COURT OF APPEAL FOR ONTARIO

CITATION: Don Mills Residents Inc. v. Toronto (City), 2022 ONCA 752
DATE: 20221104
DOCKET: C69640

Gillese, Miller and Coroza JJ.A.

BETWEEN

Don Mills Residents Inc.

Applicant (Appellant)

and

City of Toronto and C/F Realty Holding Ltd.

Respondents (Respondent)

Conner Harris and Sarah Spitz, for the appellant

Roberto Zuech and Molly Lowson, for the respondent

Heard: April 11, 2022

On appeal from the judgment of Justice Jane Ferguson of the Superior Court of Justice, dated June 2, 2021, with reasons reported at 2021 ONSC 4009.

B.W. Miller J.A.:

Overview

[1] The City of Toronto, C/F Realty Holding Ltd. ("CF"), and the appellant, Don Mills Residents Inc., entered into minutes of settlement respecting a planning appeal launched by CF. The appellant argues that the minutes require the City to construct a community centre at 966 Don Mills Road, a site known as the Don Mills Centre ("DMC").

[2] The appellant brought an application before the Superior Court seeking: (1) a declaration that the City and/or CF were required to build a community centre at the DMC (the "DMCC"); (2) an injunction requiring the City and/or CF to build the DMCC, in accordance with the terms of the minutes; and (3) an order to proceed to trial to determine consequential damages from the alleged breach of the minutes. The application judge dismissed the application. She found that the minutes did not constitute a binding contract capable of enforcement and, in any event, specific performance would not be appropriate. The application judge also found that the appellant has not suffered any compensable damages.

[3] On appeal, the appellant argues that the application judge erred in law and in fact in determining that the minutes did not constitute a binding contract. The appellant also submits that the application judge erred by assessing the merits of the City's decision to not construct the DMCC and erred in her assessment of the available remedies. This appeal relates only to the application brought against the City and not against CF. For the reasons that follow, I would dismiss the appeal.

Facts

[4] The DMC is located in the area of Don Mills Road and Lawrence Avenue East in Toronto. The land currently holds a shopping centre, which CF is redeveloping.

[5] In 2001, CF applied to amend the portion of the North York Official Plan that applied to the site, as well as the relevant zoning by-law. In 2007, CF appealed to the Ontario Municipal Board (“OMB”), now the Ontario Land Tribunal, for approval of Phase 2 of its proposed redevelopment. The appellant was granted party status in CF’s appeal. In March 2010, the parties reached an agreement and provided the OMB with minutes of settlement in resolution of the appeal.

[6] The minutes set up a framework for community benefits from the redevelopment. Among those community benefits would be the creation of the DMCC. The provisions respecting the community centre read as follows:

> 1. The Parties agree to support, before the Ontario Municipal Board, the Land Use Plan for Phase 2 of the DMC as shown on the attached Schedule A, and will request the OMB to allow the OPA and ZBL Appeals, as revised, generally in accordance with Schedule A, upon execution and registration of the Section 37 Agreement, satisfactory to the City Solicitor and CF.
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> 2. CF will construct or cause to be constructed a publicly accessible community centre (the "CC") that has floor space area of at least 48,570 square feet. The value of the CC shall be based on the City's present benchmark of $350.00 per square foot multiplied by the floor space area of 48,570 square feet for a total of $17 million. The per square foot benchmark value of $350.00, as well as the total value of the CC, will be indexed annually based upon 2010 dollars.
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> …
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> 4. Unless otherwise mutually agreed upon by the General Manager, Parks, Forestry, and Recreation of the City of Toronto (the "GM") and CF, the CC will include among its

