LPAT File No.: PL180613

ENVIRONMENT AND LAND TRIBUNALS ONTARIO
LOCAL PLANNING APPEAL TRIBUNAL

BETWEEN:

HADI SALMASIAN

(Appellant)

and

170 PRESTON LTD.

(Applicant)

SUPPLEMENTARY SUBMISSIONS OF THE APPELLANT DR. HADI SALMASIAN

(RE: CITY'S MOTION FOR PARTY STATUS, CITY'S SUBMISSIONS, AND STATUTORY AUTHORITY OF LPAT)
(Re: lot on 7 Chestnut Street, Ottawa)

Appellant's submissions in the matters scheduled to be argued for one day starting on Wednesday, October 3, 2018, at 10:00 AM, at City Hall, Keefer Room, 110 Laurier Avenue W., Cartier Square, Ottawa, ON K2P 2L7.

Minor Variance Application to the Committee of Adjustment, City of Ottawa
File No.: D08-02-18/A-00159.
Owner(s): 170 Preston Ltd.
Location: 7 Chestnut Street.

September 24, 2018 **Dr. Hadi Salmasian** (Appellant)

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City's submissions and City motion for party status

1. The Appellant welcomes the City's arguments and helpful information about the constitutional issue **(City's submissions dated September 21, 2018)**.

2. The Appellant consents to the said City's submissions, as an intervention that provides constitutional information and perspective.

3. The City is refusing to give notice in advance of the (October 3, 2018) hearing of its legal grounds for a motion requesting party status.

4. The Appellant fails to see valid legal grounds whereby the City would acquire party status, rather than intervener status in aid of the tribunal.

5. Not having seen the City's motion argument, the Appellant at this time expects to oppose that the City would be granted full party status in this contested application.

Appellant's Response to the City's submissions

6. For efficiency at the hearing, the Appellant gives this advance response, including specifying areas where the Appellant agrees with the City, in the same order as presented by the City.

1
"Does the LPAT have Jurisdiction to hear the Constitutional Challenge?"
(City's paras. 5 to 10)
The Appellant agrees: Of course the LPAT does not have the jurisdiction to strike down a provincial statute but rather is obliged not to apply it if it is unconstitutional

7. The Appellant agrees with the City's explanations (City's paras. 5 to 10).

8. The Appellant is asking that LPAT find that the impugned provision cannot be applied because it is not constitutional. The "declaratory finding … and therefore cannot be applied" requested by the Appellant (his para. 116(a)) is solely to that effect.

9. The Appellant of course agrees that the LPAT does not have the jurisdiction to strike down a provincial statute, which is not an issue in the appeal.

2
"Is section 45(1) of the Planning Act unconstitutional because it violates the appellant's s. 15.(1) Charter Rights?"
(City's paras. 11 to 20)
The City's argument is a technicality that does not preclude unconstitutionality for violation of the principle of equality before and under the law

10. The city argues that the Appellant cannot or has not proven discrimination against an enumerated or analogous group, and therefore that no violation of s. 15(1) is established.

11. To the Appellant's knowledge, the Supreme Court has not decided a case focused on s. 15(1) equality before and under the law without connection to the discrimination provision. [1]

12. In any case, the City's argument is a technicality that cannot decide the constitutional question.

13. Equality before and under the law is constitutionally guaranteed by the rule of law. In the words of Chief Justice of Canada Beverley McLachlin: [2]

> "The rule of law excludes the exercise of arbitrary power in all its forms. It requires that laws be known or ascertainable to citizens, and ensures that laws are applied consistently to each citizen, without favouritism, thus ensuring the legitimacy of state exercise of power."

14. The City itself admits this principle when it states: "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." (At City's para. 18).

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[1] For a discussion of the legal distinction between the "equality" and "discrimination" provisions of s. 15(1) of the *Charter*, see professor Elliott's comment: "Comment on Andrews v. Law Society of British Columbia and Section 15(1) of the Charter: the Emperor's New Clothes?", by Davis W. Elliott, *McGill Law Journal*, 1989, vol. 35, pages 235-252. http://lawjournal.mcgill.ca/userfiles/other/7764122-Elliot.pdf

[2] "Unwritten Constitutional Principles: What is Going On?", Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand, Wellington, New Zealand, December 1st, 2005. https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx

15. In this appeal, s. 45(1) of the Planning Act has structural (built-in) inequality: It allows the applicant to cause harm (nuisance) to a neighbour by violating a bylaw intended to protect the said neighbour, while not statutorily limiting the variance magnitude or impact, and while not requiring that the said harm (nuisance) be avoided, considered, minimized, or balanced.

