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Local Planning Appeal Tribunal

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VIA EMAIL

December 23, 2019

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Dear Counsel:

RE: Section 35 Request for Review
Decision of Member Marcia Valiante, Issued August 9, 2019
LPAT Case No. PL170714

The Local Planning Appeal Tribunal ("Tribunal") acknowledges receipt of a Request for Review ("Request") of the Decision and Order issued by Member Marcia Valiante on August 9, 2019 ("Decision") in the above captioned case. The Request was submitted by Homestead Land Holdings Limited, the Applicant and Appellant ("Appellant") in this proceeding. The Tribunal invited and received a responding submission from the Frontenac Heritage Foundation ("Foundation"). A reply submission to the Foundation's response was invited and received by the Tribunal. The City of Kingston ("City") chose not to respond to the Request.

The Tribunal Rules to Dispose of a Request

Pursuant to subsection 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, I have been delegated authority by the Executive Chair of Tribunals Ontario to dispose of all aspects of your Request.

Rule 25 of the Tribunal's Rules of Practice and Procedure ("Rules") sets out the process to review a decision or order, under s 35 of the *Local Planning Appeal Tribunal Act*. Rule 25.7 provides that a request may only be granted if it raises a "convincing and compelling case" that one of the grounds in this Rule is applicable. Rule 25 reflects the high threshold which has been established by the Tribunal to review a decision. I am only authorized to exercise this review power when this threshold has been met.

Background to the Request

The Decision considered two appeals filed by the Appellant, arising from the non-decision of the City, of their applications for an Official Plan amendment ("OPA") and Zoning By-law amendment ("ZBA") to permit the redevelopment of two properties: 51-57 Queen Street ("Block 3") and 18 Queen Street ("Block 5") with two mixed use rental apartment buildings, collectively referred to as the Subject Properties. The Subject Properties are currently vacant and consist of surface parking lots.

The Decision dismissed both appeals, following a ten-day hearing. A summary of the Tribunal's findings are set out in paragraph 108 and 109 of the Decision. The Tribunal found the proposed amendments:

1. Are consistent with the Provincial Policy Statement ("PPS");
2. Fail to conform with section 10A.4.7 of the City Official Plan ("OP") because the proposal would create undue adverse effects, that have not been sufficiently mitigated, "specifically visual intrusion and architectural incompatibility";
3. Conform with other OP policies; and
4. The agreement between the City and the Appellant under the authority of section 37 of the *Planning Act* ("section 37 agreement") is appropriate and conforms with the OP.

The Request asserts that the Tribunal erred in its interpretation of the OP, and in particular, the application of s 10A.4.7 and the land use compatibility principles in s 2.7. The Request maintains that these errors are significant, and it is likely that the Tribunal would have reached a different decision had they not been made. Accordingly, I am asked to exercise my discretion pursuant to Rule 25.07(c) to rescind the decision and direct a rehearing.

The Foundation disputes the grounds raised in the Request and counters that the Tribunal has not erred in its interpretation of the OP, and in particular, the application of s 10A.4.7 and the land use compatibility principles. The Foundation's response maintains that the Tribunal undertook a comprehensive evaluation of the OP when it found that the development would create undue adverse effects - specifically visual

intrusion and architectural incompatibility – that have not been sufficiently mitigated. The response also points out that a rehearing is a "rare and extraordinary" remedy and the previous jurisprudence of the Ontario Municipal Board, now continued as the Tribunal, has consistently acknowledged that it is important that our decisions have a measure of finality.

I agree with the summary of the case law regarding the review powers of the Tribunal which is set out by the Foundation in paragraphs 70 to 74 (inclusive) of its response. Our decisions have repeatedly affirmed that a Tribunal decision ought to bring finality to a matter, and that a rehearing is a remedy that is both "rare and extraordinary". I have been mindful of this jurisprudence in my review of the Decision, the Request, the response, the reply, and in my consideration of whether the Request meets the threshold set out in Rule 25.7.

Disposition of the Request

I have concluded that this is a rare instance in which the exercise of my review power is warranted. The Request has established a convincing and compelling case that there are significant errors of law in the Tribunal's interpretation of the OP, and if these errors had not been made, it is likely that the Tribunal would have reached a different decision. These errors, if considered on an individual basis, may not be sufficient to warrant a review. However, the cumulative effect amounts to a manifest error that exceeds the high threshold set out in Rule 25.7 to authorize the exercise of my discretion to rescind the Decision and order a rehearing. My reasons are as follows.