> principal functional components a competition-size swimming pool, fitness area, running/walking track, meeting rooms, gymnasium and auditorium (which may be combined with the gymnasium). In addition, at the option of CF, but subject to the provisions of Schedule B, the CC may include a partial or complete level of underground parking.
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> …
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> 6. CF shall provide letters of credit (collectively, the "LCs"), in a form satisfactory to the City Solicitor, as set out in paragraph 6 of Schedule B and in the aggregate amount of $17 million (indexed annually from 2010 dollars) to secure the substantial completion of construction of the CC by the deadline set out in section 5 above. In the event that the CF Landlord fails to substantially complete (as determined in accordance with the Construction Lien Act (Ontario)) the CC by October 12, 2020, the City may draw down on the LCs to the extent necessary to pay the costs it incurs to complete the construction of the CC. If the LCs are drawn down by the City, then the Ground Lease as defined in section 9 shall automatically be terminated (without any further action by the parties thereto).
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> 7. The CC will be operated by a community centre operator (the "Operator") selected by CF, acceptable to the GM, and in consultation with DMRI. The Operator will be an arms-length not-for-profit organization.

[7] The minutes contemplated that the terms respecting the DMCC would be implemented through an agreement under s. 37 of the *Planning Act*, R.S.O. 1990, c. P.13. Section 37 allows municipalities to pass zoning by-laws increasing the height or density allowances for a property in exchange for community benefits from the property owner. In addition to the s. 37 agreement, the minutes required CF to execute a number of other contracts, including escrow agreements, sub-

leases, and easement documents. The minutes state that the parties “will cooperate to achieve the intent of this settlement in a timely fashion.”

[8] On February 25, 2011, CF and the City registered the s. 37 agreement contemplated by the minutes. As the appellant is not the owner of the lands in question, it is not a party to the s. 37 agreement. The agreement allows the parties to amend it on consent of both CF and the City. The s. 37 agreement does not require the appellant’s consent to any changes. In fact, there were several amendments to the s. 37 agreement, all made without the appellant’s consent.

[9] In 2017, the City established a steering committee to select a third-party operator for the community centre. In accordance with s. 7 of the minutes, the City included members of the appellant on the steering committee. The steering committee evaluated several possible options for operators but found all of them to be unsatisfactory. In August of 2018, the City advised the steering committee that it would need to conduct more reviews and community consultations in light of changes to the community’s needs.

The Celestia Recreation Centre

[10] Since the minutes were executed in 2010, the area surrounding the DMC has seen dramatic population growth. The City anticipates that the area’s population will increase by approximately 25,000 people, largely concentrated

around the intersection of Don Mills Road and Eglinton Avenue East. The primary impetus for this growth is the construction of the Eglinton LRT.

[11] In response to the changing population, the City re-evaluated its plans for community services in the area. In 2018, the City approved redevelopment plans for a 60 acre plot of land at the northwest corner of Don Mills Road and Eglinton Avenue East, which had previously been used for offices and manufacturing (the "Celestica site"). As part of the redevelopment, the City secured 5.58 acres of parkland and a site for a large recreation facility. The Celestica site is approximately one kilometre south of the DMC.

[12] In light of the changing needs of the community and the new opportunity presented by the Celestica site, City staff recommended the creation of a 125,000 square foot facility known as the Celestica Recreation Centre ("CRC"). The CRC would be located at the Celestica site and serve the entire Don Mills community, replacing the proposal to have two smaller community centres, one at the Celestica site and one at the DMC. In July 2019, City Council voted in favour of the CRC proposal and directed staff to effect amendments to the s. 37 agreement with CF. This effectively ended the plans for the DMCC.

[13] The application judge found that the CRC enjoyed broad community support, as expressed during the consultation process. It is a larger facility at a more central location, in the heart of the highest growth area of the community.

The appellant's leadership had previously acknowledged the accessibility of the Celestica site from the DMC area.

The decision below

[14] The application judge found that the minutes should be read in the context of the *Planning Act* regime, which permits reconsideration of planning decisions when it is in the broader community interest to do so. She concluded that (1) the minutes do not obligate the City to construct the community centre; and (2) the minutes do not constitute a binding contract between the City and the appellant. The application judge found that although the City had binding obligations with respect to certain matters addressed in the minutes, the obligations came from the s. 37 agreement between the City and CF, to which the appellant is not a party.

