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Between Citizens for Riverdale Hospital, Moving Party, and Bridgepoint Health Services
and City of Toronto, Responding Parties

INDEXED AS: Citizens for Riverdale Hospital v. Bridgepoint Health Services

Court File No. 85/07

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

JUDGES: S.E. Greer J.

[2007] O.J. No. 2527; 2007 ON.C. LEXIS 2620

DATE INFORMATION: May 28, 2007 Judgment: June 26, 2007.

JUDGMENT DATE: June 26, 2007

COUNSEL:

[*1]

Eric K. Gillespie, Counsel for the Moving Party.

Jonathan C. Lisus and *Cynthia MacDougall*, Counsel for Bridgepoint.

Kirsten Franz and *Leslie F. Forder*, Counsel for the City.

JUDGMENT:

REASONS

[1] S.E. GREER J.:-- The City of Toronto has developed a plan for the redevelopment of the lands on which the former Riverdale Hospital (now the Bridgepoint Health Services), the Don Jail and certain other heritage buildings, are situate. The site in question is on the north side of Gerrard Street East and Broadview Avenue and the Don Valley Parkway, in the City (the "Site").

[2] On September 9, 2006, a group of individuals incorporated an entity known as the Citizens for Riverdale Hospital ("CRH") for the sole purpose of appealing to the Ontario Municipal Board (the "Board"), certain decisions made by the City regarding the Site. The incorporation arose out of the disagreement by some residents of the area with the City's "... assessment of the heritage value of the old hospital building." These residents participated fully in the consultation process, which took place between the City and other interested persons or entities, with respect to the Plan for the redevelopment of [*2] the Site.

[3] Both the Don Jail (the old historic building and not the new addition) and St. Matthew's Lawn Bowling Club located on the Site, were found by the *Heritage Preservation Services* and the *Toronto Preservation Board* to be worthy of preservation. The former Riverdale Hospital is scheduled to be demolished by the City, once a new hospital is built on the Site. Bridgepoint Health Services ("Bridgepoint") supports the City's position in this regard and is in favour of the City's plans for the redevelopment of the Site.

[4] Bridgepoint, in conjunction with the City and with the support of the Province of Ontario, has developed a "Comprehensive Community Master Plan" for the redevelopment of the Site. The consultation process took place over a two-year period. This Plan is part of the Ontario government's \$ 30 billion five-year infrastructure investment plan en-

titled "*Renew Ontario*." Certain aspects of that Plan are opposed by the CRH. While CRH does not oppose the building of the new hospital, it opposes the demolition of the old hospital, which is scheduled to take place after all patients of Bridgepoint are transferred to the new hospital. CRH refers to the old [*3] hospital as the "Half Round", given its architectural structure.

[5] The City approved Proposed Amendment No. 358 to the Official Plan for the City and CRH appealed from that decision, to the Ontario Municipal Board under subsection 17(24) of the *Planning Act*, R.S.O. 1990, c. P-13, as amended. It also appealed to the Board under subsection 34(19) of that Act, against Zoning By-law 157-2006 of the City.

The Decision of the Board

[6] On January 27, 2007, the Board dismissed the two appeals made by CHR after an 11-day hearing of evidence from 11 witnesses. It held that the Board had no power under any of the provisions of its Act to designate the Half-Round as a heritage property with cultural value or interest, nor it said, could it compel the municipality to do so even if it were of the opinion that it was a good thing to do so. The *Heritage Act* does not provide any right of review or appeal from a decision not to designate a building as a heritage site.

[7] The Board found that the evidence was plain that CRH's proposition that the Half-Round not be demolished was an "untenable and somewhat disingenuous" proposition. The environmental concerns, which CRH had regarding [*4] any demolition of the building, were found by the Board to all have been refuted by the City's experts. Further, the Board said that the scheme before the Board for the redevelopment of the Site met all the criteria in both the letter and spirit of the legislative framework it was founded in. It found that an "extensive and thorough" consultation process had been followed in addressing "... an urgent and dire need to replace a hospital that is dysfunctional and obsolete."

[8] Under s. 96 of the *Ontario Municipal Board Act*, an appeal of that decision lies to the Divisional Court, with Leave of the Court, on a question of law. CRH moves before me for Leave to Appeal that Decision. In its Motion for Leave, CRH sets out a number of grounds for granting such Leave. By the time the Motion for Leave came on before me, CRH had narrowed the grounds to three issues for which leave is sought, namely:

1. Did the Board err in law by approving the proposed official plan and zoning by-law amendments as being in conformity with the applicable Official Plans' objectives and policies regarding the environment and CO₂ emissions?
2. Did the Board err in law by approving the proposed [*5] official plan and zoning by-law amendments as being in conformity with the applicable Official Plans' objective and policies regarding residential intensification, affordable and special need housing?
3. Did the Board err in law by misinterpreting the powers and authority under the *Planning Act* and the PPS regarding built heritage resources and cultural heritage landscapes, thereby fettering its discretion?

