COURT OF APPEAL FOR ONTARIO

CITATION: Hummel Properties Inc. v. Niagara-on-the-Lake (Town), 2022 ONCA 737
DATE: 20221028
DOCKET: C69502

Lauwers, Nordheimer and Zarnett JJ.A.

BETWEEN

Hummel Properties Inc.

Applicant (Appellant)

and

The Corporation of the Town of Niagara-on-the-Lake

Respondent (Respondent)

Brian Gover and Justin Safayeni, for the appellant

Terrence H. Hill, for the respondent

Amy Sherrard and Andrew Parley, for the interveners Niagara Home Builders' Association and Ontario Home Builders' Association

Heard: April 27, 2022

On appeal from the judgment of Justice James A. Ramsay of the Superior Court of Justice, dated April 15, 2021, with reasons reported at 2021 ONSC 2793.

Lauwers J.A.:

A. OVERVIEW

[1] A major debate in the 2018 municipal election campaign in the Town of Niagara-on-the Lake was about "uncontrolled development of the old town", in the

application judge's words, that might adversely affect the Town's historical character and properties essential to its status as a "hub of history, culture and tourism."

[2] A municipal council committed to controlling development was elected on October 22, 2018. On or about November 22, 2018, Betty Disero, then Lord Mayor-Elect, directed Town staff to draft an interim control by-law under s. 38 of the *Planning Act*, R.S.O. 1990 c. P.13, to take effect December 5, 2018. The by-law was enacted by council at a special meeting on December 5, 2018, two days after council's inaugural meeting.

[3] The appellant had submitted a development application for six townhouse condominium dwelling units at 2203 Niagara Stone Road, a vacant site outside of the built-up areas of the Old Town but within the area to which the by-law applied.

[4] After informal efforts to get the by-law repealed or at least not extended, the appellant brought this application "under s. 273 of the *Municipal Act, 2001*, S.O. 2001 c. 25, to quash a municipal by-law for illegality and bad faith", as the application judge noted. He added that the application also "claims damages for misfeasance in public office and fraudulent and negligent misrepresentation and asks me to order a trial to determine the quantum." The application judge dismissed the application.

[5] For the reasons that follow, I would allow the appeal and order consequential relief in the appellant's favour.

B. THE ISSUES

[6] The legal context is framed against s. 273 of the *Municipal Act*, which provides: "Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality."

[7] There are six issues in this appeal:

1) Was the legality of the interim control by-laws a moot issue because the challenged by-laws had been repealed?
2) Were the by-laws illegal because they did not relate to "land use" as required by s. 38 of the *Planning Act*?
3) Were the by-laws illegal because they infringed s. 38(7) of the *Planning Act* which prohibits a municipality from applying a second interim control by-law to land to which another such by-law applies?
4) Was the initial by-law adopted by an illegal process?
5) Was the initial by-law passed in bad faith?
6) If the answer to any of these issues is affirmative, what remedy, if any, flows to the appellant?

C. THE FACTUAL CONTEXT

[8] As noted, the appellant challenges the legality of interim control By-law 5105-18, which was enacted at a special meeting of council on December 5, 2018, and of By-law 5105A-19, which was enacted by council on November 11, 2019 to extend the interim control by-law until November 11, 2020. Both by-laws were repealed on June 22, 2020, after the Official Plan amendments addressing the issues of concern to the council came into force.

[9] Mr. Hummel was of the view that the by-law's true target was not his development, but the one proposed for the "Randwood Lands", elsewhere in the Town. This led Mr. Hummel to fruitless efforts to get the by-law repealed or at least not extended, and then to this application. He swore that the appellant has incurred additional costs for studies and for carrying the property. He expressed his worry about changes in the market conditions that might affect the profitability of the development.

[10] The factual context of the proposed Hummel development is set out in the "Planning Application Pre-Consultation Agreement", which records a meeting on August 16, 2018. In summary terms, the check boxes on the form note that the proposal required a Local Official Plan amendment, site plan approval, and a zoning by-law amendment. The area in which the site is located was identified as a "Built-Up Area" in the Regional Official Plan, with which the application was in

conformity. It was also stated to be in conformity with the existing Local Official Plan designation as “Low Density Residential, Conservation”. However, the existing zoning was “Rural Agricultural (A)” requiring a zoning by-law amendment. The application noted that an “amendment [is] required to change zoning to Residential Multiple RM1 (Zone) to allow townhouse or row dwelling”.