Issues

[15] The main issue on appeal is whether the minutes of settlement formed a binding and enforceable agreement. The appellant argues that the application judge committed the following errors:

1. The application judge erred in characterizing the minutes as an instrument under the *Planning Act* rather than as a binding settlement agreement;
2. The application judge erred by considering the merits of the agreement;
3. The application judge erred in characterizing the minutes as an agreement to agree.

Analysis

(1) Did the application judge err in characterizing the minutes as an instrument under the Planning Act rather than as a settlement agreement?

Appellant's Position

[16] The appellant's position before the application judge was that both the language of the minutes of settlement and the surrounding circumstances that led to them – including lengthy negotiations, and offers and counter-offers leading to the final agreement – demonstrate that the parties intended to be bound by the minutes. The appellant argues that, accordingly, any change in circumstances that occurred after the minutes were signed could not have any relevance to the interpretation of the minutes, and the application judge erred in taking them into account. The appellant argues, essentially, that the minutes should be interpreted according to the ordinary rules of contractual interpretation in the same way as any other minutes of settlement. The appellant therefore submits that the application judge erred in failing to articulate the appropriate test to ascertain whether there was a binding agreement: was there a mutual intention to create a binding contract, and did the parties reach agreement on all the essential terms?

[17] The application judge approached the minutes on the basis that the agreement was analogous to other agreements made under the *Planning Act*, such as the site plan agreement that was at issue in *Hi-Rise Structures Inc. v. Scarborough (City)* (1992), 10 O.R. (3d) 299 (C.A.). In that case a developer

sought approval from the OMB to amend an executed site plan agreement made between the developer and the city. The OMB denied the request on the basis that the agreement did not provide for further amendment. This court ultimately concluded that the OMB had the authority to modify site plan agreements without the consent of the municipality. The court's reasoning was based on the planning process's orientation towards decision-making about the future use of land based on a broad range of interests in the community. Although the court said that in some circumstances a site plan agreement would remain a contract for the purposes of enforcement, in other circumstances it had to be understood as "amenable to the change which is inherent in all planning", even if the municipality that is a party to the agreement does not consent: *Hi-Rise*, at p. 305.

[18] The application judge relied on this court's holding in *Hi-Rise* that even "though provisions of the *Planning Act* state that 'every decision or order of the [OMB] is final,' this did not mean that all decisions were 'everlasting' … such a reading may 'prevent a fresh consideration of the planning of the community' and do a 'disservice to the broader community interest'." With these principles in mind, the application judge concluded that the express consent of the appellant was not required before amendments could be made to the applicable zoning by-law, official plan, or the minutes of settlement.

[19] The appellant argues that the application judge erred in analogizing the minutes of settlement to a site plan agreement made under the *Planning Act* and

treating *Hi-Rise* as governing. The minutes of settlement differ fundamentally from a site plan, the appellant argues, because a site plan agreement can be the subject of an appeal to the Ontario Land Tribunal (OLT) – the successor tribunal to the OMB. The minutes of settlement, as an ordinary contract that exists outside the *Planning Act* regime, cannot.

[20] Furthermore, the appellant argues, the minutes of settlement, on their face, evidence a mutual intention to create a binding contract that ought to be respected. The agreement was a means to settle the matters at issue between the city and CF, paving the way for the OMB to approve the CF redevelopment.

Respondent's Position

[21] The respondent (in these reasons the City of Toronto is referred to interchangeably as the City and the respondent) argues that the appellant's position is based on a misunderstanding of how planning works, and the nature of the legal obligations the *Planning Act* generates. The minutes of settlement, it notes, do not obligate the City to construct or operate the community centre. CF is the only party so obligated. What the application judge found was that the minutes create a framework for the implementation of CF's phase 2 re-development. The City and the appellant gave their support for the re-development in exchange for community benefits to be provided under a s. 37 agreement and implemented through various other agreements. However, the ultimate decision whether to

approve of the re-development and on what terms, rested at all times with the OMB. Further, the terms to which the appellant agreed were not only revisable by the OMB but by the parties to the s. 37 agreement. As provided in s. 12.1 of the agreement, CF and the City may "modify, revise, or amend this agreement from time to time and upon the consent of both parties in writing". The City also notes that the s. 37 agreement had been amended several times without the consent of the appellant.

