

FILE NO.: 236/08
DATE: 20081010

**SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)**

RE: CITY OF TORONTO v. ROMLEK ENTERPRISES, THREE R AUTO BODY,
HIGHLAND CREEK COMMUNITY ASSOCIATION AND GREGORY
MCCONNELL

BEFORE: Justice Janet Wilson

COUNSEL: Robert A. Robinson / Kirsten Franz, for the Appellant (Moving Party)

Alan B. Dryer / Adam J. Brown, for the Respondents, Romlek Enterprises and
Three R Auto Body

Edward R. Fleury, Q.C., for the Respondents, Highland Creek Community
Association and Greg McConnell

HEARD AT TORONTO: September 25, 2008

ENDORSEMENT

Janet Wilson, J.

[1] It appears that this is one of the first cases to come before the Divisional Court interpreting the new Official Plan that was amended and passed by the Ontario Municipal Board in Decision/Order No. 1928 dated July 6, 2006, following the fusion of the former municipalities to create the City of Toronto.

[2] The City of Toronto (the City) seeks leave to appeal the decision of the Ontario Municipal Board (the Board) dated April 28, 2008 (the Decision). Board member R. Rossi allowed the developers' application for four minor variances with respect to a proposed retirement residence with accompanying retail and parking located in Highland Creek Village, Scarborough, in the City of Toronto (the Property).

[3] The City asserts that the application should have proceeded by way of a rezoning application and a request for an amendment to the Official Plan, not by way of minor variance.

[4] The Board Decision changes the use permitted in the zoning by-law of the Property from commercial to mixed use, and permits lot coverage five times that contemplated by the zoning

by-law. As well, the Board decision is in conflict with the Official Plan, as the unit density limits stipulated in the applicable Secondary Plan are significantly exceeded.

[5] The Board allowed the appeal from the decision of the Committee of Adjustment. The Committee of Adjustment rejected the developers' request for the minor variances. The Committee accepted the position of the City that the appropriate application should have been a request for rezoning, and an amendment to the Official Plan, not an application for a minor variance.

Test for Leave to Appeal

[6] An appeal lies from a Board decision on a question of law to the Divisional Court with leave in accordance with section 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c.O.28.

[7] Caselaw confirms that for leave to be granted there must be some reason to doubt the correctness of the Board's decision on a point of law, and the point of law must be of significant importance to warrant the attention of the Divisional Court (see: *Juno Developments (Parry Sound) v. Parry Sound (Town)* [1997] O.J. No. 976 (Div. Ct.) at para. 7 and *Toronto Transit Commission v. Toronto (City)* (1990), 2 M.P.L.R. (2d) 42 (Div. Ct.).

Background Facts

[8] The Property is a .38 hectare parcel located at the intersection of Old Kingston Road and Moorish Road in Highland Creek. It is presently used as a parking lot and auto body repair shop. It is zoned commercial.

[9] The developers' proposal is for a three story mixed residential and commercial building with a 90-unit retirement residence, 65 parking spaces and associated commercial (the Proposal).

[10] The Proposal is a change of use from that permitted in the by-law. The zoning by-law does not permit residential use, such as a retirement residence. The commercial zoning by-law does permit a motel or a hotel.

[11] The Proposal requires 205% lot coverage, which is five times the 40% lot coverage contemplated in the zoning by-law.

[12] The Official Plan applicable to the entire City does permit city-wide residential use, and does not stipulate density requirements. There are however, specific areas in the City that may be targeted for future development that are subject to a Secondary Plan. The Property is located in Highland Creek, Scarborough, and is subject to the Highland Creek Community Secondary Plan.

[13] The policies for interpretation of the Official Plan are clear. Policy 5.6.6 of the Official Plan states that in the case of conflict, a Secondary Plan policy prevails over a policy of the

Official Plan. Therefore, a specific density requirement stipulated in the Secondary Plan prevails where there is a conflict between the Official Plan and the Secondary Plan.

[14] The Highland Creek Secondary Plan contains a density limit of 37 resident units per hectare. The Proposal is the equivalent of 268 units per hectare.

Position of the City

[15] The City argues that the Board Decision contains several significant errors in law.