[11] The Town required a number of studies to be undertaken and several were under way when the interim control by-law came into force, which brought progress to a temporary halt.

D. ANALYSIS

[12] I now turn to the issues in this appeal.

(1) Was the legality of the interim control by-laws a moot issue because the challenged by-laws had been repealed?

[13] The application judge took the position that the legality issues were moot because the challenged by-laws had been repealed. He nonetheless addressed the issues in some measure, albeit inadequately, perhaps in view of his mootness ruling. The application judge erred in this mootness ruling. The application continued to have relevance to the appellant’s outstanding civil claim for damages, like the situations in *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.), at paras. 3-4, *TRG-KFH (Lakeside) Inc. v Muskoka Lakes (Township)*, 2019 ONCA 443, 89 M.P.L.R. (5th) 181, at paras. 18-23.

(2) Were the by-laws illegal because they did not relate to "land use" as required by s. 38 of the *Planning Act*?

[14] The appellant argues that the Town acted illegally by enacting an interim control by-law that prohibited the subdivision of land, because s. 38(1) of the *Planning Act*, only gives municipalities authority to pass interim control by-laws "prohibiting the use of land… except for, such purposes as are set out in the by-law" (emphasis added). The appellant argues that the subdivision of land is not and has never been interpreted to be a "use of land".

[15] The application judge rejected this argument. He asserted: "Condominium approval is a land use." He added, at para. 25:

> In my view, at least for the purposes of s. 38, prohibition of subdivision amounts to prohibition of a land use. Prohibition of subdivision has the effect of prohibiting any increased density of use. I do not agree with Mr Henricks that s. 38 is only aimed at zoning, and not at subdivision.

The application judge gave no legal basis for these assertions. They are not consistent with the *Planning Act* and the caselaw that has developed under it.

[16] The Town had no authority to control the subdivision of land by means of an interim control by-law. It is not surprising that the Town was unable to cite a single case in support of its argument that it had such authority. The by-law was illegal within the meaning of s. 273 of the *Municipal Act.* My explanation for reaching this conclusion follows. I begin with the principles of statutory interpretation, then

discuss the structure of the *Planning Act* and specifically Part V of the Act, s. 38 and s. 34, and then conclude.

(a) The principles of statutory interpretation applied to the structure of the *Planning Act*

[17] The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it. The interpreter must attend to text, context, and purpose, to which I now turn: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 117, 118-124.

[18] The context in which the *Planning Act* operates is the control of land development in Ontario. The *Planning Act* treats land use under Part V. Land use is the subject and purpose of zoning by-laws and includes s. 38. The Act treats the division of land, under Part VI, quite differently. Both parts show signs of the “cat and mouse” games played over time by landowners seeking to develop land with municipalities wanting to impose constraints. This accounts for the detailed but different complexities of the Act under each Part. Part VI of the Act controls the subdivision of land, not the use of land, and has its own distinct approval process for land division, from plans of subdivision to consent land divisions. I refer to Part VI because the interim control by-law purported to limit land division, not land use.[1]

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[1] Each of the Parts provides a code for its area of focus. Section 34 sets the framework for s. 38 in Part V as s. 53 does for Part VI. Minor variances in zoning are handled by a local committee of adjustment,

[19] Part V is engaged in this appeal. It is entitled “Land Use Controls and Related Administration”, which captures well the purpose of that part of the Act. The term “land use” and the related term “use of land” are not defined. The meaning of these terms must be gathered from their use in Part V. These terms generally mean what they say – they refer to the actual use of the land.

(b) Sections 38 and 34 of the *Planning Act*

[20] Section 38 of the *Planning Act* authorizes a municipality to pass an interim control by-law:

> **38** (1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law. [Emphasis added.]

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which is empowered by s. 45 to “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.” Committees of adjustment might have authority delegated to them under s. 54(6) to consent to a land division if, in accordance with s. 53(1) it is “satisfied that a plan of subdivision of the land is not necessary for the proper and orderly development of the municipality.” The procedural provisions of s. 53 apply, not the provisions in s. 34. I note in passing that subdivision control which in s. 50(3) extends to prohibit agreements granting the right to use land for a period of more than twenty-one years, and part lot control, which require consent for land leases “granting the use or right in such part” in s. 50(5), are meant to catch an indirect method of land division, not land use.

