LPAT File No. PL180613

ENVIRONMENT AND LAND TRIBUNALS ONTARIO
LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act,* RSO 1990, c P. 13

BETWEEN:

HADI SALMASIAN

(Appellant)

and

170 PRESTON LTD.

(Applicant)

SUBMISSIONS OF THE CITY OF OTTAWA

CITY OF OTTAWA
Legal Services Department
110 Laurier Avenue West
3rd Floor
Ottawa, ON K1P 1J1

Tel: (613) 590-2424 ext. 29521
Fax: (613) 560-1383
LSUC No. 62575V

Kristina.mahon@Ottawa.ca

Kristina Mahon
Lawyer for the City of Ottawa

Zaynab Al-waadh
Student at Law

TO: Dr. Hadi Salmasian
[redacted]

h_salmasian@yahoo.com

Dr. Hadi Salmasian
Lawyer for the Appellant

AND TO: LOCAL PLANNING APPEAL TRIBUNAL
Suite 1500, 655 Bay Street
Toronto, ON M5G 1E5

Tel: (416) 326-6775
Fax: (416) 326-5370

Tomislav.Saric@ontario.ca

Tomislav Saric
Planner, Case Coordinator

1. The Applicant 170 Preston LTD. filed an application for a minor variance for 7 Chestnut Street on May 1, 2018. The City attended at the Committee of Adjustment meeting on June 6, 2018 and provided a report with respect to the planning considerations for the proposed development. The City received notification of the Appellants' appeal on July 9, 2018 and in August informed the Tribunal and the Parties of its intention to seek party status on the scheduled hearing date.

2. The City makes the following argument to demonstrate that section 45(1) of the Planning Act (the "Act") does not violate section 15(1) of the Charter of Rights and Freedoms (the "Charter"). The City further states that section 45(1) of the Act is not vague, but rather, both the statute and case law give clear and unambiguous instruction to the Committee of Adjustment and the Tribunal on how to determine minor variances.

3. Section 45(1) states:

> 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.
>
> ***Planning Act,* R.S.O. 1990, CHAPTER P.13, Book of Authorities Tab 1**

4. For ease of reference the City will follow the general order of argument laid out in the Appellants submissions and will address each of the alleged issues in turn:

   a. Does the LPAT have jurisdiction to hear the Constitutional challenge?
   b. Is section 45(1) of the *Planning Act* unconstitutional because it violates the

appellants section 15.(1) Charter Rights?

c. Is section 45(1) unconstitutionally vague and therefore of no force and effect?
d. If section 45(1) of the Act is constitutional, do the Committee of Adjustment and LPAT have the jurisdiction to hear the applications?
e. If the Committee and LPAT have jurisdiction, should the applications be approved?

Issue A: Does the LPAT have Jurisdiction to hear the Constitutional Challenge?

5. It is agreed by both the Appellant and the City that the LPAT has the legislative authority to hear and determine all questions of fact and law, including issues involving the *Charter* when properly raised before it. In addition to its statutory authority, the LPAT (through the former Ontario Municipal Board or "OMB") itself has acknowledged that it has the jurisdiction to consider *Charter* issues.

> ***Unger v. Onondage (Township),* [1997] O.M.B.D No. 17 (OMB) (Q.L.) at 448.; and *Local Planning Appeal Tribunal Act Section 11(2),* Book of Authorities Tabs 2 and 3 respectively**

6. Despite this, the Supreme Court of Canada (the "SCC") has confirmed that only a Superior Court has the prerogative to formally declare legislation constitutionally invalid. A statutory court may only treat this legislation invalid for the purposes of the matter before it.

> ***Cuddy Chicks Ltd v Ontario (Labour Relations Board),* [1991] 2 SCR 5 (SCC) at para 17, Book of Authorities Tab 4.**

7. As a result, the City agrees with the position that the Appellant can ask the Tribunal to deal with the constitutional question before it. The only question becomes the limit on the disposition available to the Tribunal.

8. The SCC has established a two-part test to determine whether a Charter remedy can be granted. The two-part test is as follows:

    1) Is the administrative tribunal a court of competent jurisdiction?
    2) Does the administrative tribunal have the statutory authority to grant the particular remedy at issue?

    R v Conway, 2010 SCC 22 at paras 83-86, Book of authorities at Tab 5.

9. The Appellant has requested the Tribunal declare section 45 of the Act unconstitutional, which does not meet the above noted test. Such a declaration, which is not admitted but is expressly denied by the City, could only be applied to the subject property. The LPAT does not have the jurisdiction to declare any section of the provincial legislation to be of no force and effect.