Inadequate Regard to the Minutes of Settlement in the Reasons for the Decision

First, the Tribunal had inadequate regard in its reasons for the resolution of the City to enter into minutes of settlement ("MOS") with the Appellant prior to the hearing. Only a few brief sentences in the Decision refer to the MOS. Paragraph 28 is both apposite and striking in showing the absence of the Tribunal's consideration of the MOS. In this paragraph the Tribunal concludes that "it has had regard for the decision of Council". Presumably, this statement refers to the decision or resolution of City Council to approve the MOS and to support the development proposal, given that the appeals arose from a "non-decision". No further discussion immediately follows this paragraph, to explain either the content of the MOS, the public benefits to the City, or how the Tribunal "had regard for" this settlement in arriving at its Decision.

One of the purposes of the *Planning Act*, as set out in section 1.1 is "to recognize the decision-making authority and accountability of municipal councils in planning". This purpose is carried forward throughout the Act, such as section 2.1, which requires the Tribunal to have regard to decisions of municipal council that relate to a planning matter. Many other provisions reflect this key purpose, such as the precondition for persons to make written or oral submissions before municipal council, in order to have a right to appeal a decision to the Tribunal.

It is readily apparent that the MOS should have been a highly relevant factor for the Tribunal to weigh in its reasons. The City entered the MOS with the benefit of qualified expert advice from internal staff and outside advisors, in the disciplines of heritage conservation, urban design and land use planning. The Decision found the City's consultant team invested significant time and effort into the refinement of the development application and influenced the final design of the proposed buildings. In paragraph 22 the Decision states that the City supports the proposals "in the full conviction that the unique cultural heritage resources of the Central Business District will not be diminished as a result". Further, at the end of paragraph 47, the Decision refers to the City's submissions "that the final designs for the proposed development were presented to the public and were supported by an urban design study, and that Council was satisfied that its policies had been met." The City also entered into an increase in height and density agreement with the Appellant (section 37 agreement) as part of the MOS. In the final paragraphs of the Decision the Tribunal found that the section 37 agreement "is appropriate and conforms with the OP".

Despite these factors, the Tribunal fails to meaningfully assess the City's perspective on the underlying merits of the settlement, its public benefits, and the reasons why the City decided to support the approval of the OPA and ZBA. As I read the Decision as a whole, I make the observation that the focus of the debate or contest appears to be between the Foundation and the Appellant, and there is comparatively less analysis of the evidence presented by the City in support of the proposed development – despite the fact that the democratically elected City council represents the public interest at first instance.

This is not to suggest that the Tribunal should relinquish its responsibility to assess the merits of a development proposal where the municipality and proponent have agreed to terms. It is well accepted that the Tribunal has a public interest mandate to make an independent judgment on the merits of an appeal, in an instance when there is agreement amongst the municipality and the appellant. Caselaw from the Divisional Court supports this proposition. However, the Tribunal is expected to carefully scrutinize the MOS endorsed by a municipality, in determining whether a development proposal is in the public interest, accords with good planning principles and satisfies the applicable statutory tests. The Decision should have approached its analysis as a triangular contest of ideas, in recognition of the "accountability" of the decision-making authority of municipal council.

In the circumstances of this proceeding, the reasons of the Tribunal overlook a highly relevant factor. Only a few brief factual references are made to the resolution of City council to enter the MOS with the Appellant in support of the OPA and ZBA. The statement in paragraph 28 above, that the Tribunal had regard to the decision of Council, is what I would characterize as mere "tokenism". There is insufficient scrutiny of the City's perspective on the merits of the OPA and ZBA. It was an error for the Tribunal to have inadequate regard for the MOS given the extent to which the City and its consultant team were actively engaged in this development proposal and participated in its refinement through a public process, endorsed by Council.

The Decision fails to adhere to one of the aforementioned key purposes in section 1.1 of the *Planning Act*, and thus commits an error of law.

Error in the Interpretation of the City Official Plan

It is well understood that an official plan is to be read as a whole as it is often necessary to balance competing policy objectives to determine whether a specific development proposal satisfies its overall intent and purpose. Official plans are not statutes. The Court of Appeal, in City of Toronto v Goldlist Properties Inc. (2003) 67 (3d) 441, paragraph 49, reminds us that the purpose of an official plan is to set out a framework of "goals, objectives and policies… and that an official plan rises above the level of detailed regulation and establishes the broad principles that are to govern".