…

> Prohibition
>
> (7) Where an interim control by-law ceases to be in effect, the council of the municipality may not for a period of three years pass a further interim control by-law that applies to any lands to which the original interim control by-law applied.

[21] The context within which s. 38 operates is set by s. 34, which is the first section in Part V and is the linchpin of land use controls. Subsection (1) provides:

> **34** (1) Zoning by-laws may be passed by the councils of local municipalities:
>
> Restricting use of land
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
>
> Restricting erecting, locating or using of buildings
>
> 2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway. [Emphasis added.]

[22] The balance of the paragraphs in s. 34(1) and the next several subsections address details of various uses of land and buildings, including density, height and building envelopes. None address land division. Section 34 goes on to detail the process of obtaining a rezoning including public meetings, and the appeal rights of

owners denied the zoning they seek or ratepayers disputing the planning merits of a rezoning.

(c) The Purpose of s. 38 of the *Planning Act*, and the Determination of Illegality

[23] The purpose of interim control by-laws under s. 38 of the *Planning Act* was described by this court in *Equity Waste Management* at paras. 49 and 50:

> Interim control by-laws reflect "the Legislature's belief that a balancing of interests between the municipality and individual land owners should be built into the planning process in order to protect against over-development contrary to the public interest": Pepino and Watt, "Interim Control By-Laws and the Ontario Municipal Board" (1988), Insight at p. 3. … A municipality must give notice of a zoning by-law before passing it, but does not have to give notice of an interim control by-law until after it has been passed, thus enabling the municipality to act quickly if necessary to freeze development. …
>
> Interim control by-laws are, therefore, an important planning instrument for a municipality. They allow the municipality breathing space to rethink its land use policies by suspending development that may conflict with any new policy.

[24] Typically, in the “cat and mouse game” of land development, an owner seeks to rely on current zoning to undertake development and to get a building permit. If the building permit is secured, the municipality is stuck. But if it can enact an interim control by-law under s. 38 in time, the building permit can be withheld. An example is *Luxor Entertainment Corp. v. North York (City)* (1996), 27 O.R. (3d) 259 (Gen. Div.). The applicant sought to develop a restaurant, club and entertainment facility in an existing building located adjacent to a residential area in North York. Several

council members opposed but the proposal complied with all applicable requirements including zoning. The applicant brought an application for the issuance of the building permit. Before the scheduled hearing date, city council passed a site-specific interim control by-law prohibiting the applicant's proposed use. The applicant successfully applied for an order compelling the city to issue the building permit and to quash the by-law on the grounds that it was passed in bad faith and for an improper purpose.

[25] A “cat and mouse” example closer to land division is found in *Pedwell v. Pelham (Town)* (2003), 174 O.A.C. 147, leave to appeal refused, [2003] S.C.C.A. No. 335. The scheme involved the division of land into 25 one-acre lots by way of a testamentary devise. The estate solicitor sold 15 lots to a developer. The Town enacted an interim control by-law and did several other things to try to prevent the development. This court upheld the trial judge’s finding that the Town had acted in bad faith in enacting the by-law. At para. 40, Rosenberg J.A. quoted and accepted the trial judge’s reasoning:

> In the case at bar, there seems to be no question that all planning forces joined to attempt to thwart what they saw as a flagrant attempt to circumvent the *Planning Act*. Unfortunately for every one, at that time the Legislature in its wisdom had chosen to exempt testamentary devises from *Planning Act* controls. So there was nothing wrong with an individual working around the *Planning Act* in this fashion. There simply was no obligation to comply with the *Planning Act* and the Town knew this. Yet, two of its officials instructed the Chief Building Official to

> delay the processing of the applications for building permits. There is no authority for such delaying tactics.