10. Further, the Act is a legislative document which confers jurisdiction upon the Tribunal and therefore cannot be altered or amended by the Tribunal itself.

Issue B: Is section 45(1) of the Planning Act unconstitutional because it violates the appellants section 15.(1) Charter Rights?

11. The Appellant has made a number of allegations within his submission alleging that section 45(1) of the Act violates section 15(1) of the Charter. The City disagrees with each of the propositions and interpretations alleged throughout the Appellant submission.

12. Section 15(1) states:

    15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

Charter, s. 15, Constitution Act 1982, Book of Authorities Tab 6

13. The purpose of section 15 was noted by the SCC in *Miron v Trudel*. The SCC clarified that section 15 was created "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance."

***Miron v Trudel [1995] 1 SCR 358, at para 141,* Book of Authorities Tab 7**

14. The Appellant has failed to connect the alleged discrimination with an established protected ground under section 15(1). Nor has he provided an argument to connect the alleged discrimination to an analogous ground to those enumerated under the Charter. As a result, the vague and unclear arguments within the Appellant's submission lack any meaningful connection with the Charter and its ultimate purpose.

15. The Appellant appears to allege that inequality before the law occurs through the application of "different" zoning rules for different properties when a Minor Variance is granted under section 45(1). The City submits that this perception is false. The result of Committee decisions need not be equal across all properties. What is important is that the mechanism of review is not discriminatory against any individual for any ground laid out in section 15. One person's perception of unfairness does not equate to discrimination. Section 45 of the Act provides equality of opportunity for all zoning applications. The permitted zoning and exceptions do not need to be uniform so long as the mechanism to challenge or

receive an exception, such as a minor variance, is equal to all involved and does not discriminate on an established or analogous ground.

16. The City further notes that property ownership status is not a ground of protection under section 15. It is well-established that the Charter does not protect property rights. Moreover, being an "ordinary individual resident acting in personal interest" is also not a ground of protection under section 15, nor has it been proven to be analogous to an established ground.

17. Although the grounds listed in section 15 are not exhaustive, a claimed ground should be *analogous* to an already established ground. The SCC in *Corbiere v Canada (Minister of Indian and Northern Affairs)* stated that analogous grounds must be either "...immutable, like race, or constructively immutable, like religion." In essence, these personal characteristics cannot be changed, or a government should not expect one to change these characteristics in order to be treated equally under the law. The SCC in *Andrews* further states that the analogous grounds analysis should not be restricted to the facts of a particular case, but rather must be conducted "in the context of the place of the group in the entire social, political and legal fabric of our society." It follows, as is mentioned in *Corbiere* that distinctions can be made under an enumerated or analogous ground, but this will not always constitute discrimination within the meaning of section 15(1) of the Charter.

> ***Corbiere v Canada (Minister of Indian and Northern Affairs),* at para 5 and 13, Book of Authorities Tab 8**
>
> ***Andrews v Law Society (British Columbia),* at page 152, [1989] 1 SCR 143, Book of Authorities Tab 9**

18. Economic motivations may vary across a variety of homeowner types, however; these motivations are not grounds under section 15, nor does the motivation impact the application of the section 45(1) test by the relevant committee. So long as the mechanism for determining whether a minor variance is applied equally against all applicants, which the City submits it is, there is no violation of section 15(1) of the Charter. This proposition that it is equal opportunity rather than necessarily equal treatment was reflected *Withler v Canada* (Attorney General), where the SCC states:

> Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination.
>
> ***Withler v Canada* (Attorney General), 2011 SCC 12 at para 31, Book of Authorities Tab 10.**

19. Section 15(1) of the Charter has gone through a few re-articulations since *Law v Canada* (Minister of Employment and Immigration). Essentially, an analysis of section 15(1) of the Charter requires the following steps:

(1) Does the law create a distinction based on an enumerated or analogous ground?
(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

***R. v. Kapp, [2008] 2 S.C.R. 483 (S.C.C.)*, Book of Authorities Tab 11**

20. The Appellant has failed to create a distinction based on an enumerated or analogous ground. With respect to the second branch of the test, permitting a minor variance has not and does not create a disadvantage by perpetuating any form of prejudice of stereotyping. The fact that individuals can apply to vary the zoning on their property is not inherently discriminatory. The application process

before the Committee of Adjustment and the appeal process to the Tribunal ensures that all citizens have an equal right to request or oppose such applications. The fact that zoning and performance standards may differ across properties is not unconstitutional.