In my view, the Tribunal failed to undertake a proper assessment of the entirety of the OP, in the evaluation of the appeals. Such a failure amounts to an error of law. This error is exemplified in the summary of the findings (paragraph 108) where the Decision states that the proposed amendments "fail to conform with s 10A.4.7 of the OP". Conformity with the OP is not the test for the evaluation and disposition of an OPA. The OPA is to be tested against the overall framework, visions, goals or objectives of the OP. The Decision does not explain how other important policy considerations in the OP are to be weighed or balanced against s 10A.4.7.

The Tribunal quotes section 9.3.2 of the OP which identifies the considerations to evaluate applications for an OPA, on the basis of criteria that include "the degree of conformity of the proposed amendment to the general intent and philosophy of this Plan, particularly the vision and planning principles, including sustainability, stability and compatibility outlined in section 2, and consistency with provincial policy…." (paragraph 37).

Despite setting out the proper test, the analysis in the Decision is primarily focused on the conformity of the OPA and ZBA to s 10A.4.7 – even though this policy considers circumstances where height may be increased (beyond 25.5 metres) without the need for an amendment to the OP. The Tribunal concludes that the proposal fails to conform with s 10A.4.7 because the proposal would create undue adverse effects that have not been sufficiently mitigated, "specifically visual intrusion and architectural incompatibility." The reasons in the Decision do not balance these specific considerations with other policy objectives in the OP, to determine "the degree of conformity of the proposed amendment to the general intent and philosophy of the Plan, particularly the vision and planning principles." The Decision cites evidence that was presented of many other policy considerations applicable to the Subject Properties. It was necessary for the Tribunal to weigh these considerations against the overall goals and objectives of the OP to properly test and dispose of the merits of the proposed amendments.

For instance, the Decision acknowledges that the policies applicable to the Subject Properties are "complex, detailed and overlapping." Considerable background work was undertaken by the City prior to the adoption of these policies, as summarized in paragraphs 41 to 44 of the Decision. In paragraph 42, the Decision recognizes the

special status of the Subject Properties. These lands are identified in a 4.5 area block known as the North Block that are subject to specific urban design guidelines. The Decision notes "that there is no doubt that the City's intention for the North Block is to support and encourage redevelopment and intensification." The City owns one of the blocks in this area – Block 4 – and according to its witness (paragraph 82), the City adopted a policy framework to attract private investment to these lands, but as of the date of the hearing "nothing was happening" (paragraph 82).

In addition, other policy considerations are briefly mentioned in the Decision that could have relevance to the planning goals and objectives applicable to the Subject Properties. Again, these policies considerations were not adequately weighed or balanced in the evaluation of the OPA and ZBA. Examples include:

- the revitalization of underutilized brownfield sites – paragraph 7 points out the City has spent $2.2 million to clean up the contamination on the Subject Properties;
- the availability of infrastructure and public services in the North Block– the Subject Properties are vacant and are currently used as parking lots;
- the promotion of housing supply – 400 rental housing units are proposed in a City with a low vacancy rate;
- the City's overall support for redevelopment and intensification within the downtown and North Block, that respects cultural heritage resources; or
- the locational attributes of the Subject Properties as distinguished from lands within a Heritage Conservation District or Heritage Character Area.

For the reasons above, I conclude the Tribunal erred by failing to undertake a proper assessment of the entirety to the OP in the evaluation of the appeals of the OPA and ZBA. It was an error for the Tribunal to dismiss the OPA and ZBA by a finding of non-conformity with one OP policy, without providing reasons to explain how the OPA and ZBA failed to conform with the intent and philosophy of the OP and its framework, vision and planning principles. The Decision elevates the importance of s 10A.4.7 when it applied the incorrect test to evaluate an OPA.

This is not to suggest that an OP policy cannot be prioritized in the assessment of a development proposal. A Decision must set out reasons for preferring one policy objective over another in the consideration of the OP as a whole, and its "intent and philosophy". That careful balancing exercise was not undertaken in this Decision.