[16] First, the Board failed to consider the interrelationship between the applicable zoning and Official Plan restrictions. The Property is zoned commercial and has stipulated limits to lot coverage. The Property is also subject to the density limits stipulated in the Highland Creek Secondary Plan.

[17] The Board misapplied section 45(1) of the *Planning Act*, R.S.O. 1990, c. P. 13 by allowing the application to proceed as a minor variance. On its face under any flexible definition of a minor variance the Proposal is clearly and manifestly not minor. The Proposal changes the intended use stipulated in the by-law and allows five times the lot coverage contained in the zoning by-law.

[18] As well, the Proposal fails to respect the density limit stipulated in the Highland Creek Secondary Plan. The Board further erred in law in interpreting “unit” to mean a townhouse unit, or a residential unit, and not a unit in a multi-unit building.

[19] The City argues that the Proposal should have proceeded as a rezoning application pursuant to section 34 of the *Planning Act*.

[20] The City requests clarification from the Divisional Court with respect to when it is appropriate to proceed by way of minor variance or a rezoning application. Those engaged in the planning process need to know the appropriate weight and consideration to be given to zoning by-laws as well as Official Plan and Secondary Plan policies.

[21] The proper interpretation of the new Official Plan for the City of Toronto, and the interrelationship between the Official Plan and the density limits in the applicable Secondary Plan have potential city-wide implications with respect to limiting density in areas subject to a Secondary Plan.

Position of the Respondents

[22] The respondents argue that the Decision involves mixed questions of fact and law engaging the expertise of the Board, and is therefore not appropriately the subject matter for a motion for leave to appeal. The Board decision is a reasonable, and is supported by the evidence.

[23] The respondents also argue that the City has not presented any evidence as to the adverse impact of the Proposal and the City is advancing “empty technical objections”. The respondents assert that this is an isolated minor variance application with no precedent value.

Analysis

[24] Counsel at my request provided me with contextual background with respect to the procedures used and requirements of a minor variance application compared with a rezoning application.

[25] The applicable test is different. A minor variance application must conform to the three-pronged requirements of section 45(1) of the *Planning Act*. The test is subject to additional requirements developed in the caselaw.

[26] Section 45(1) provides:

The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is in effect under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

[27] What is minor is factually dependent. Minor cannot be specifically, mathematically calculated and the test defining what is minor must be flexible (see *Fred Doucette Holdings Ltd. v. Waterloo (City)*, [1997] O.J. No. 6292 (Div. Ct.)). Sharpe J. confirmed in *Doucette* at para. 21 that there must be a flexible assessment of the significance of the variance to the surrounding circumstances and to the terms of the existing by-law. He adopts the reasoning in *Perry v. Taggart*, [1971] 3 O.R. 666 at page 668 (H.C.J.) where a minor variation is “a relative expression and must be interpreted with regard to the particular circumstance involved”.

[28] The Divisional Court has recently discussed the meaning of “minor” in *Vincent v. Degasperis*, [2005] O.J. No. 2890 (Div. Ct.) at paras. 9-12. Matlow J. defines “minor” in accordance with the Concise Oxford Dictionary as being “lesser or comparatively small in size or importance”. He concludes that a variance may be patently too large to be considered a minor variation, or too important. He confirms that the Committee of Adjustment or the Board must consider whether the criteria section 45 of the *Planning Act* have been met, and whether the proposed variation is minor.

[29] By contrast, the test on a rezoning application made pursuant to section 34 is much broader, assessing a proposal in accordance with generally good planning principles. A rezoning involves more stringent notice requirements to neighbours, more mandatory public involvement and more mandatory requirements for reports as to future impact of the proposed rezoning. Various reports must be filed including traffic studies, and impact on schools and community services. Height, shadow and overlook issues must also be addressed.

[30] In this case it appears that the developers provided the broader notice to neighbours contemplated in a rezoning and filed the required reports mandatory for a rezoning.

[31] The City Planner filed a report used both at the Committee of Adjustment and before the Board stating that the Proposal was such a significant departure from the permitted uses in the by-law that a rezoning application was more appropriate. The evidence before the Board confirmed that the City does not subject a proposal to the same level of detail and revision on a minor variance application as it does on a rezoning application.

[32] The City's evidence is that it did not express concerns with the design of the Proposal as the City's staff comments on design are part of a rezoning, not part of a minor variance application. It appears that the City did not do all of the usual due diligence involved in a rezoning application with respect to the Proposal, as it was handled by the staff as a minor variance.

