CITATION: 2072231 Ontario Limited v. The Corporation of the City of London 2020 ONSC 4032

DIVISIONAL COURT FILE NO.: 64/19
DATE: 20200703

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
2072231 ONTARIO LIMITED, BURWELL AUTO BODY LTD., DREWLO HOLDINGS INC. and NORTHVIEW APARTMENT REIT Applicants	Annalee J.M. Baroudi, for the Applicants
– and –	Aynsley Anderson, for the City of London Kim Mullin, for the Middlesex-London Health Unit and Regional HIV/AIDS Connection
THE CORPORATION OF THE CITY OF LONDON, MIDDLESEX-LONDON HEALTH UNIT and REGIONAL HIV/AIDS CONNECTION Respondents	**HEARD:** June 11, 2020

[1] A Supervised Consumption Facility provides a safe location for clients to consume street drugs in the presence of a nurse or other health care professional. The clients obtain the street drugs elsewhere. The clients can access other health care services at the Facility, including addiction counseling, housing support and mental health treatment. This wrap-around service is part of a coordinated harm reduction strategy among federal, provincial and municipal governments to combat a public health emergency regarding opioid-related deaths.

[2] The respondents Middlesex-London Health Unit and Regional HIV AIDS Connection reviewed several potential locations in London for a Supervised Consumption Facility.

They identified 446 York Street as the preferred location. Among other factors, 446 York Street is located between two "hot spots" that contain high concentrations of improperly discarded used needles. The respondents applied to the respondent City for a zoning by-law amendment to permit a Safe Consumption Facility at 446 York Street.

[3] London city council passed By-law No. Z-1-192722. The amendment allows the operation of a Supervised Consumption Facility at 446 York Street.

[4] The applicants each own property within 400 metres of the intended site for the Facility. The applicants appealed the zoning by-law amendment to the Local Planning Appeal Tribunal.

[5] The applicants argued the amendment did not comply with the 1989 Official Plan. The Official Plan designates 446 York Street as "Office/Residential". The Official Plan permits clinics as a secondary "accessory" use to the main office and residential use. The applicants argued the Supervised Consumption Facility reversed the permitted main and secondary uses in the Official Plan; illicit drug consumption is the main use, whereas the wrap-around support services are the secondary use.

[6] The Tribunal rejected the applicants' characterization of the Facility. The Tribunal concluded that drug consumption is not the main use; it is one part of a health facility that offers a number of integrated services. The Tribunal found the zoning by-law amendment complied with the 1989 Official Plan and dismissed the applicants' appeal.

[7] The applicants seek leave from this court to appeal the Tribunal decision to the Divisional Court pursuant to s. 37(1) of the *Local Planning Appeal Tribunal Act, 2017*, SO 2017, c 23, Sch 1.

[8] The applicants contend the Tribunal erred in law in finding the zoning by-law amendment conformed to the Official Plan. They submit that the proposed appeal is not about the existence of the opioid crisis or the concept of the Supervised Consumption Facility but whether the Tribunal correctly interpreted the Official Plan.

[9] The parties agree that to obtain leave, the applicants must establish that: (a) the proposed appeal raises a question of law; (b) there is reason to doubt the correctness of the Tribunal decision on the question of law raised; and (c) the question is of sufficient importance to merit the attention of the Divisional Court: *Snowden v. The Corporation of the Township of Ashfield-Colborne-Wawanosh*, 2017 ONSC 6777 (CanLII) at para. 11.

1. Does the Proposed Appeal Raise a Question of Law?

[10] The applicants frame the proposed question for appeal as: Did the Tribunal err in holding the by-law amendment conforms to the 1989 Official Plan in light of its finding the proposed SCF would be a "health facility"?

[11] The nature of the question is crucial, as leave to appeal is only permitted on a question of law. This means the Tribunal alone has the task of balancing the factual and policy

considerations underlying planning decisions. This court's task is limited to ensuring the Tribunal applies the proper legal principles in the exercise of its exclusive decision-making authority: *My Rosedale Neighbourhood v. Dale Inc*., 2019 ONSC 6631 at para. 3.

[12] I conclude the applicants' proposed issue for appeal is a question of mixed fact and law on its face. The alleged error of law is embedded in the Tribunal's factual determinations about the nature of the Supervised Consumption Facility. The Tribunal then applied the Official Plan policies to those findings to reach a determination on the Facility's conformity with the Official Plan: *SOS-Save Our St. Clair Inc. v. Toronto*, 2006 CanLII 4945 (ON SCDC) at para. 33; *Rosedale, supra*, at para. 11. A question of mixed fact and law is where the legal principle is not readily extricable from the factual determinations: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36. That is the situation in this application, where the alleged error of law is embedded in the Tribunal's factual determinations about the nature of the Supervised Consumption Facility.