The Test for Leave to Appeal

[9] An appeal to the Divisional Court under s. 96 of the *Planning Act* may only be made on a question of law and with leave of the Court.

[10] Leave to Appeal, in the circumstances of the case before me, is governed by subrule 62.02(4)(a) of the *Rules of Civil Procedure*. It states that leave to appeal shall not be granted unless:

- (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

The test is conjunctive and both parts must be met before Leave is granted.

[11] The use of the words, "... shall not be granted unless:", in my view, emphasize [*6] the fact that leave is not granted lightly. This is especially true, given that the Board is a tribunal with special expertise, which is owed a significant degree of deference. The Court should therefore not interfere with the Board's decisions save in the clearest of cases. See: *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 400 Court File No. 1198 (Div. Ct.).

[12] The Board, in reaching the decision it did, had to review an amendment to the Official Plan and the Zoning by-

law in question, both matters squarely within its expertise. There had been considerable consultation, meetings, mediation and attempts to resolve the many issues arising out of the Comprehensive Plan, before the City passed the amendment to its Official Plan and passed the by-law in question. The Board heard evidence from the City's own planners, from other experts in specialized areas affecting what was to take place. It took into account the Provincial Policy Statements, the various applicable statutes and the lengthy submissions, which were before it.

[13] In addition, the decision as a whole must be reviewed in considering whether leave to appeal should be granted. [*7] Pieces should not be taken out of context or held up to a "magnifying glass", except, in my view, if there is reason to doubt the correctness of the decision/order and if that piece is of such importance in the overall scheme, that leave should be granted. See: *Toronto (City) v. Social Housing Coalition of Metropolitan Toronto*, [1993] O.J. No. 2289 (Div. Ct.) and see: *Neebing (Municipality) v. Dale*, [2003] O.J. No. 3973 Court File No. D02-0021.

The issues in question

1. The Environment and CO[subscript 2]

[14] The two Official Plans, which are applicable to the Comprehensive Plan and govern what goes on the Site, are the Metroplan and the Toronto Plan. CRH says each provides policy objectives and targets regarding environmental protection and in particular, CO[subscript 2] emissions. It is CRH's position that the Board did not have enough evidence before it on this issue and did not analyze the provisions of the *Planning Act* in this regard and did not come up with any planning conclusions regarding the goals and objectives associated with these emissions. It says that Bridgepoint's experts only dealt with emissions [*8] from vehicles and ignored the broader picture.

[15] It also says that the Board failed to find conformity with the two Plans on this issue, and says the onus was on Bridgepoint and other proponents to satisfy the Board that the proposal was in conformity with all the official plans' objectives and policies. CRH points to the fact that the causes and impacts of climate change must be carefully looked at, given the public's great concern about greenhouse gas emissions. It says that Bridgepoint's experts only dealt with emissions from vehicles and ignored the broader picture.

[16] Bridgepoint says that there is no requirement in law for the Board to make any "findings" or reach any "conclusions" about such policies and objectives in the Official Plans regarding CO[subscript 2]. Bridgepoint sees the issue as one of demolition, which can cause CO[subscript 2] emissions through the breaking down of concrete but also through the use of concrete when the new building is being erected. CRH, however, supports the construction of the new hospital. It seems odd, to me, for the CRH on the one hand to oppose the demolition because of the emission of gases, which will inevitably go into the atmosphere, [*9] when, on the other hand, it supports the use of masses of new concrete (which also emits gases) to build the new hospital.

[17] Bridgepoint says that the architect presented by CRH, Mr. Liefhebber, is not an independent expert and is one of the unhappy residents of the area, and who also is one of the incorporators of CRH. Further, Bridgepoint says that CRH led no expert evidence on the air emission issue and no expert evidence that the proposal did not meet the requirements of section 24(1) of the *Planning Act*.

[18] Bridgepoint, on the other hand, did lead evidence from Mr. Reusing, a professional engineer with expertise in air quality impact assessment and monitoring as a result of demolition and constructing as well as the monitoring of cement plants. It also led evidence of Dr. Brecher, an expert in risk assessment and human health. All of this evidence was before the Board.

[19] The City fully supports the position of Bridgepoint on all three issues. While the City filed a detailed factum, it saw no need to give separate oral submissions.