Discussion

[22] I am not persuaded that the application judge made any reviewable error in finding that the minutes of settlement are not, in substance, a contract and do not generate the contractual obligations claimed by the appellant. As the application judge explained, the minutes of settlement must be understood within the context of the *Planning Act*. The legislative scheme governing land-use planning requires that municipalities exercise their powers in the public interest: *Planning Act*, s. 2. As this court held in *Hi-Rise*, land-use planning instruments made under the authority of the *Planning Act* can be revisable under the supervision of the OLT so as to best ensure that land is put to uses that serve the current and future needs of the community.

[23] In *Hi-Rise*, this court drew a distinction between ordinary commercial contracts and site plan agreements. Site plan agreements are a species of

planning instrument for the purposes of the *Planning Act*, and accordingly are revisable in response to changed circumstances, irrespective of whether the site plan agreement expressly contemplates amendment. *Hi-Rise* held that ss. 17, 22, and 34 of the *Planning Act*, which set out the manner in which amendments can be made to official plans and zoning by-laws, apply to site plan agreements. The application judge reasoned that agreements that are functionally similar to a site plan agreement, such as the minutes of settlement at issue in this appeal, are similarly revisable under that scheme, and subject to appeal to the OLT.

[24] The appellant's argument against this conclusion is, essentially, that site plan agreements are planning instruments that are creatures of statute, and the minutes of settlement are not. Evidence for this position is that the minutes were not placed before the OMB for approval.

[25] I do not find the appellant's argument persuasive. The planning context of the minutes of settlement is significant. What constitutes a planning instrument is not defined exhaustively in the *Planning Act*. Land use planning is a complex process, and *Hi-Rise* does not purport to limit the instruments by which a municipality effects site plan control to site plan agreements. The minutes of settlement were the means of settling appeals before the OMB. Those appeals were part of the land use planning process and had an inescapably public dimension. The minutes were a single step in a process that was to be implemented through various other agreements to which the appellant would not

be a party. The context was thus far removed from a paradigmatic bilateral commercial contract.

[26] The appellant's second argument for why minutes of settlement among a municipality, a developer, and a residents' association should not be considered the functional equivalent of a site plan agreement is because of the parties' *intentions*. The parties intended the minutes to function as a private contract rather than a planning instrument, and the application judge erred by allowing the planning context to overwhelm the words of the minutes of settlement, which unambiguously manifest a private commercial agreement.

[27] The hurdle faced by the appellant is that the application judge interpreted the minutes differently. This interpretation is entitled to deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 52. Accordingly, the appellant would have to identify either a palpable and overriding error or an extricable error of law: *Sattva*, at para. 53. The appellant has not done so. A key finding by the application judge – to which the appellant does not have an effective answer – is that the minutes do not create any legal obligation on the respondent to build the recreation centre. That obligation was solely carried by CF. The application judge's conclusion was that "[t]he minutes set out the framework for the Phase 2 redevelopment of the DMC site as requiring further agreements, such as the section 37 agreement, to implement the intent of the minutes. At most, the minutes outline a planning framework to be implemented via the execution of

various planning instruments, such as the zoning by-law amendment and official plan amendment approved by the OMB, the section 37 agreement executed by the City and CF, and several other agreements yet to be executed … The minutes do not govern a contractual relationship between the City and the [appellant].” This finding is dispositive not only of this issue, but of the appeal as a whole.

(2) Did the application judge err by considering the merits of the agreement?

