COA File No.: D08-02-18/A-00159

COMMITTEE OF ADJUSTMENT

CITY OF OTTAWA, ONTARIO

BETWEEN:

HADI SALMASIAN

(Complainant)

and

170 PRESTON LTD.

(Applicant)

NOTICE OF CONSTITUTIONAL QUESTION

(Re: Section 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13)

June 5, 2018

Dr. Hadi Salmasian
(Complainant)

The complainant, Hadi Salmasian, intends to question the constitutional validity and applicability of Section 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13.

The question is to be argued for approximately 30 minutes on Wednesday, June 6, 2018, at 1:00 PM, at Ben Franklin Place, The Chamber, Main Floor, 101 Centrepoint Drive, Ottawa, ON K2G 5K7.

The following are the material facts giving rise to the constitutional question:

(Set out concisely the material facts that relate to the constitutional question. Where appropriate, attach pleadings or reasons for decision.)

1. Section 45(1) of the *Act* grants the Committee and now the Board limited jurisdiction to hear variance applications; solely if the variances are "minor".

2. The application for variance from the zoning bylaw is for a new full-lot-footprint large three-story (plus basement) multi-unit building in an established single-dwelling neighbourhood. It constitutes a substantial development, not a minor adjustment.

3. The variances violate a current interim control bylaw to prevent buildings from being used as or being transformable into *de facto* rooming houses with more than four (4) bedrooms, while a City study is under way.

4. The building plan is for a building size that could accommodate 16 bedrooms, and greatly exceeds the Interim Control Bylaw building floor area limit.

5. The Interim Control Bylaw is repealed on July 12, 2018, and may be renewed for another year, while study continues.

6. The variances are also not in conformity with the pre-existing general bylaw, which may be changed following the current said study. The lot area is 41.5 square meters (447 square feet) too small for this size building.

7. The land of the said development was and is in the primary study area of a current joint (city and environment ministry) soil toxicity and former industrial-waste-site

footprint study, the results of which are not yet known. Significant soil toxicity was found in a recent distinct environmental study of the same neighbourhood.

8. Thus, the land is potentially contaminated and Committee authorization of the said development is in violation of Article 4.8.4, Policies 1, 2 & 3, of the Official Plan made pursuant to the Act.

9. The land is potentially unstable soil or bedrock (former industrial-waste site), such that Committee authorization of the said development is in violation of Article 4.8.3, Policy 1, of the Official Plan made pursuant to the Act.

10. The applications are (the said development is) at odds with the dominant character of the neighbourhood and of the city block, which consists of one and two-story detached single-family dwellings with large backyards, and moderately large front yards with old-growth trees.

11. Deleterious effects to other properties include: large cast shadows on the small houses to the immediate north, parking demand, change of neighbourhood character (short-term rental), rooming house environment, street character destruction, isolation effect for smaller dwellings, loss of backyard community environment, loss of privacy from high windows, noise from multiple air conditioners, and loss of green space in the neighbourhood.

The following is the legal basis for the constitutional question:

(Set out concisely the legal basis for each question, identifying the nature of the constitutional principles to be argued.)

12. The constitutional status of the principle of the rule of law is beyond question. The rule of law provides a shield for individuals from arbitrary state action, and implies:
    (a) subjection to known legal rules;
    (b) one law for all, including government; and
    (c) adherence to the doctrine against vagueness.

13. The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion.

14. The doctrine of vagueness applies to all law, from the criminal code to regulatory enactments.

15. Any provision of law, which does not satisfy both rationales of the doctrine against vagueness, is invalid and without force or effect.

16. Section 45(1) of the *Act* provides conditional jurisdiction to the Committee and to the Board to authorize variance from provisions of bylaws enacted pursuant to the *Act*:

> Powers of committee
> 45 (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, 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. [Emphasis added]

17. The jurisdiction to authorize variance from bylaw provisions is limited to "minor" variances, which is a true jurisdictional question. The historical jurisprudence of allowing minor variances is to admit the difficulty of imposing codified bylaw conditions on the complexities of real land-use circumstances.