Sub Issue 1: The Tort of Nuisance

21. The Appellant has argued that his section 15 rights under the charter are violated by his inability to bring evidence related to any nuisance claim he may experience as a result of the proposed development on the property at 7 Chestnut Street. It is further alleged that limiting the jurisdiction of the Tribunal to land use planning topics is discriminatory.

22. The City must disagree with the Appellant as the Tribunal can hear evidence relating to any adverse impacts which may result from the development. The Tribunal is however appropriately limited to matters of a land use planning nature. The Tribunal was created as an administrative body with specific expertise to address unique matters regarding land use planning. This is not discrimination, it is the practical limit to the jurisdiction required to ensure the Tribunals expertise is not diluted by irrelevant matters which if alleged have an appropriate legal outlet through the Superior Court system.

> ***Local Planning and Appeal Tribunal Act*, 2017, S.O. 2017, c. 23 section 15, Book of Authorities Tab 12**

23. Any allegations of adverse impact can been reviewed as part of the cumulative effect of the proposal which we submit is appropriately part of the four-part test, and is discussed in detail in Section C of the City's submissions. However, any

allegations of a stand-alone nuisance would be a tort falling under the jurisdiction of the Civil Court system. Therefore, it is not that the impact cannot be assessed, it is just that any specific individual claim for nuisance is to be brought before the Court of Competent jurisdiction, being the Superior Courts. The rights of the Appellant to bring a claim are not removed or restricted, they simply must be pursued in a different forum.

Sub Issue 2- Section 1 of the *Charter* – Reasonable Limit on *Charter* Rights

24. In the alternative, should the Tribunal find that discrimination has taken place, which is not admitted and is expressly denied, the City argues that any such infringement of the Charter is justified under the test set out in section 1.

25. Section 1 of the *Charter* provides that an infringement of a *Charter* right may be upheld if the infringement is reasonable and demonstrably justified in a free and democratic society.

Charter s. 1, Constitution Act 1982, Book of Authorities Tab 6

26. The Section 1 or "Oakes" test requires parties to examine:

> First, the objective which the impugned legislation is designed to serve must be of pressing and substantial importance, sufficient to override a constitutionally protected right or freedom. Secondly, the means chosen to achieve the objectives must satisfy a three pronged proportionality test, as follows:
>
> (a) the measures adopted must be rationally connected to the objectives;
> (b) the measures chosen must constitute a minimal impairment on the right; and
> (c) there must be a proportionality between the effects of the measure chosen and the objectives.

***R. v. Oakes* [1986] 1 SCR 103 as cited in R. v. 1676929 Ontario Inc., 2014 ONCJ 370, at para 32, Book of Authorities Tab 13**

27. The City submits that rigid uniform zoning rules would not take into account the site specific requirements of residents and property owners. As a result, the opportunity to vary such rules, as may be required is of sufficient and substantial importance in a free and democratic society. Further, with respect to the three pronged proportionality test, the goal of carrying out the legislative objectives of community planning and development via zoning by-laws and the opportunity to apply for demonstrably necessary site exemptions constitutes a pressing and substantial objective.

> ***R. v. Pinehouse Plaza Pharmacy Ltd.*** **(1991), 4 M.P.L.R. (2d) 1 (Sask. C.A.) at 15-18, Book of Authorities Tab 14**

28. The mechanism of allowing site specific exemptions where appropriate is a rational measure to facilitate the planning goals of the City. Finally, the section is proportional in that minor variances are limited to the specific development project that is seeking one. They are context and site-specific. Moreover, there is no more harm done by the impugned section than any other zoning by-law enacted by a City on good and desirable planning grounds.

> ***R. v. Pinehouse Plaza Pharmacy Ltd.*** **(1991), 4 M.P.L.R. (2d) 1 (Sask. C.A.) at 15-18, Book of Authorities Tab 14**

29. As result, the City submits that if any discrimination is found, it would be saved under section 1 of the Charter.

Issue C: Is section 45(1) unconstitutionally vague and therefore of no force and effect?

