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Customer Relations
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THE EVOLUTION OF LEGAL NON-CONFORMING RIGHTS

by Michael Polowin and Elad Gafni

Introduction

Many, if not most, municipalities across Ontario have provisions in their zoning by-laws that purport to limit repair, renovation or use of buildings that are non-conforming as to use or non-complying as to performance standards. The intent and effect of these by-laws are to "encourage" property owners to bring non-conformity or non-compliance to an end. Two recent decisions, *TDL Group Corp. v. Ottawa (City)*, 2009 CarswellOnt 7336 (O.M.B.), striking out a portion of the City of Ottawa's zoning by-law regarding non-conforming rights, and *Ottawa (City) v. TDL Group Corp.*, 2009 CarswellOnt 7168 (Ont. Div. Ct.), which denied the City of Ottawa's leave to appeal of an order of the Ontario Municipal Board (OMB or Board), signifies a clear and unambiguous ruling that municipalities may not limit or coercively bring to an end non-conforming or non-complying rights beyond the narrow constraints permitted by the *Planning Act*, R.S.O. 1990, c. P.13 and at common law.

Background

In 2001, the new City of Ottawa (the City) was created by the amalgamation of the Region of Ottawa-Carleton and 11 local municipalities. On June 25, 2008, following approximately five years of public consultation, the City enacted Comprehensive Zoning By-Law 2008-250 ("CZBL"). The CZBL harmonized the existing 36 zoning by-laws from the former municipalities comprising the new City, into a single zoning by-law, and was designed to implement the new Official Plan of the City, which was adopted on May 14, 2003 and amended in July 2005.

Over seventy appeals regarding the enactment of the CZBL were received by the Ontario Municipal Board. One of these appeals was brought by The TDL Group Corp. ("TDL") to challenge the validity of section 3 of the CZBL which concerned non-conformity and non-compliance. TDL alleged that section 3 of the CZBL was contrary to section 34(9)(a) of the *Planning Act* and was outside the City's authority.

Legislation

Section 34(9)(a) of the *Planning Act* creates an exemption to the scope of zoning by-laws that municipalities may enact. The effect of section 34(9)(a) is to establish legal non-conforming uses which are lawful violations of current zoning by virtue of the fact that the use of the land or structure existed in compliance with applicable by-laws before the by-laws with which there is non-compliance was passed. Section 34(9)(a) provides:

> 34. (9) No by-law passed under this section applies,
>
> (a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose;

The impugned section 3 of the CZBL reads, in part, as follows:

> 3. (1) Nothing in this section affects subsection 34(9) of the *Planning Act, R.S.O. 1990*, Excepted Lands and Buildings, which addresses non-conforming uses.

(2) *No person will repair or rebuild any part of any building housing or otherwise used in connection with a non-conforming use, except as set out in subsection (3).*

(3) *When a building, structure, facility or otherwise, including septic and other servicing systems, used in connection with a non-conforming use is damaged or demolished, the non-conforming right is not extinguished if:* (By-law 2008-462)

(a) *the damage or demolition was involuntary;*

(b) *the building is repaired or re-occupied before the expiry of two years*; and

(c) the building continues to be used for the same purpose after it is repaired as it was used before it was damaged or demolished.

(4) *Non-conforming rights are extinguished*:

(a) *where the damage, demolition or removal of a building is not involuntary*;

(b) *where a damaged building is not repaired or re-occupied before the expiry of two years*; or

(c) where the non-conforming use,

(i) is abandoned, or

(ii) is changed without permission from the Committee of Adjustment.

(5) This section applies, with all necessary modification, to a non-complying building.

. . . [Emphasis added]

Ontario Municipal Board Decision

The position of TDL before the Board was that section 3 of the CZBL unlawfully attempted to narrow, amend and restrict the non-conforming rights of property owners beyond the jurisdiction of the City pursuant to the *Planning Act*. Specifically, TDL took issue with the fact that subsections 3(3) and (4) of the CZBL purported to extinguish property owners' legal non-conforming rights where "damage, demolition or removal of a building is not involuntary", as contrasted to circumstances where repair or rebuilding is done as a result of "involuntary" damage, demolition or removal (i.e. causes beyond the control of the owner).

TDL referred the Board to numerous cases standing for the proposition that as long as the intention of an owner is to continue a long-established pattern of usage, then there can be no loss of a non-conforming use as a result of damage or demolition, whether it was voluntary or non-voluntary.