[13] I dismiss the application for leave on this ground.

[14] I acknowledge the line of decisions which hold that the proper interpretation and application of an official plan and the conformity of a proposed use with an official plan is a question of law: *The Legislative Assembly of Ontario v. Avenue-Yorkville Developments Inc.*, 2011 ONSC 258 (CanLII) at para. 6; *Snowden v. The Corporation of the Township of Ashfield-Colborne-Wawanosh*, 2017 ONSC 6777 (CanLII). Those decisions are not determinative of the analysis and can be understood as situations where the question of law as it related to the interpretation of the official plan or by-law arose in a different context where the legal principle was readily extricable from the factual determinations. That is not the case in this application.

[15] I alternatively considered the application as though it did raise a question of law and considered whether the application satisfied the other parts of the test for leave to appeal.

2. Is there Reason to Doubt the Correctness of the Tribunal decision on the question of law raised?

[16] If the issue as framed by the applicants raises an error of law, I nevertheless find no reason to doubt the correctness of the decision.

[17] As s. 37 of the *Local Planning Appeal Tribunal Act, 2017* provides that an appeal only lies to the Divisional Court on a question of law, this raises an appellate standard of review; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) at para. 37. The appellate standard of review on an error of law is correctness: *Housen, supra*, para. 8.

[18] The applicants submit the Tribunal's error arose from its finding that supervised consumption at Facility would not be an "accessory use" but would be one part of a "strictly regulated health facility." The finding that drug consumption was not an "accessory use" conflicts with the Office/Residential designation. Furthermore, "health facilities" are not

a permitted use in the Office/Residential designation for this site. It was therefore an error of law to conclude the zoning by-law amendment conformed to the Official Plan.

[19] I find that neither of these positions establish the Tribunal made an error of law in its interpretation of the Official Plan. In any event, the Tribunal was entitled to give the Official Plan a broad and liberal interpretation to conclude the by-law amendment conformed to the plan.

a. The Tribunal did not decide the Supervised Consumption was not an "Accessory Use":

[20] At one point in its reasons the Tribunal stated the clinic was not an "accessory use". Read in isolation, this comment may raise a question as to the correctness of the Tribunal's interpretation of by-law conformity with the Official Plan. However, on reading the Tribunal's reasons as a whole, I am satisfied the Tribunal found the drug consumption at the Facility was an "accessory use" for the following reasons.

[21] First, the by-law amendment expressly intended the drug consumption aspect of the Facility to be accessory to the main function of an office, which would provide support services. The Tribunal's reasons show it understood the amendment would add medical/dental offices and accessory clinics to the existing zone on this basis.

[22] Second, I find the Tribunal made an inadvertent misstatement when it stated at one point in its analysis that the supervised consumption was not an "accessory use". The Tribunal's impugned comments arose in the course of its rejection of the applicant's argument that illicit drug consumption was the primary or main use at the Facility. The court must read the totality of a decision and weigh it according to the appropriate tests: *Supportive Housing Coalition of Metropolitan Toronto, Re*, [1993] O.J. No. 2289 (Div. Ct.). The one statement seized upon by the applicants did not lead to an error of law when one reads the decision in its entirety. The Tribunal's analysis emphasized the reasons why drug consumption is not a primary use at the Facility; it is one component of an integrated service. The Tribunal found that the fact that the wrap-around services will comprise about two-thirds of the gross floor area corroborated the fact that support services are the primary function, not drug use. It is evident the Tribunal concluded that illicit drug consumption is not the primary purpose of the site, but rather that it attracts users to a safe environment where further treatment and counselling can be offered. In other words, as found by the Tribunal, the supervised consumption activity is "one aspect of a whole use".

b. The Tribunal did not designate the Supervised Consumption Site as "Health Facility":

[23] The applicants contend the Tribunal's use of the term "health facility" signalled a designation not permitted by the Official Plan for that area. I dismiss this argument for two reasons.

[24] First, it is evident the Tribunal used the term "health facility" to distinguish the Facility use from being only an illicit drug consumption site, which was the characterization urged by the applicants. The Tribunal used the term "highly regulated health facility" or "regulated

health facility" to describe the nature of the Supervised Consumption Facility as including both supervised drug consumption and support services.