[28] After the application judge had determined that the minutes were a planning instrument and that there was no contract between the parties, she addressed the merits of the ultimate issue: whether the CRC would better serve the Don Mills community and be a better use of the City’s resources than a community centre at the DMC. By reference to various criteria set out in the respondent’s facilities master plan, the application judge concluded that the CRC would better serve the community and be a better use of public resources.

[29] It is not apparent why the respondent raised this issue before the application judge, or why the application judge answered it. As the appellant argues, the merits of the two proposals had no bearing whatsoever on the task before the application judge, which was to interpret the minutes of settlement and determine what legal obligations it established, if any. There were no interpretive questions raised – such as an ambiguity that needed to be resolved – to which the merits of the decision to relocate the recreational centre might have been relevant. Neither were

there allegations that the minutes were unconscionable, grossly unfair, or improvident. It was, as the appellant contends, an error to have addressed this issue at all.

[30] Nevertheless, although the error is a palpable one, it is not overriding. That is, the analysis plays no part in the line of reasoning by which the application judge determined that the minutes of settlement did not compel the respondent to build the community centre. Accordingly, the error has no impact on the disposition of this appeal.

(3) Did the application judge err in characterizing the minutes as an agreement to agree?

[31] The appellant also argued that the application judge erred in the alternative finding that characterized the minutes of settlement as an agreement to agree. The application judge stated that had she not held that the minutes of settlement were part of a land use planning process, she still would not have found the minutes to be an enforceable agreement because the minutes on their face failed to satisfy the requirements of a valid and enforceable agreement. She reasoned on this point as follows:

> The minutes do not meet these requirements in this case. They are a “contract to make a contract”, and do not in themselves create the obligation proposed by the DMRI. The execution of a section 37 agreement and other agreements are conditions or terms of the minutes and the DMRI is not a party to any of them. The section 37 agreement is the formal planning instrument that secures

> the DMCC. The construction of the DMCC is also conditional on the execution of the other required agreements. If these agreements, such as the 49-year ground lease (between the City and CF) and the long term sublease (between CF and an operator yet to be determined), fail to be executed for whatever reason, the DMCC as set out in the minutes cannot come to fruition. Similarly, if the lands on which the proposed community centre rests fail to be remediated to the environmental standards required by the City, the City is not obligated to accept the conveyance of the lands and thus the community centre cannot be built as envisioned by the minutes.
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> The minutes contemplate potential changes to the functional components of the community centre. Section 4 of the minutes states that "unless otherwise mutually agreed upon by the General Manager, Parks, Forestry, and Recreation of the City of Toronto, and [CF], the community centre will include…". Thus, the minutes explicitly anticipate potential changes to the very essence of the community centre - its functional components - without consultation or consent of the DMRI.

[32] The appellant argues that in finding the minutes to be an “agreement to agree” and lacking the requisite terms to be a binding contract, the application judge demanded too much of the minutes of settlement and ignored crucial context. The fact that the agreement contemplated – and required – further agreements to implement it, and that the appellant would not be a party to some of those agreements, did not mean that the minutes were therefore lacking in the particulars needed to form a contract. The essential terms, according to the appellant, are the parties, the period, and the price, and the minutes identified each of these: the minutes set out the triggering events for the start of construction and

the substantial completion date, they set a value of $17 million for the construction of the community centre, and they identify the parties to the settlement as the appellant, the respondent, and CF.

[33] Contrary to the appellant's arguments, the application judge's interpretation of the minutes of settlement is reasonable and is entitled to deference by this court. The application judge properly interpreted the terms of the minutes as a whole, and with due appreciation for the planning context in which the minutes were reached. There is no basis on which intervention by this court would be warranted.

[34] Given my proposed disposition of this appeal, it is not necessary to address the nature of the relief sought by the appellant.

Disposition

[35] I would dismiss the appeal. I would award costs to the respondent in the agreed amount of $15,000, inclusive of HST and disbursements.

Released: November 4, 2022 "E.E.G."

"B.W. Miller J.A."
"I agree. E.E. Gillese J.A."
"I agree. Coroza J.A.