[20] The Board spent 2 1/2 pages of its Decision on these very issues and appears to have accepted the evidence of these two Bridgepoint [*10] experts, noting that this evidence was not contradicted by any evidence presented by the "citizens' group". The Board expressed concern about how these issues were raised by CRH and what approach it seemed to be taking, since it submitted no previous precedent to show that this is what the Board should do in these instances. Finally, it concluded that, "In short, all the environmental concerns have been refuted.

[21] In my view, there is no good reason to doubt the correctness of the Board's decision in this regard given the above analysis. I do, however, agree that the issue of CO[subscript 2] emissions is an important environmental concern to all members of the public, and in particular, those persons who live in the nearby vicinity where the construction and demolition will take place. It is up to the City to ensure that contractors involved take the appropriate precautions when

demolition occurs in every site in the City, including the demolition of the old hospital. Leave to appeal this issue is therefore dismissed.

2. Affordable and Special Needs Housing

[22] It is the position of CRH that the Half Round could be reused for residential purposes, subject to certain conditions. [*11] In its view, the decision made in the Plan to not preserve the Half-Round, after the new hospital has been built, means that the stated goals and policies regarding residential intensification, affordable and special needs housing found in the two relevant Official Plans, were not considered in relation to this aspect of the redevelopment of the Site.

[23] While affordable and special needs housing is of significance to all Toronto residents, and while the building may be part of the "public infrastructure", it is the position of Bridgepoint that the assertions now made by CRH were not advanced before the Board and that this issue was not an issue identified by CRH during the process of consultation and mediation. Further, Bridgepoint says that CRH adduced no evidence that the hospital was suitable for affordable housing nor any evidence that the building could be adapted as such. CRH agrees it was not an original issue on the parties' list of issues. It says, however, the Board heard some evidence on this.

[24] In my reading of the Board's Decision, I note that it speaks of the "demarcation of sites for which new buildings are to be constructed", but makes no mention of changing [*12] the old hospital into either affordable or special needs housing. On p.3 of the Decision, it mentions that some residents voiced their caution against attaching too "nostalgic or iconic value" to the Half-Round. These persons, therefore, did not oppose the building's proposed demolition. On p. 5 thereof, it finds that, "No amount of tinkering or refinement of the site-planning can enable the co-existence of a proposed new hospital and the retention of an old hospital building." Bridgepoint says that there is evidence that even if the old hospital was kept and renovated, the extent of such renovations would leave little of the building intact.

[25] I cannot see anywhere in the Decision that there is evidence of this issue of affordable and special needs housing being raised. It was therefore not dealt with by the Board. I therefore cannot say that there is good reason to doubt the correctness of the Decision in these circumstances. Since the first part of the test has not been met, it matters not if the general issue of affordable or special needs housing is important to the community as a whole or is part of the two Official Plans in question, since it was not part of the agenda [*13] before the Board. Leave to appeal this issue is therefore dismissed.

3. Heritage Planning

[26] CRH says the Board fettered its own discretion in dealing with the heritage issue. It says there are implications for heritage preservation, in general, to the Board acting this way. CRH relies on statements made by another Board member in *Tucker v. Chatham-Kent (Municipality) Committee of Adjustment*, [2000] O.M.B.D. No. 723, Files PL000430; V000179, a Decision by Member Yao. (See: paragraphs 13 and 14.) In addition, CRH says the Board applied the wrong planning test in this regard.

[27] The Board did a thorough analysis of the heritage issues respecting the Half-Round, and agreed with CRH that a "municipality may designate a property with cultural value or interest." What it did decide, however, was that it would not "second-guess" what a municipality should choose when it comes to "heritage designation." It also notes that the Board has no power under any of its provisions to designate the Half-Round, as a heritage building, and found on p.5 of its Decision that the Board should not do something indirectly, which it cannot do directly. It carefully analyzed the extensive evidence, [*14] which was before it, on these issues, including the fact that the building, itself, was only three decades old, in comparison to the very historic Don Jail, which will be preserved.

[28] Again, I cannot say there is good reason to doubt the correctness of the Board's decision in this regard, nor can it be said that it did not take into account the planning issues surrounding the heritage question. The Board is knowledgeable about the *Planning Act* and the PPS regarding heritage resources, since this is part of the Board's area of expertise. Leave to appeal this issue is therefore dismissed.

[29] Leave to appeal the Decision of the Board on the issues as noted is therefore dismissed. There is no good reason to doubt the correctness of the decision as a whole. If the parties cannot otherwise agree on Costs, I will receive brief written submissions by the parties within 30 days of the date of release of these Reasons.

S.E. GREER J.

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