

COURT FILE NO.: 423/05
DATE: 20070220

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CORPORATION OF THE TOWN OF CALEDON

Applicant

v.

541904 ONTARIO LIMITED and
WOOD WASTE SOLUTIONS CANADA INC.

Respondents

BEFORE: SPROAT J.

COUNSEL: M. Virginia MacLean, Q.C., for the Applicant

Derek A. Schmuck, for the Respondent 541904 Ontario Limited

David P. Lees, for the Respondent Wood Waste Solutions Canada
Inc.

ENDORSEMENT RE COSTS

[1] On a partial indemnity basis the Town claims \$45,113 for fees of which approximately \$42,500 represents time docketed by Ms. MacLean, billed by her at \$300 and claimed on a partial indemnity basis at \$210 per hour. The hourly rate claimed is reasonable given Ms. MacLean's 37 years of experience and the fact she is a specialist in municipal and planning law.

[2] I exclude 10.5 hours of time prior to June 1, 2005, being the day on which Ms. MacLean received a retainer letter. While the earlier time was related to the same issue, it appears a decision was made to commence litigation on or about June 1, 2005 and the Notice of Application was actually issued September 1, 2005.

[3] The Application took the position that Wood Waste was in breach of the Fire Code, however, this allegation was withdrawn on April 20, 2006 at which time Justice O'Connor reserved the matter of the costs relating to those allegations to the judge hearing the application.

[4] In total Ms. MacLean docketed approximately 210 hours and she estimates 37 hours related to the Fire Code issues. Mr. Schmuck docketed 95 hours and estimates that 33-50% of the total time related to the Fire Code. (One would expect Ms. MacLean to docket significantly more hours than Mr. Schmuck as Caledon initiated the materials and prepared extensive affidavit material.)

[5] The dockets were prepared at a time when it was not material to isolate the time devoted to the Fire Code issues so the parties cannot estimate with precision. I think it fair to proceed on the basis that the Fire Code occupied 25% of the time of both counsel. Having made the Fire Code allegations, and

abandoned them, the Town should be liable to Wood Waste for its costs thrown away in dealing with the matters.

[6] I would, therefore, notionally reduce the claim by the Town as follows:

- | | | |
|----|---|----------|
| a) | 25% x 300 hours (post June 1, 2005
at \$210 per hour). | \$10,500 |
| b) | 25% of 95 hours spent by Mr. Schmuck
at \$210 per hour | \$ 4,987 |

[7] I also take into account the fact that this was a case of some significance to the Town and of moderate complexity legally and factually. In all the circumstances, I accept that the time Ms. MacLean devoted to the file was reasonable.

[8] Wood Waste also submits that it should not be ordered to pay any costs on the following grounds:

- a) If no costs are awarded the costs will be borne by all ratepayers including Wood Waste.
- b) It was reasonable for Wood Waste to seek an interpretation of the bylaw and it was arguable that *Sansone* was distinguishable.

[9] These are weak arguments. Given that costs are awarded on a partial indemnity basis ratepayers are already bearing approximately 1/3 of the Town's costs. To my mind the fact that ratepayers would be further burdened weighs in favour of awarding costs. Wood Waste is a substantial corporation which acquired the property without reviewing the applicable bylaws and speaking to the Town. Wood Waste took a calculated risk in locating where it did. *Sansone*, decided in 2002, gave a strong indication that Wood Waste was on shaky ground, however, Wood Waste exercised its right to contest the litigation and attempt to distinguish *Sansone*. That right to litigate, however, carries with it an exposure to costs.

[10] The position of the landowner 541904 Ontario Limited ("541904") was that no costs should be awarded against it and I agree. 541904's participation was helpful and I agreed with its point that the 1991 Official Plan was irrelevant to the interpretation of the 1988 bylaw. Further, the real contest was between the Town and Wood Waste.

[11] I have also turned my mind to the overall reasonableness of the costs award from the perspective of Wood Waste. As I said, Wood Waste is a substantial corporation that decided to take a calculated risk in establishing at the site and in contesting the litigation. As such, I believe the costs I award were, or

should reasonably have been, well within the reasonable expectations of Wood Waste.

[12] I, therefore, order that Wood Waste pay the Town, within 30 days, costs as follows:

Fees: \$29,500.
Disbursements: \$ 5,906.18
Plus applicable G.S.T.

Sproat J.

DATE: February 20, 2007

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51904 ONTARIO LIMITED
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Limited

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