Inconsistent Findings in the Decision

In paragraphs 1, 21 and 23 the Tribunal characterized the central issue, or "the heart of this appeal", as a dispute over whether the proposed heights of the two buildings would be "appropriate within" or would "diminish" the low-rise heritage context of downtown Kingston. The Subject Properties are not located within a Heritage District, or a Heritage Character Area and do not contain designated heritage buildings. However, they are in close proximity, or in the case of Block 3, adjacent to the Lower Princess Street Heritage Character Area (paragraph 71).

The PPS contains a number of policies relating to the protection of cultural heritage resources and landscapes. These are discussed in paragraph 34. These are relevant because section 3(5) of the *Planning Act* requires that a decision of the Tribunal is to be consistent with the PPS. The Decision found that the proposed development satisfied this statutory requirement as the heights of the two buildings conserved the heritage resources both adjacent to and in the vicinity of the Subject Properties. This finding of consistency with the PPS is included in the summary of findings at paragraph 108.

In addition, the summary in paragraph 108 also sets out the Tribunal's finding that the development proposal conforms to the OP with the exception of s 10A.4.7. The balance of the OP contains policies aimed to protect and preserve cultural heritage, the historic low-rise character of Downtown Kingston, and other considerations related to the broader heritage landscape. The proposal therefore conformed to these other policies, with the noted exception.

It is unclear how these findings – that the development proposal would conserve heritage resources and low-scale heritage character of the area within the vicinity of the Subject Property - can be reconciled with the Tribunal's ultimate determination that the proposal would create undue adverse effects, "specifically visual intrusion and architectural incompatibility". The disposition of the central issue based on the applicable policy framework should override policy considerations of lesser import. That would be the logical outcome of the findings made on what the Tribunal described as the "heart of the appeal".

I conclude that either the Tribunal framed the central issue erroneously or it arrived at critical findings that are irreconcilable. Either scenario is an error of law.

Section 10A.4.7 of the OP

In addition, I also find an inconsistency in the Tribunal's interpretation of s 10A.4.7 in the evaluation of the OPA and the ZBA. At paragraph 53 the Tribunal acknowledges that there is a degree of subjectivity in the meaning of the terms visual intrusion and compatibility. That subjectively is imported into s 10A.4.7, as that policy allows for the approval of greater heights within the North Block, without an amendment, if a supporting site specific urban design study "clearly indicates to the satisfaction of the City" that a taller building is compatible with the massing of surrounding buildings and satisfies land use compatibility principles. The Decision acknowledges that the City was clearly satisfied with the supporting urban design study when it determined it would support the approval of the OPA and the ZBA.

However, in my view, the Tribunal failed to accord adequate weight of this subjectivity, which is built in to this policy, to the City. This error is magnified because the Tribunal found the proposal conformed to the OP, with the exception of s 10A.4.7, the very policy which incorporates this subjectively for the City to resolve.

The Tribunal failed to apply its finding of subjectivity consistently, to the matters identified in s 10A.4.7 given the City was clearly satisfied with the supporting urban design study. My concerns with respect to this interpretation are amplified when I consider the perfunctory reference to the City's support for the proposal as reflected in the MOS, which I discussed above.

Concluding Comments

The exercise of the Tribunal's review power is a rare and extraordinary remedy. The cumulative errors described in this disposition authorize the exercise of my discretion under Rule 25, and section 35 of the *Local Planning Appeal Tribunal Act,* to rescind the Decision and order a new hearing of the appeals before a different panel of the Tribunal. I recognize that there is a need for finality of Tribunal decisions. However, the errors in the Decision are fundamental. I am satisfied that they warrant the exercise of my review powers. The Tribunal would have likely reached a different decision had these errors not been made. It would have read the OP as a whole, weighed and balanced competing policy objectives and most of all, it would have carefully considered the MOS, for the reasons I have set out above.

The parties are directed to contact the Case Coordinator, Jason Kwan, upon receipt of this letter with dates when they are available to attend a one-day case management conference to organize the hearing of the appeals of the OPA and ZBA. A panel assigned to the case management conference will schedule a hearing date after dealing with any preliminary matters such as notice, or the refinement of the issues list, or related matters that may be necessary for the Tribunal to dispose of the appeals in an efficient and effective manner.

My Order will follow to implement this disposition to rescind the Decision.

Yours truly,

Marie Hubbard
Associate Chair
Local Planning Appeal Tribunal