Moreover, TDL took the position that the decision of the Supreme Court of Canada in *Saint-Romuald (Ville) c. Olivier* (2001), [2001] 2 S.C.R. 898, 22 M.P.L.R. (3d) 1, 2001 CarswellQue 2013, 2001 CarswellQue 2014, [2001] S.C.J. No. 54, REJB 2001-25834, 2001 SCC 57, 204 D.L.R. (4th) 284, 275 N.R. 1 (S.C.C.) stood for the proposition that non-conforming and non-complying uses are not fixed, but can evolve over time, provided that the impact on the surrounding neighbourhood was minimal. As Binnie J. held, "[u]nder the doctrine of "acquired rights", the respondents were not only entitled to continue to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use", including the right to "normal evolution" and to "adapt to the demands of the market or the technology that are relevant to it" (para. 19). Section 3 of the CZBL unlawfully frustrated this right to the "normal evolution" of non-conforming uses by prohibiting activities such as the installation of energy-saving windows or the repair of a decrepit roof because such renovations would run afoul of the prohibition on voluntary damage, demolition or removal contained in subsections 3(3) and (4).

In contrast, the City argued that section 3 was an appropriate vehicle to encourage or "cause" the "evolution" of land use over time from "a legal non-conforming use to one in conformity with the zoning by-law" (pages 8-9). In oral evidence before the Board, the City's land use planner confirmed that the effect of section 3 of the CZBL was that "if a property owner repairs or rebuilds voluntarily, to maintain, upgrade or modernize the building, the non-conforming or non-complying right is lost" (page 3). In fact, according to the City's planner, the City's intent [of section 3 was] to gradually phase out existing legal non-conforming uses (page 3).

The OMB rejected the City's argument in this regard and determined as follows at page 10:

> [O]n a clear reading of section 34(9)(a) of the *Act* . . . such a municipal intent and effect of a zoning by-law is *not* permitted by the *Act*. [. . .]
>
> The cases cited by the Appellant, especially the decisions of the Supreme Court of Canada, *Central Jewish Institute v. City of Toronto and Saint-Romuald (City) v. Olivier* affirm the right of a landowner to continue with a legal non-conforming use. In fact, the Supreme Court of Canada decisions stand for the proposition that such a use may be expanded within the confines of the building, may be intensified as part of the pre-existing activity, and finally, of particular relevance to the case at hand, may see "renewal and change" (*Saint-Romuald (City) v. Olivier*).
>
> The Board finds that section 3 of the CZBL specifically operates to prohibit such "renewal and change". [Emphasis in original]

The City also argued that voluntary cessation of use, including for voluntary repair or replacement of elements of the building, brings legal non-conforming and non-complying uses to an end, and that such will not be the case only if such cessation is beyond the control of the property owner. However, once again, the Board disagreed, holding that the intention of the property owner was paramount. The Board stated at pages 10-11:

> The appellant would not lose its rights to its legal non-conforming use during a closure for a voluntary repair or even replacement of the building. The Board notes the words of the court in *Rotstein v. Oro-Medonte (Township of)*: ". . . intention is a relevant factor to be considered in the case of a long-established pattern of use."

Finally, the Board rejected the two-year limitation period for repairing and reoccupying specified in sections 3(3)(b) and 3(4)(b) of the CZBL. The Board wrote at page 11:

> Again, there is nothing in section 34(9)(a) which allows for the extinguishment of a landowner's right to a legal non-conforming use if repairs or renovations are not completed before the expiry of two years. As noted above, "intention" is determinative. If a landowner demonstrates a continuous intention to continue a long-established pattern of usage, there is no loss of its right, regardless of the time it takes to complete repairs.

The Board then ultimately concluded that "section 3 of the CZBL, in its entirety, improperly narrows, amends and restricts the right of a property owner to a legal non-con-

forming use, contrary to section 34(9)(a) of the *Planning Act*. Section 3 is beyond the jurisdiction of the City" (page 11).

Divisional Court Decision

The City sought leave to appeal the decision of the Board repealing section 3 of the CZBL to the Divisional Court. As a preliminary matter, the City sought that subsections 3(6) to (8) of the CZBL be restored. There was no evidence before the Board that these three subsections were unlawful pursuant to the *Planning Act*. In fact, both the planners for the City and TDL supported these provisions. Justice Toscano Roccamo ordered, on consent of both parties, that subsections 3(6) to (8) be remitted to a rehearing of the matter before the OMB pursuant to section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28.

After reviewing the parties' submissions with respect to the standard of review, the court held the appropriate standard of a review of a decision of the Board to be reasonableness, given that "the Board has specialized expertise in interpreting the provisions of the *Planning Act*, including Section 34, and in applying its underlying policies" (para. 19).