[26] If a by-law is enacted by a municipality for an improper purpose, that is, not for the statutory purpose for which the power was granted, the by-law is illegal and may be set aside by the court: see e.g. *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55, 84 O.R. (3d) 346; *wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)*, 2016 ONCA 496, 132 O.R. (3d) 529; *TRG-KFH.*

(d) The Principles Applied

[27] The operative provisions in the Town's interim control by-law that delayed the appellant's development were these:

> 3. Subdividing of land within the Study Area is prohibited. …Applications to subdivide land, including but not limited to consents pursuant to Section 53 of the Planning Act and part lot control exemptions pursuant to Section 50 of the Planning Act, within the Study Area, shall be deemed contrary to this By-law and are prohibited.
>
> 4. Approval of condominium descriptions, except conversions of existing buildings as of the date of passing of this by-law, within the Study Area is prohibited…
>
> 5. Official Plan Amendment, Zoning By-law Amendment or Minor Variance applications with the Study Area that could permit lands to be subdivided, or that could facilitate applications to subdivide lands as described in Clause 3, or that could facilitate applications for approval of a condominium description as described in Clause 4, or that could otherwise facilitate the construction of townhouse or apartment residential dwelling units, shall be deemed contrary to this By-law and are prohibited.

[28] The by-law's provisions show conclusively that it was designed to prohibit the subdivision of land, which includes the creation of condominiums. This purpose

is reinforced by the references in para. 3 of the by-law to s. 50 and s. 53 of the *Planning Act*. These sections are found in Part VI of the Act governing land division, not Part V, in which s. 38 authorizes interim control by-laws only for land use purposes.

[29] In my view, the interim control by-law was enacted for an improper purpose – to control land division, not zoning. It is therefore illegal and, on that basis alone, I would quash it.

(3) Were the by-laws illegal because they infringed s. 38(7) of the *Planning Act*, which prohibits a municipality from applying a second interim control by-law to land to which another such by-law applies?

[30] The site of Hummel's development, 2203 Niagara Stone Road, is in the area to which the cannabis interim control By-law 5089-18 applied. It was passed on August 27, 2018, in order to restrict the use of all lands in the Town for any cannabis related land uses for a period of one (1) year and was extended in August of 2019. Thus, when the by-law at issue in this case was passed, two interim control by-laws applied to the Hummel site. The appellant argues that this was contrary to s. 38(7) of the *Planning Act*, which prescribes a prohibition: "Where an interim control by-law ceases to be in effect, the council of the municipality may not for a period of three years pass a further interim control by-law that applies to any lands to which the original interim control by-law applied."

[31] The appellant is joined by the intervenors in advancing the argument that s. 38(7) prohibited the passage of the by-law at issue in the application.

[32] The application judge rejected this argument and asserted: “Enacting two interim control by-laws for completely different purposes does not contravene the section: *Quay West v. Toronto (City)*, [1989] O.J. No. 3072, 1989 CarswellOnt 516 (Div. Ct.), para. 2.”

[33] The application judge erred in making this holding, in two ways. First, it is not at all clear that *Quay West* stands for the proposition that enacting two interim control by-laws for completely different purposes does not contravene s. 38(7) of the *Planning Act*. That is not what para. 2 of *Quay West* stipulates. In a cursory and summary way related to the argument being made, Southey J. said:

> Nor can I see any merit in the 3rd or 4th issues raised by Mr. McQuaid in his factum. Issue 3 is: Whether the *Planning Act*, 1983 permits more than one interim control by-law to be enacted at the same time governing the same land but for different purposes?

The factual basis for the argument is not set out in the decision. I would be reluctant to treat it as a precedent for the proposition cited by the application judge. It is especially instructive that the respondent does not rely on the *Quay West* decision despite its endorsement by the application judge.

[34] I accept the argument of the appellant and the intervenors that *Quay West* turned instead on the proposition that “[a]s a general rule, a building permit should not be issued for a development in a site plan control area to which s. 40 of the *Planning Act* applies until site plan approval for the development has been

obtained from council or the Municipal Board": *Quay West*, at para. 8. This is the proposition of law for which *Quay West* is usually cited.

[35] Second, and more importantly, the application of more than one interim control by-law to a piece of land is not consistent with the terms of s. 38(7) or the law as it has been developed and settled both at the Ontario Municipal Board and in courts. The law enforces s. 38(7) strictly, as the courts did in *Shell Canada Ltd. v. Barrie (City) Chief Building Official*, 1992 CarswellOnt 514, at p. 292 (Gen. Div.), and in *Manchester v. North York (City) Chief Building Official* (1994), 18 O.R. (3d) 540 (Div. Ct.).