[25] Second, the Official Plan expressly contemplates that not all uses can be identified at the time of the writing of the Plan. Where lists or examples of permitted uses are provided in the policies related to specific land use designations, they are intended to indicate the possible ranges and types of uses to be considered. Municipal council may approve a use that is not listed if council considers them to be similar in nature to the listed uses and to conform to the general intent and objectives of the land use designation: 1989 Official Plan, s. 19.1.1 (iv). The policy pertaining to Office/Residential land use designations also shows that the list of secondary permitted uses is not exhaustive, as evidenced by the term "includes": 1989 Official Plan, Policy 5.3.1. Therefore, if the description of the Supervised Consumption Facility as a "health facility" signified a land use designation, this was not precluded by the Official Plan.

c. <u>The Tribunal was entitled to give the Official Plan a broad and liberal interpretation:</u>

[26] Official plans are not statutes. When considering whether a zoning by-law conforms with an official plan, the Tribunal should give the official plan a broad liberal interpretation with a view to furthering its policy objectives; *Bele Himmell Investments Ltd. v. Mississauga (City)*, 1982 CarswellOnt 1946 (ON DC). The Tribunal cited this decision in its analysis of conformity of the by-law amendment with the Official Plan. The Tribunal considered the applicable policy objectives, including s. 2 of the *Planning Act* and the Provincial Policy Statement. This is the recognized approach at law, and I can find no reason to doubt the correctness of its finding that the amendment conforms with the Official Plan.

[27] The court has consistently endorsed this approach and supports the distinction to be made between official plans and zoning by-laws. An official plan rises above the level of detailed regulation and establishes the broad principles that are to govern the municipality's land use planning generally: *Goldlist Properties Inc. v. Toronto (City)*, [2003] O.J. No. 3931 (CA) at para. 49. Official plans should be flexible documents setting out general policy and are not intended to be prescriptive in their application: *Ottawa (City) v. 267 O'Connor Ltd*., 2016 ONSC 565 (Div. Ct.) at paras. 20 & 24.

[28] I conclude there is no reason to doubt the correctness of the Tribunal's decision on a question of law.

3. Is the question of law of sufficient importance to merit the attention of the Divisional Court?

[29] The applicants submitted the question of law is of sufficient general or public importance due to the new nature of the Supervised Consumption Facility and that the issue involves the correct interpretation of the Office/Residential designation in the Official Plan.

[30] I appreciate the importance of this matter to the applicants; however, I am not satisfied that the question is one of sufficient general or public importance to merit the attention of the Divisional Court.

[31] The applicants placed significant weight on the Tribunal's comment that this was likely the first time this type of land use had been considered by the Tribunal. While a Supervised Consumption Facility may be a new land use, the issue nevertheless remains as a private dispute. Indeed, the applicants emphasized at the hearing that the proposed appeal was not about the opioid epidemic or Supervised Consumption Facilities in general, but whether 446 York Street was the appropriate site. The Tribunal did no more than interpret and apply the existing policies to the by-law amendment in issue: *Simon v. Bowie*, 2010 ONSC 5989 (CanLII) at paras. 27-28. The Tribunal did not engage in the interpretation of a *Planning Act* provision or a policy of general application. Although the Tribunal strives for consistency, it is not bound by the principle of stare decisis: *Re 250 St. Helen's Avenue*, 1992 CarswellOnt 4394 (OMB) at paras. 56-58.

[32] A Supervised Consumption Facility may be a new land use and this may be the first time the Tribunal considered such a use. However, appellate review of the issue in these circumstances is unlikely to inform future matters of general and public importance. This by-law amendment concerns the 1989 Official Plan. London city council passed a new Official Plan ("London Plan"). The London Plan is largely under appeal and so is not currently in effect. The London Plan will allow for Supervised Consumption Facilities in all place types, with locational criteria. The London Plan also eliminates the "Office/Residential" designation. The significance of this zoning by-law amendment is confined to the 1989 Official Plan. The proposed issue of law will have limited importance in any future consideration on the issue.

Disposition

[33] The application for leave to appeal is therefore dismissed.

[34] The parties agreed on the appropriate quantum of costs, subject to submissions on entitlement. The respondents were wholly successful in opposing this application and are presumptively entitled to their costs.

[35] The applicants shall pay costs of $5,000 inclusive of HST to each of the respondents.

Justice K. Tranquilli

Released: July, 2020

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2072231 ONTARIO LIMITED, BURWELL AUTO BODY LTD., DREWLO HOLDINGS INC. and NORTHVIEW APARTMENT REIT

Applicants

– and –

THE CORPORATION OF THE CITY OF LONDON, MIDDLESEX-LONDON HEALTH UNIT and REGIONAL HIV/AIDS CONNECTION

Respondents

REASONS FOR JUDGMENT

Tranquilli J.

Released: July 3, 2020