While admitting that "the interpretation of Section 3 of the CZBL is open to considerable debate, such as to arguably run afoul of Section 34(9) of the *Planning Act*" (para. 28) and that its position with respect to the definition of "damage" in the CZBL was "evolving" (para. 29), the City nevertheless asserted that:

> [V]oluntary "demolition" of a structure as under Section 3(4) of the CZBL justifies termination of legal non-conforming rights in the absence of any intention to continue the non-conforming use at the time the by-law was passed, coupled with an interruption in continuity or physical existence of the structure. (para. 29)

TDL argued that the Board's reasoning was an appropriate application of the Ontario Court of Appeal decision in *Ottawa (City) v. Capital Parking Inc.* (2002), 28 M.P.L.R. (3d) 223, 212 D.L.R. (4th) 342, 2002 CarswellOnt 1197, 158 O.A.C. 174, 59 O.R. (3d) 327, [2002] O.J. No. 1511 (Ont. C.A.), which concerned whether the defendant, which enjoyed a legal non-conforming use as a public garage, could be subject to performance standards in the City of Ottawa's zoning by-laws.

All zoning by-laws fall under one of either of two categories: (1) land use provisions; or (2) performance standards provisions. In *Capital Parking*, Doherty J.A. applied the reasoning of the Supreme Court in *Saint-Romuald* and held that performance standards will fail where they are found to interfere with acquired rights, in that they alter the nature of a legal non-conforming use or interfere with the real and reasonable expectations flowing from a legal non-conforming use (para. 35). TDL took the position, supported by the Court, that section 3 of the CZBL, which was a performance standard because it did not purport to regulate the types of uses of land, ran afoul of the holding in *Capital Parking* because the prohibition on voluntary repair or renovation unlawfully interfered with the real and reasonable expectation for the right to "renewal and change" of non-conforming uses as articulated in *Saint-Romuald*.

After reviewing the submissions of both parties, Toscano Roccamo J. found that "the Board's decision in this matter was well reasoned and correct" (para. 39), and stated at paragraphs 36-37 that:

> In specific reference to *Capital Parking*, *supra*, where it engaged the reasoning applied in *Saint-Romuald*, the Board concluded that acquired rights entitled property owners to some flexibility in the operation of the use, including normal evolution of some uses. The Board concluded that normal evolution of use could encompass demolition and rebuilding of a property within its footprint with the intention to continue the use of the building or structure as it existed prior to the enactment of a by-law. I find no error in the Board's reasoning in this respect.
>
> In concluding that Section 3 of the CZBL operated to frustrate the normal evolution of a legal non-conforming use through renewal and change, the board accepted the reasoning in *Rotstein v. Oro-Medonte (Township of)* (2002), 34 M.P.L.R. (3d) 266 (Ont. Sup. Ct.) and *Mohammed v. Dysart (Municipality) Building Official* (2003), 45 M.P.L.R. (3d) 282 (Ont. Sup. Ct.) in support of the proposition that where a landowner demonstrates a long established pattern of use, there is no loss of rights that flows from interruption in use for renovations or repairs, whether or not within the control of the property owner, and regardless of the time needed to effect repairs. Again, I find no cause to doubt the Board's reasoning in this regard.

Accordingly, the City's motion for leave to appeal to the Division Court was dismissed.

Discussion

As noted above, municipalities across Ontario purport to restrict property owners' rights to repair, renovate or use buildings that are non-conforming as to use, in apparent (and now confirmed) contravention of section 34(9)(a) of the *Planning Act*. This is not surprising given that acquired rights are a thorn in the side of municipal planners since they interfere with the achievement of the City's vision articulated in municipal official plans.

The decision of the Board and the Divisional Court in the matter of the *Ottawa (City) v. TDL Group Corp.* represents a warning to cities across the province that the courts will not tolerate attempts by municipalities to overreach their powers under the *Planning Act* and the law to contravene legal non-conforming rights. As noted by Killeen J. in *382671 Ontario Ltd. v. London (City) Chief Building Official* (1996), 32 M.P.L.R. (2d) 1, 1996 CarswellOnt 1388, [1996] O.J. No. 1352, 28 O.R. (3d) 718 (Ont. Gen. Div.) by-laws that seek to restrict non-conforming rights are "nothing more nor less than a clever attempt by the municipality to trench upon and even disembowel section 34(9) of the *[Planning] Act*" (para. 25).