18. Any jurisdictional question must be answered both objectively and correctly; it is not a matter of discretion, however the *Act* does not provide a definition of or a test for the jurisdictional threshold expressed as "minor".

19. This uncertainty in a true jurisdictional question — in which an independent tribunal (accountable only to the courts) is given the power to allow non-compliance with a duly and democratically adopted bylaw — undermines the constitutional division between the judiciary and the legislature, and offends the doctrine against vagueness.

20. Case law applying and interpreting a particular section is relevant in determining whether the section is vague. In the instant case, there are four areas demonstrating vagueness:
    (a) The wording of the section itself, in its statutory context;
    (b) The large body of applications and interpretations of the section by the municipality, the Committee and the Board;
    (c) The applications and interpretations of the section in regulations that derive from the *Act* (Official Plan, Provincial Policy Statement, Rules of Procedure of the Board); and
    (d) The consequences on the ground of opposed and authorized so-called minor variances.

21. Due to its vagueness, Section 45(1) of the *Act* has improperly become a tribunal planning instrument that:
    (a) circumvents democratic bylaw amendment procedures;
    (b) gives non-resident developers virtually whatever they want;
    (c) vitiates common law land ownership rights regarding the tort of nuisance; and
    (d) produces deleterious consequences on the ground, in neighbourhoods.

22. Therefore, Section 45(1) of the *Act* is unconstitutionally vague.

23. Ontario is the only province in Canada whose bylaw-variance provision in its planning act sets a jurisdictional threshold as “minor variance”, without defining “minor” and without providing the established criteria of undue harm from compliance with the bylaw and absence of injury to neighbouring properties.

24. Disjunctively, s. 45(1) of the *Act* is unconstitutional because in-effect it infringes or denies the complainant’s s. 15(1) *Charter* right of every individual’s equality before and under the law:
    (a) The applicant’s common law property rights are kept intact, whereas the common law property rights (nuisance tort) of the complainant are prejudicially negated, disregarded and violated.
    (b) The residents living near the applicant’s land are denied the full protection and benefit of the zoning bylaw whereas other residents are not.

25. Section 45(1) of the *Act* is not saved by a s. 1 *Oakes* analysis *inter alia* because the infringements against the individual's *Charter* equality rights are not prescribed by law.

26. In the alternative, s. 45(1) of the *Act* is unconstitutional because in-effect it infringes or denies the complainant's s. 15(1) *Charter* right of equal protection and equal benefit of the law without discrimination. The complainant is discriminated against as an ordinary resident of a dwelling, acting in personal interest to protect his living environment, compared to a non-resident developer acting with a business interest.

27. The said discrimination is established in the body of Committee and Board decisions, is quantitative and palpable, and is thus not saved by a s. 1 *Oakes* analysis. It is not prescribed by law nor demonstrably justified in a free and democratic society.

June 5, 2018

Dr. Hadi Salmasian
Complainant

[redacted]

TO The Attorney General of Ontario
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
fax: (416) 326-4015

The Attorney General of Canada
Justice Building
234 Wellington Street
Ottawa, Ontario K1A 0H8
fax: (613) 954-1920

Committee of Adjustment
City of Ottawa
101 Centrepointe Drive
Ottawa, Ontario K2G 5K7
fax: 613-580-2425
E-mail: cofa@ottawa.ca

RCP-E 4F (April 11, 2012)

HADI SALMASIAN and 170 PRESTON LTD.

(Complainant) (Applicant)

COA File No.: D08-02-18/A-00159

COMMITTEE OF ADJUSTMENT

CITY OF OTTAWA, ONTARIO

Proceeding commenced at Ottawa

NOTICE OF CONSTITUTIONAL QUESTION

(Re: Section 45(1) of the Planning Act, R.S.O. 1990, c. P.13)

Dr. Hadi Salmasian

[redacted]

Complainant

[redacted]