[36] The strict approach is underpinned by concern for the rights of property owners and the need to ensure strict compliance by municipalities. This was explained by the Divisional Court in *Manchester*, at paras. 7-8:

> A by-law enacted under s. 38 is authorized for the purpose of protecting the public interest in suitable zoning of an area in question and takes precedence over the right of affected landowners to use their lands freely: see *715113 Ontario Inc. v. Ottawa (City)* (1987), 63 O.R. (2d) 102 at p. 106, 46 D.L.R. (4th) 552 (H.C.J.). An interim control by-law is generally passed "as a quick response to the emergence of a specific problem for the purposes of stopping the problem from getting out of hand and as a means of providing breathing space during which study can be done to determine the appropriate planning policy and controls for dealing with the situation": see *Re S[h]uniah (Township) Interim Control By-law 1601* (1990), 24 O.M.B.R. 377 at p. 379. Indeed, an anticipated urgency to act explains the exceptional

> right accorded to a municipality to pass a by-law before giving notice.
>
> Against this important purpose of s. 38 is the equally important interest of property-owners to use their land as permitted by existing law. The enactment of a by-law without initial notice is clearly an exceptional power.

[37] There are competing policy thrusts. On the one hand is the common-sense proposition that the section must be interpreted purposively. This view was taken in *Re Burlington (City) Interim Control Re By-law 4000-589* (1988), 22 O.M.B.R. 233. The pre-existing by-law prohibited adult entertainment establishments, while the by-law stopping the applicant prohibited expansion of her present nursery school use. The appeal was dismissed on the basis that the appellant had not obtained site plan approval. The adult entertainment by-law came to light and the municipality disclosed it to the Board. While the case did not turn on the issue, Member T.F. Baines Q.C. stated, at para. 8:

> When looking at the broad intent of s. 37 and the *Planning Act, 1983*, as the principles of statutory interpretation suggest, the board concludes that it would be unduly restrictive to suggest that, because Burlington had admittedly passed an interim control by-law less than three years prior, it could not now do so on this piece of property for fear of running foul of s. 37(7). That would be, even though the purposes of the two by-laws were so widely different as to be almost incapable of comparison. In the one case, the by-law seeks, over a very wide area, in effect, *to control a certain type of social conduct* that is thought to be offensive to some. In this case the by-law seeks *to control the development of land* in a particular way as related to maximizing the use of urban services in the form of piped water and sewage. [Underlined emphasis added.]

[38] The *Burlington* approach argues that a by-law prohibiting adult entertainment establishments can live with a by-law controlling future development of land without oppressing landowners. The objects are radically dissimilar. The Town in this case argues that cannabis uses, on the one hand, and heritage preservation, said to be the true object of the by-law challenged in this application, on the other hand, are also radically dissimilar and do not fall afoul of s. 38(7).

[39] On the other hand, opposite to the approach adopted in *Burlington*, is the strict approach that has been taken by the Ontario Municipal Board in many decisions. The reasoning in *Burlington* has been rejected: see, for example, *Re Niagara-on-the-Lake (Town) Interim Control By-law 2049-89,* [1990] O.M.B.D. No. 320; *Woolford v. Etobicoke (City)* (1991), 25 O.M.B.R. 289. The approach of the text writers is the same: see, for example, Ian MacF. Rogers, *Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Thomson Reuters, 2022), at § 17:30: "s. 38 must be interpreted strictly in view of the fact that it permits a municipality to negate development rights." The call for strictness resonates with the Supreme Court's observation in *London (City) v. RSJ Holdings Inc.,* 2007 SCC 29, [2007] 2 S.C.R. 588, at para. 40, that the "potentially draconian effects of interim control by-laws accentuate the need for the courts to jealously require" due compliance with the statutory substantive and procedural requirements.

[40] Even if the subject matters of the two interim control by-laws were radically dissimilar, the municipality may not enact the second unless it complies with s.

38(7) of the *Planning Act*. The lack of cases contesting this view since the 1990s and the legislature's silence on this issue despite many changes to the *Planning Act* since suggest that the strict view is now the settled, correct view. Certainty, finality, stability, and predictability are important features of the rule of law. I would also quash the interim control by-law on the basis of this illegality.