Indeed, many municipalities across the province of Ontario are arguably running afoul of the law with respect to non-conforming rights. At the time of writing, zoning by-laws in the City of Orillia, the Town of Haldimand, the City of Sudbury, and the Town of Dunnville all essentially permit, with minor variances in wording, the strengthening or restoration to a safe condition of any non-conforming building or structure, while restricting the right to rebuild or repair only

for situations where the non-conforming building or structure is damaged or destroyed by causes beyond the control of the owner. See City of Orillia's By-laws No. 2005-72, ss. 3.4.3 and 3.4.5; the Town of Haldimand's By-laws 1-H 86, ss. 6.3.1 and 6.3.2; the City of Sudbury's By-laws No. 95-500Z, s. 4(4)(a); and the Town of Dunnville's By-laws 1-DU 80, ss. 6.3.1 and 6.3.2. The effect of these by-laws is to prohibit voluntary repair or renovation other than for the purpose of improving the safety condition of a non-conforming building or structure. Consequently, renovation for upgrading or modernizing a building, such as the installation of energy-saving windows, would arguably not be permitted. However, as the Board noted in the TDL decision, such restrictions on voluntary repair and renovation are in direct conflict with Binnie J.'s ruling in *Saint-Romuald* that municipalities cannot frustrate the normal evolution of non-conforming uses through "renewal and change".

Even more egregious violations of non-conforming rights can be found in zoning by-laws that prohibit the restoration of non-conforming buildings or structures when they are damaged or destroyed even in cases where the destruction is due to causes beyond the control of the owner. For example, the City of Guelph prohibits "the rebuilding of a non-conforming use if it should be destroyed" (Zoning By-law (1995) — 14864, s. 2.5.3.4). No definition is provided for the term "destroyed". The City of Barrie prohibits the restoration of any non-conforming building or structure "other than a single detached dwelling, converted dwelling or a multiple family dwelling which has been destroyed to the extent of more than fifty percent of the structure (exclusive of walls below grade)" (Zoning By-law 85-95, s. 4.2.6). While residents of the City of Thunder Bay who own legal non-conforming "occupied dwellings" that are "damaged or destroyed by accidental fire or a natural disaster" are permitted to reconstruct their buildings, owners of legal non-conforming buildings or structures "other than a dwelling . . . which has been damaged by accidental fire or natural disaster to the extent of more than sixty percent (60%) of its value are precluded from restoring their buildings or structures" (Zoning By-law 177-1983, s. 5.11.1(a) and (b)).

Such attempts are contrary to Toscano Roccamo J.'s holding in the TDL Group Corp. case that "where a landowner demonstrates a long established pattern of use, there is no loss of rights that flows from interruption in use for renovations or repairs, whether or not within the control of the property owner" (para. 37). It should be noted that nowhere in the *Planning Act* are distinctions made with respect to repair and renovation rights between different types of non-conforming uses, and therefore such attempts in the above noted by-laws are unjustified and unlawful.

Finally, there are also examples of zoning by-laws from across the province that place time limits on the repair or reconstruction of a non-conforming building or structure similar to the two-year limitation period in subsections 3(3)(b) and 3(4)(b) of the City of Ottawa's CZBL that were repealed by the Board and the Court. The City of Kingston permits the replacement of a non-conforming building destroyed by any means beyond the control of the owner "provided that construction is commenced within one year from the date of destruction and provided that the building is completed within a reasonable time thereafter" (Zoning By-law No. 8499, s. 5.24(a)). Similarly, the City of Orillia allows the rebuilding or repair of any building or structure that is damaged or destroyed by causes beyond the control of the owner "provided such rebuilding or repair is conducted within two years" (Zoning By-law 2005-72, s. 3.4.5). However, as the Board held in its decision at page 11, and which was affirmed by the Divisional Court, "[i]f a landowner demonstrates a continuous intention to continue a long-established pattern of usage, there is no loss of its right, regardless of the time it takes to complete repairs."

The above examples of zoning by-laws from across Ontario demonstrate the extent to which municipalities attempt to "encourage" or cause the "evolution" over time from legal non-conforming uses to ones in conformity with current zoning by-laws. The judgment in *Ottawa (City) v. TDL Group Corp.* represents for the first time a clear and unambiguous ruling that such efforts by municipalities are contrary to section 34(9)(a) of the *Planning Act* and are, therefore, beyond their jurisdiction. Municipalities must ensure that their zoning by-laws conform to the law with respect to legal non-conforming rights.

Michael Polowin is a partner with Gowling Lafleur Henderson LLP in Ottawa, practicing in Development and Planning Law. Mr. Polowin advises and represents clients through the full spectrum of the development process. He has acted for some of the largest developers in Canada, and has been involved in developments throughout the Ottawa area and Eastern and Southern Ontario. Mr. Polowin also acts on behalf of municipalities in Eastern Ontario on planning and development and public-private partnership matters.

Elad Gafni is an Articling Student with Gowling Lafleur Henderson LLP in Ottawa, where he also worked as a Summer Student. He graduated in 2009 with an LL.B. (Cum Laude) from the English Common Law Program at the University of Ottawa. Prior to law school Elad attended Queen's University on a Chancellor's Scholarship where he received a B.A. (Hons.) in Economics, as well as the University of Toronto on an Ontario Graduate Scholarship where he received an M.A. in Economics.