16. The said structural inequality results in quantitative differential treatment of applicants versus neighbours, seen in:

i. the resulting developments in the neighbourhood,
ii. the body of committee and tribunal decisions, and
iii. the statistics of overwhelming approval rates of applications.

17. Thus, the applicant's inequality ground for unconstitutionality is not contingent on the *Charter*; it is not contingent on establishing that he is part of an enumerated or analogous group; and it is not contingent on the discrimination provision of s. 15(1) of the *Charter*. [3]

3
"The Tort of Nuissance"
(City's paras. 21 to 23)

Access to the courts for civil claims of nuisance is irrelevant to this appeal. It offends the rule of law that LPAT has unfettered discretion whether or not to hear or consider or balance any nuisance-harm complaint whatsoever, in approving an application to violate a bylaw that protects residents

18. This appeal is not about access to make a civil claim for damages pursuant to the tort of nuisance. Those City's comments are irrelevant (City's para. 23).

19. In different words, the City basically argues that the LPAT has an implied statutory authority to hear nuisance-harm complaints in deciding applications to violate bylaws.

20. <u>The City misses the point</u>: The impugned provision that grants the LPAT the power to approve applications to violate bylaws leaves the LPAT with unfettered discretion whether or not to hear or consider or balance any nuisance-harm complaint whatsoever. No other province has the said statutorily unfettered discretion in its statutory minor variance provision while not defining "minor" (See Appellant's table of provincial minor variance provisions, main submissions).

[3] See footnote 1, above.

21. As such, the impugned provision's omission of limits on nuisance-harm to neighbours, in approving violations of bylaws that protect residents, is part of the said structural (built-in) inequality that violates the rule of law (see above).

4
"Section 1 of the *Charter* — Reasonable limit on *Charter* Rights" (City's paras. 24 to 29)
The Appellant has clarified that his inequality ground for unconstitutionality of the impugned provision is not contingent on the *Charter*

22. As clarified above: Unconstitutionality of the structural (built-in) inequality before and under the law in the impugned provision follows from the rule of law. The said inequality is not merely or solely a *Charter* right. Therefore, the said unconstitutionality cannot be saved by section 1 of the *Charter*, which does not apply to the foundational constitutional principle of the rule of law.

23. The City states a false premise that underlies its overall analysis (at City's para. 28):

> "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."

24. Thus the City incorrectly fails to distinguish between:
i. the bylaw enacted in a democratic and participatory process, and
ii. a statutory provisions that empowers an unelected committee or tribunal to grant applications to violate the said bylaw that is intended *inter alia* to protect residents.

25. In one statement, the City fairly summarizes the underlying rational that makes minor variance laws acceptable in a free and democratic, which is consistent with the international jurisprudence on minor variance laws (at City's para. 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." [appellant's emphasis]

26. Only Ontario removes the applicant's onus to establish "required" and ignores the underlying rational that rare site-specific circumstances can make it overly

burdensome or impossible to follow all the bylaw provisions (See Appellant's table of provincial minor variance provisions, main submissions).

27. The City then admits that it is using the minor variance provision as a planning instrument (at City's para. 28):

> "The mechanism of allowing site specific exemptions where appropriate is a rational measure to facilitate the planning goals of the City."

5

"Is section 45(1) unconstitutionally vague and therefore of no force and effect?" (City's paras. 30 to 45)

The City incorrectly subsumes the statutory jurisdictional threshold question of whether the variance is "minor" into the category of statutorily specified questions over which the LPAT has discretion

28. In its whole section, the City incorrectly subsumes the statutory jurisdictional threshold question of whether the variance is "minor" into the category of statutorily specified questions over which the LPAT has discretion.

29. Statutory jurisdiction of a tribunal is not open to discretion. It is answered by analysis of the statutory language.