(4) Was the initial by-law adopted by an illegal process?

[41] The appellant argues that the procedure leading to the interim control by-law's first enactment breached the Town's procedural by-law. The meeting was first announced publicly on December 4, 2018. Under the Town's procedural by-law, a special meeting had to be "announced no later than the Thursday prior to the Meeting except in the case of an emergency."

[42] The application judge rejected the argument that the special meeting did not comply with the Town's procedural by-law. He found that "[t]he Lord Mayor was entitled by the Town's procedural by-laws to call an emergency meeting for December 5. Nothing in those by-laws precluded her from considering the subject-matter to be an emergency, allowing shorter notice. Interim control is by its nature urgent. The director of planning was not aware of an emergency, but that does not matter." The application judge did not address the appellant's argument that the notice of the meeting was inconsistent with the principles reviewed by the Supreme

Court in *RSJ Holdings*, at para. 19, because it was deficient and lacked transparency.

[43] The application judge added this comment, at para. 18: "The Town's director of planning explained the by-law to council members. That may or may not have taken place during a break in the meeting. That does not mean that the meaning was closed to the public." This statement is overly broad, in light of the "open meeting" requirements of s. 239 of the *Municipal Act* and the analysis in *RSJ Holdings*.

[44] The application judge gave short shrift to these arguments. I would set aside his finding that the process leading to the adoption of the by-law was not illegal.

(5) Was the initial by-law passed in bad faith?

[45] It is common ground that a by-law passed in bad faith is void for illegality: *Equity Waste Management*, at para. 28.[2]

[46] The application judge found the case that the Town passed the interim control by-law in bad faith to be "contrived". The application judge disagreed with the appellant's assertion that mere illegality would be an adequate basis on which to find the Town liable for negligent misrepresentation or misfeasance in public

[2] As s. 272 of the *Municipal Act* notes: "A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law." Section 450 immunizes a municipality from liability in negligence for the exercise of discretionary power "made in a good faith exercise of the discretion."

office. He took the position that the appellant had to prove council's bad faith in order to establish these torts and to avoid the application of s. 450 of the *Municipal Act*, which provides some immunity for tort liability.[3] The application judge found that Town council did "essentially what they were supposed to do" by freezing the status quo, considering studies and public input, amending the Official Plan, and then repealing the interim control bylaws.

[47] I have found that the application judge made three overriding legal errors in his brief six-page endorsement: first, the legality issue was not moot; second, the interim control by-law was illegal because it did not relate to "land use" as required by s. 38 of the *Planning Act*; and third, that the by-law was illegal under s. 38(7) of the Act because another interim control by-law affecting the Hummel land was in force. I have also found that the application judge did not adequately analyze whether the process leading to the by-law's enactment was legal.

[48] The application judge's finding that there was no bad faith rested on these three errors, and on his inadequate analysis of the process leading to the by-law's enactment. Accordingly, I would set aside that finding.

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[3] Section 450 provides: "No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against,

(a) a municipality or local board;
(b) a member of a municipal council or of a local board; or
(c) an officer, employee or agent of a municipality or local board."

(6) Given the findings of illegality, what remedy flows to the appellant?

[49] I address these in the Disposition.

E. DISPOSITION

[50] I would allow the appeal as set out above with costs payable by the respondent to the appellant. I would send the case back to the Superior Court of Justice, and direct a trial of the issues of the appellant's claims of negligent misrepresentation and misfeasance in public office, to be initiated by fresh pleadings in the form of statements of claim and defence, to be completed in the ordinary course of a civil action including document production, examinations for discovery and so on. The issues of whether the process leading to the adoption of the initial interim control by-law was illegal, and whether there was bad faith in its enactment, may be litigated afresh.

[51] If the parties are unable to agree on costs, then the appellant may file a written submission no more than three pages in length within ten days of the date of the release of these reasons; the respondent may file a written submission no more than three pages in length within ten days of the date the appellant's submission is due.

Released: October 28, 2022 "P.L."

"P. Lauwers J.A."

"I agree. I.V.B. Nordheimer J.A."

"I agree. B. Zarnett J.A."