeated.

[5] For its part, the County, I find, acted responsibly in its duties but floundered procedurally giving the Applicants opportunity to move before the court for relief. To defeat the Applicant's claim it was necessary for the County to bring itself within an exception to a general procedural rule of natural justice in an arguable and well-argued case. So, I find that the County was on the wrong side in creating the grounds for dispute but the right side in the litigation. The County's litigation position succeeded. In the latter regard, the County can legitimately rely on the principal that costs should follow the event.

[6] The Applicant cites *Lancaster v. St. Catherines(City)* 19 MPLR (5^{th}) 22 at 169-170, for the principle that though the "Developer may assert that as a private party, despite its superior resources, it should not have to subsidize an unsuccessful opponent. Quinn J. was of the opinion that this concern is "trumped" if the litigation raises an issue of public importance". That is indeed the nub of this cost issue.

[7] The Applicant further cited *DeLarue v Kawartha Pine Ridge District School Board* (2012) 226 ACWS (3d) 54 as authority for the notion that "courts often exercise their discretion to order no costs against a well-behaved public interest litigant". In that case the court did order $25,000 of the $125,000 claimed by the successful Respondent but the Applicant would distinguish even the reduced award as based on a "no holds barred" approach and the fact that the Applicant had some funds available through donations to satisfy costs. The Applicants, it is submitted, brought very narrow issues before me, thereby minimizing expense and moreover have only $5000 in raised funds.

[8] In my reasons for decision I began by observing:

> [3] This was a well-argued, compelling proceeding which engaged issues of environmental concern, the social value of protest, limitations on the rights of ownership of private property, public influence over private property and who is the guardian of public interest.

[9] My findings, however, moderate my enthusiasm for protecting the social value of protest in the present circumstances. The narrowing of the issues to denial of natural justice is a strategy consistent with the absence of evidence to support the substantive position on the merits. Further, a motion for injunctive relief invokes the requirement of an undertaking as to damages. While it was argued on the balance of convenience issue of that the developer upon examination could point to no more than legal cost as damages, I find it irresponsible, perhaps even disingenuous, for an unsuccessful litigant to hide behind lack of funds as grounds for denying an order for costs having earlier asserted that it could meet undertaking requirements.

[10] Tecumseh Estates Inc. claimed costs of partial - $24,050; substantial - $27,850; and full - $32,947. Plus disbursements of $1763.07 and HST

[11] The County claimed costs of partial - $15,709.33; substantial - $19,962.86; and full - $23,485.70. plus disbursements of $213.28

[12] I stated earlier, that the question whether a private landowner must "subsidize an unsuccessful opponent. Quinn J. was of the opinion that this concern is "trumped" if the litigation raises an issue of public importance." is the nub of the costs issue before me. In this instance of a fully compliant landowner who had met the public interest concerns put forth by the County over several years; and a group of publicly minded citizens who were never able to elevate their views to the level of evidence of a public importance; I find that the landowner is not "trumped".

[13] I considered ordering the County to pay some portion of Tecumseh Estates Inc.'s costs because of my finding that the County's floundering generated opportunity for the dispute to escalate into litigation. Instead, looking at the circumstances of the parties as a whole, I order that Tecumseh Estates Inc. should have priority to any enforceable costs.

[14] I am fixing costs, not assessing them.

[15] I fix costs payable by the Applicant to the Respondent Tecumseh Estates Inc. at a rate generally consistent with substantial indemnity at $27,000 all in. These costs are in priority to any costs payable to the County.

[16] I fix costs payable by the Applicant to the Respondent County with an eye to the County's part in generating the litigation and so as not to chill legitimate public interest protest, at $5,000.

EBERHARD J.

Released: November 10, 2015