[33] In spite of being aware of the limitations to the scope of the City review, the Board reached the conclusion at p. 9 of its Decision that "with no evidence to the contrary, the Board accepts that the Highland Creek Village Design Guidelines are supported and reflected in the proposed development."

[34] The Board concluded at p. 6 that the interpretation of the City's expert was "rigid and inflexible". He preferred the evidence of the expert called on behalf of the developer concluding that the Board, in interpreting planning instruments, takes the approach that

...one should consider these policies as guidance for development but not so strictly as to impeded new and innovative forms of mixed-use development. A degree of flexibility must be maintained in order to reflect the changing face of the City – a fact reflected in the Official Plan.

[35] I conclude that there is a good reasons to doubt the correctness of the legal interpretation of the Board with respect to the test outlined in section 45 of the *Planning Act* and the caselaw that:

1. the variance must be minor
2. the Proposal must maintain the general intent and purpose of the zoning by-law; and
3. the Proposal must maintain the general intent and purpose of the official plan.

[36] It appears that the Board may have run roughshod with respect to specific mandatory requirements of a minor variance. It appears that in essence the broad contextual approach used by the Board was closer to the test for a rezoning – that is whether the Proposal is consistent with good planning principles. The Board did not adequately focus on the specifics of the mandatory four-pronged test of a minor variance.

[37] The problem in this case is the City did not have its usual comprehensive input to what appears to have been a rezoning application done under the guise of a minor variance.

[38] I conclude that the City has clearly raised several important questions of law, not merely project specific questions of mixed fact and law. I rely on the recent decision of Lax J. in *Toronto (City) v. 2059946 Ontario Ltd.*, [2007] O.J. No. 3021 (Div. Ct.) at para. 4. She confirms that:

The proper interpretation of the Planning Act and the proper consideration of matters of provincial interest are questions of law: *Concerned Citizens of King (Township)* at paras. 15-24; *Juno Developments (Parry Sound) v. Parry Sound (Town)*, [1997] O.J. No. 976 at paras. 28-31. The proper interpretation and application of an Official Plan and the conformity of a proposed development with an Official Plan is a question of law: *Juno Developments* at paras. 16-18. This satisfies the first prong of the three-part test for granting leave.

[39] I conclude that the test for leave to appeal the decision is met. There is good reason to doubt the correctness of several aspects of the Decision in law. This case raises issues with respect to the proper interpretation of the new Official Plan, as well as the relationship between local zoning and the Official Plan. It raises significant issues of city-wide public importance warranting the attention of the Divisional Court.

Questions of Law

[40] As noted above, the broad question at issue is the relationship between the Official Plan, any Secondary Plan, and the zoning by-laws in place. Leave to appeal is granted upon the following questions of law:

1. Should the developers' application have proceeded by way of an application for rezoning and Official Plan amendment pursuant to sections 22 and 34 of the *Planning Act*, rather than a request for a minor variance in accordance with section 45(1) of the *Planning Act*?
2. Did the Board err in failing to apply the appropriate test for a minor variance, and specifically:
 - i. Did the Board err in failing to consider whether the variations cumulatively were minor?

- ii. Did the Board err in finding that the variation maintained the general intent and purpose of the Official Plan?
- iii. Did the Board err in concluding that the variance maintained the general intent and purpose of the zoning by-law?
3. Did the Board err in law in its interpretation of the by-law equating permitted hotel/motel commercial use with residential use as a retirement residence?
4. Did the Board err in its interpretation of the relationship between the Official Plan and the Highland Creek Community Secondary Plan with respect to density?
5. Did the Board err in interpreting a “unit” referred to in the Secondary Plan as constituting a townhouse, not a unit in a multiple unit dwelling?

Costs

[41] The parties agreed in submissions that if the motion for leave to appeal was dismissed, that it would be appropriate to fix costs in this motion in the amount of \$7,500.00 in favour of Romlek. As I have granted leave, I fix costs in favour of the City in the amount of \$7,500.00 in the cause, dependent upon the outcome of the appeal before a full panel of the Divisional Court.

[42] I thank counsel for their comprehensive submissions.

Janet Wilson J.

DATED: October 10, 2008