30. The City disagrees with the Appellant's suggestion that section 45(1) of the Act is vague and as a result unconstitutional. The Appellant has chosen in his submissions to selectively disregard certain portions of the minor variance test which help to support the clear and concise nature of the test. Specifically, the four-part test for requires that a variance:

a. be a minor variance;
b. be desirable, in the opinion of the committee, for the appropriate development or use of the land, building or structure;
c. maintain, in the opinion of the committee, the general intent and purpose of the zoning by-law; and
d. maintain, in the opinion of the committee, the general intent and purpose of the official plan

***DeGasperis v Toronto (City) Committee of Adjustment [2005, On SCDC] at para 23,* Book of Authorities Tab 15**

31. The Divisional Court agreed with the Board's interpretation of the law in this case and noted:

> ... in addition to what the Board stated I would add that the inclusion of the word "may" in section 45 (1) indicates that the jurisdiction given to a committee of adjustment to grant minor variances is permissive and confers on it a residual discretion as to whether or not grant them even when the four tests are satisfied.

***DeGasperis v Toronto (City) Committee of Adjustment* [2005, On SCDC] at para 23, Book of Authorities Tab 15**

32. The test accounts for the discretion of the Committee to take into account its own opinion and expertise. When the four part test was established, the former OMB further clarified that the tests would not be met by strictly legal points but "by consideration of all of the relevant circumstances" inclusive of evidence from those experienced in land use planning.

***Vedova v. Port Stanley (Village) Committee of Adjustment, 1989 CarswellOnt 3493, 23 O.M.B.R. 53 (O.M.B.) at paras. 7-8,* Book of Authorities Tab 16**

33. The Appellant alleges that the section is unconstitutional due to a perceived lack of clear definition of what constitutes "minor" and "not providing an analytical framework or criteria for determining minor amounts to giving the tribunal discretion over its jurisdiction to decide variances, which equates to state discretion without criteria or oversight about whether a bylaw must be followed, as is the observable outcome in the application results."

Appellant Submission dated August 31, 2018, para 98

34. Principles of statutory interpretation have highlighted that legislatures often use broad terms to demonstrate their intent to allow for the expertise and interpretation of the relevant Judiciary. For example, Randal Graham notes:

> Similarly, s. 63 of the Criminal code prohibits tumultuous disturbances of the peace. "Disturbing the peace" is not defined. Nor does the Code describe how one could disturb the Peace in a "tumultuous" manner. In instances such as these, the drafter has used an extremely broad term for the purpose of delegating the task of filling in the legislative blanks to the judiciary. Judges are able to determine what are "exigent circumstances" because of long exposure to fact situations involving police behaviour. Judges know what "disrupts the peace tumultuously" because of their great experience adjudicating offences against the public order. The legislator, by contrast, has neither the expertise nor the inclination to define these vague terms with specificity. Through the use of the vague language found in these statutes, the legislature acknowledges the judiciary's expertise and grants courts the discretion to apply and interpret the law as they see fit.
>
> **Randal N. Graham, *Statutory Interpretation: Theory and Practice*, 2001 Emond Montgomery publications, page 128, Book of Authorities Tab 17**

35. Mr. Graham goes on to include a footnote for this passage which reads:

> This point is underscored in cases involving statutes that are administered by administrative officials or Tribunals. In such cases, the body charged with administering the statue is often staffed by experts in the relevant legislative field.
>
> **Randal N. Graham, *Statutory Interpretation: Theory and Practice*, 2001 Emond Montgomery publications, page 128, Book of Authorities Tab 17**

36. The use of broad terms alone may arguably pose a problem; however, the committee of Adjustment and the former OMB as well as the present day Tribunal, possess the experience to interpret and apply the term in light of its own experience.

37. In addition, the former OMB had previously addressed the lack of mathematical calculation for what constitutes "minor." The OMB was clear that mathematical calculations and guidance would not be appropriate as what may be minor in one case would not be in another. The OMB has ruled previously that circumstances should be taken into account and as such a strict calculation or framework, as argued for by the Appellant, would not be appropriate.

> ***Rebelo v. Toronto (City) Committee of Adjustment (1991), 25 O.M.B.R. 477, 1991 CarswellOnt 5983 (O.M.B.)*** **at para. 8, Book of Authorities Tab 18**

38. The OMB further found that it is the cumulative effect of a minor variance which is to be considered.

> ***Toronto (City), Re, 1991 CarswellOnt 4376, 27 O.M.B.R. 1 (O.M.B.)*** **at para. 99, Book of Authorities Tab 19**

39. Finally the OMB has noted:

> Whether a variance is minor or not cannot be regarded as a robotic exercise of the degree of numeric deviation, but must be held in light of the fit of appropriateness, the sense of proportion, a due regard to the built and planned environ, the reasons for which the requirement is instituted, the suggested mitigation conditions to address the possible concerns and last, but not the least, the impact of the deviation. The performance standards of the zoning bylaw are not an end, but a means to an end, a decision-maker must therefore chase after the question whether the planning objectives would be fulfilled if the variance were to be allowed. The decision-maker must not embark on a tautological and circular exercise of why one cannot abide by the requirements.