30. The City's own quoted authority makes this clear (quoted at the City's para. 30). In the said quoted authority, the first condition ("a") that the variance be "minor" is a "required" condition without qualification, whereas the other three conditions ("b", "c" and "d") in the so-called (and misnamed) "four-part test" are each explicitly qualified with "in the opinion of the committee". [4]

31. The City fails to distinguish:

i. the benefits of general statutory language for administrative tribunals to advance the objectives of a tribunal's home statute, and
ii. vague language in specifying and delimiting a tribunal's statutory jurisdiction.

32. This, where s. 45(1) is expressly a provision specifying and delimiting the power of the tribunal. The statutory section is entitled "Powers of committee".

[4] *Vincent v. Degasperis*, 2005 CanLII 24263 (ON SCDC), http://canlii.ca/t/1l4rd , see para. 23 — which the City refers to as "*DeGasperis v Toronto (City) Committee of Adjustment [2005, On SCDC] at para 23*, Book of Authorities Tab 15"

33. As such, the City's authorities on the benefits of "general language" are distinguished, and are not relevant to this appeal (City's paras. 34 to 40).

34. Administrative tribunals derive their jurisdictions from their enabling statutes:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose.
>
> ***Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, 1989 CanLII 67 (SCC), http://canlii.ca/t/1ft4g , at p. 1756(d-e)**

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. […]
>
> […] second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third […]
>
> ***Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII), http://canlii.ca/t/1vxsm , at paras. 29 and 30**

35. Further, the Appellant submits that the power to override a democratically developed and passed bylaw is a power of judicial character. Therefore the power must be presumed to be delimited and requires clear words in the enabling statute:

> The characterization of the power in question cannot proceed without reference to the exorbitant nature of the penalties which are available to secure compliance. In light of the judicial nature of the power, an extension of the power so that it would be exercisable in an administrative context would be an exceptional enlargement of its application. The power cannot be envisaged to be so broad in the absence of clear wording to that effect. [Emphasis added]

***Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724, 1993 CanLII 31 (SCC), http://canlii.ca/t/1frzw , at pp. 738(j) to 739(a)**

36. The City argues that the general discretionary provisions of s. 45(1) weaken the unqualified condition that the variance must be "minor". It argues for an integral fusing of all the elements of the so-called "4-part test" (City's paras. 40 and 44). The City's position is not correct:

> It is a fundamental rule of interpretation that the meaning of general provisions in the Code cannot be developed in such a way so as to give to the Board powers which are broader than those expressly and specially provided for elsewhere. In Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board, 1984 CanLII 26 (SCC), [1984] 2 S.C.R. 412, at p. 432, Beetz J. referred to the reasons for this principle of interpretation as twofold: first, the general may not be interpreted so as to render unnecessary the other provisions setting forth the power of the Board, and second, the limitations inherent in the specific provisions which detail the powers of the Board must be abided by if the intent of the legislature is to be respected. One of the issues in that case was the proper relationship between a broader, general provision, s. 121 of the Code, and the grants of powers made specifically elsewhere in the Code. [Emphasis added]

***Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724, 1993 CanLII 31 (SCC), http://canlii.ca/t/1frzw , at p. 741(e-i)**

6

"If section 45(1) of the Act is constitutional, do the committee and LPAT have the jurisdiction to hear the applications?"
(City's para. 46)
The City refuses to acknowledge that the Appellant makes a true statutory jurisdictional challenge: that the variance must be "minor" as a threshold condition before the LPAT has the statutory authority to decide the application

37. The City is refusing to acknowledge that the Appellant makes a true statutory jurisdictional challenge, that the variance must be "minor" as a threshold condition before the LPAT has the statutory authority to decide the application.

38. The LPAT must hear the said jurisdictional challenge, unless it first denies the application for other reasons, such as unconstitutionality.

39. The question of statutory jurisdiction to hear and decide the application on the condition that the variance is “minor” is a distinct legal issue in this appeal, which shares some factual commonality with the other issues.

All of which is respectfully submitted on this 24th day of September, 2018.

September 24, 2018

Dr. Hadi Salmasian
Appellant

[redacted]

[redacted]