***Toronto Standard Condominium Corp #1517 54 O.M.B.R. 102 2006, at para 11,* Book of Authorities Tab 20**

40. The OMB has repeatedly provided guidance on how to interpret a minor variance. Further, the language in section 45(1) paired with the established test for a minor variance creates a cohesive framework in which the decision maker can evaluate the proposed application. As a result, a rigid definition is not required or appropriate and the legislation and its constant interpretation support an analysis of the cumulative effect of a minor variance rather than a strict universal calculation which would not apply evenly across all applications.

41. Further to the above, the Appellant himself has referenced the Divisional Court decision of ***DeGasperis v Toronto (City) Committee of Adjustment***. In this decision the Court "emphasized that the definition of something "minor" is something that is 'lesser or comparatively small in size or importance' such that a variance could be more than minor because it is too large, or too important. The Court stated that a minor variance could be too large even if it will likely have no other impacts." This decision is important as the Court explicitly stated its opinion regarding Section 45 noting that the language was "adequately clear."

***DeGasperis v Toronto (City) Committee of Adjustment [2005, On SCDC],* at para 10, Book of authorities at Tab 15**

42. The decision further addresses the language used in section 45 and specifically notes:

> In exercising its discretion, a Committee is entitled to take into account anything that reasonably bears on whether or not an application should be granted and, in my view, need and hardship are factors that, in appropriate cases, can properly be taken into account. However, even when these

> factors are taken into account and an application for a minor variance is granted, that does not transform the granting of the minor variance into a special privilege.
>
> ***Vincent v DeGasperis [2005, On SCDC] at para 23,* Book of Authorities Tab 15**

43. While the Appellant appropriately cites *R. V Nova Scotia Pharmaceutical Society* as defining the doctrine of vagueness to include two rationales, being "a law must provide fair notice to citizens and must limit enforcement discretion", he has failed to acknowledge the Courts explicit support that laws may require general language to ensure their objectives. Specifically, the case notes:

> laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.
>
> ***R v Nova Scotia Pharmaceutical Society*,[1992] 2 SCR 606 at para 69, Book of Authorities Tab 21**

44. The explicit language requested by the Appellant to define "minor" is not a practical option given the degree of variation between such applications. As a result, a combination of the four-part test, case law and the expertise of the decision maker is the appropriate framework for such matters.

45. The existence of section 45(1) is proof that the legislature intended to allow for variations to existing zoning by-laws through a specialized process. As a result,

the Committee of Adjustment was created and empowered to review such applications. The judicial history interpreting minor variances demonstrates that while the term "minor" cannot be explicitly defined, there is sufficient information and relevant expertise in planning and development matters to ensure a fair interpretation and outcome. Section 45 paired with the four-part test and the individual discretion and experience of the Committee of Adjustment, and where appealed, the Tribunal, results in a framework that cannot reasonably be defined as vague.

Issue D: If section 45(1) of the Act is constitutional, do the committee and LPAT have the jurisdiction to hear the applications?

46. The Appellants submission at page 45 questions the jurisdiction of the Committee and the Tribunal to hear the application for the minor variance. The City disagrees with this proposition and would note that both parties in their submissions have conceded that the Tribunal has the jurisdiction to hear any question of fact and law. As a result, there should be no debate as to whether the Tribunal can proceed to hear this application.

Local Planning Appeal Tribunal Act Section 11(2), **Book of Authorities Tab 3**

Issue E: If the Committee and LPAT have jurisdiction, should the applications be approved?

47. The City does not intend to take a position on the planning merits of the application. The City's submissions are limited to those of the constitutional challenge as outlined throughout our submissions.

Conclusion

48. The City respectfully submits that the Appellant submissions have failed to demonstrate any unconstitutionality or vagueness on the part of section 45(1) of the Planning Act.

49. In the alternative, should the Tribunal find that discrimination has taken place, which is not admitted and is expressly denied, the City submits that any such infringement of the Charter is saved by the test set out in section 1 of the Charter.

50. As a result, the City requests dismissal of the appeal as it relates to the constitutional question.

All of which is respectfully submitted on this 21st day of September, 2018.

September 21, 2018

Kristina Mahon

CITY OF OTTAWA
Tel: (613) 590-2424 ext. 29521
Fax: (613) 560-1383
LSUC No. 62575V

Counsel for the City of Ottawa