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CITATION: Toronto District School Board v. City of Toronto, 2014 ONSC 3605
COURT FILE NO.: CV-14-501737
DATE: 20140613

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TORONTO DISTRICT SCHOOL BOARD Applicant	*Gordon Petch* for the Applicant
- and -	
THE CITY OF TORONTO Respondent	*Kirsten Franz* for the Respondent
	Heard at Toronto: February 27, 2014

DECISION

D.L. CORBETT J.

[1] This application concerns a proposed refurbishment of outdoor sports facilities at Central Technical School, a large public high school at the corner of Bathurst and Harbord Streets in Toronto. The TDSB proposes to contract with a private business, Razor Management Inc. ("RMI"), to improve playing field facilities, including installation of a dome to make those facilities available during unseasonable winter months (the "Proposal").

[2] The City decided that the Proposal requires a minor variance from the Committee of Adjustment. After hearing from interested parties, the Committee of Adjustment declined to grant the requested variance. An appeal from that decision to the Ontario Municipal Board has been commenced but not yet scheduled.

[3] In this application, the question is whether the Proposal complies with the City's zoning by-law. If it does, then the TDSB does not need a variance from the Committee of Adjustment and the planned appeal to the OMB is moot. If the Proposal does not comply with zoning requirements, then it was for the Committee of Adjustment to decide whether a variance should be granted, and it is for the OMB to consider an appeal from that decision.

[4] The City and the TDSB agree that the Proposal does not comply with the by-law unless it fits within the exemption accorded to public schools under s.11(1) of the by-law (the "Exemption"). And that is the real issue here: whether the Proposal fits within the Exemption.

Summary and Disposition

[5] Commercial exploitation of TDSB facilities is not a "school use" of TDSB premises. This does not mean that commercial exploitation of TDSB facilities is never permissible under the Exemption. The City interprets the Exemption to permit incidental use of school premises for purposes other than education or instruction by the TDSB, so long as the basic character and nature of the school use of the facilities is unchanged. Where the intensity of this non-TDSB use rises above incidental, then it is no longer within the Exemption. This court need not decide precisely where to draw the line for permissible "incidental use" by persons other than the TDSB. This is a matter for the City to decide on a case-by-case basis, so long as its decisions are reasonable.

[6] The Proposal falls well across the line of "incidental use" of TDSB facilities for commercial purposes. It is not covered by the Exemption. It therefore follows that the City's decision to this effect was reasonable, and the TDSB followed the correct procedure in seeking a minor variance from the Committee of Adjustment. The proper process for the TDSB to follow now is an appeal from the Committee of Adjustment to the OMB. And so, for the reasons that follow, this application is dismissed.

Structure of this Proceeding

[7] The TDSB structures its application as a request for a declaration pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure*.[1] The terms of the requested declaration vary somewhat between the factum and the notice of application. In paragraph 2 of the TDSB's factum, it expresses its request in the following terms:

> TDSB seeks a declaration that the Exemption allows use of the TDSB sports field and track at CTS… to be used only for teaching or instruction for non-educational purposes for soccer, football and field sports after school hours, by private persons other than TDSB staff to persons other than TDSB students.

[8] The City takes the position that the TDSB has not approached the dispute correctly. This is, at its heart, an appeal from the decision of the City's Chief Building Official ("CBO") that the Proposal does not fit within the Exemption. I agree with the City. This is not a case where the court is asked to strike down a provision in a by-law for vagueness.[2] Rather, this case concerns, directly, whether the Proposal fits within the Exemption, the precise subject-matter of the CBO's decision. It is not appropriate for the court to provide a broad advisory opinion on the meaning of the Exemption, except so far as it is necessary to do so to decide the matters in issue between the parties.

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[1] R.R.O. 1990. Reg. 194, R.14.05(3)(d).
[2] *2312460 Ontario Ltd.* v. *City of Toronto* (2013), 115 O.R. (3d) 206 (S.C.J.), per Himel J.

[9] In any event, as will be clear from the reasons that follow, the principles on which I base my decision necessarily imply that I would dismiss the TDSB's request for a declaration on the merits.

(a) Decision Under Appeal

[10] In September 2013, the TDSB submitted an application for a preliminary project review (`PPR`) of the Proposal. The PPR sought a decision from the CBO as to whether the Proposal complied with the City`s zoning by-law.

[11] The application was considered by a Zoning Examiner, who is a staff member of "Toronto Building" whose job it is (among other things) to consider whether a proposal is a "permitted use" under the City`s by-laws.

[12] The Zoning Examiner concluded that the Proposal was not a "permitted use" because it did not fit within the Exemption.

[13] The TDSB did not challenge the Zoning Examiner's decision. Rather, it asked the Committee of Adjustment to grant a minor variance to permit the Proposal. As noted above, the Committee of Adjustment declined to do so.

[14] Following the Committee of Adjustment's adverse decision, the TDSB took the position that the Exemption does apply to the Proposal and that Committee of Adjustment approval is not required. The Proposal was then reviewed again, this time by the City's Deputy Chief Building Official, who also decided that the Proposal does not fit within the Exemption.

[15] The initial decision of the Zoning Examiner, and the subsequent decision of the Deputy Chief Building Officer, are both considered, in law, decisions of the CBO.[3]

[16] Section 25(1) of the *Building Code Act* provides:

> A person who considers themselves aggrieved by an order or decision made by the [CBO]… may appeal the order or decision to the Superior Court of Justice….[4]

(b) Time for Appeal

[17] Subsection 25(1) of the *Building Code Act* provides that an appeal is to be brought within 20 days of the impugned decision. A judge may extend this deadline where "there are reasonable grounds for the appeal and for applying for the extension". The City agrees to, and I therefore grant, the necessary extension in the time to appeal.[5]

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[3] See Angelucci Affidavit, Respondent's Record, para. 3; Angelucci cross-examination, Q. 51.
[4] *Building Code Act, 1992*, S.O. 1992, c.23, s.25(1).
[5] *Building Code Act, 1992*, S.O. 1992, c.23, s.25(2).

(c) Standard of Review

[18] The standard of review of a CBO's decision depends on the nature of the decision. Questions of law are reviewed on a standard of correctness. Questions of fact are entitled to deference. Questions of mixed fact and law are reviewed on a standard reflecting the degree to which the decision is a question of law or a question of fact.[6]

> Considering these principles, it must be recognized that municipal planning and zoning are specialized areas which fall within the expertise of the CBO. Most of the determinations made by CBOs in the context of by-law interpretation are mixed questions of fact and law. This requires a significant degree of deference for all but purely legal questions. For most issues, the standard of review will be reasonableness.
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> …
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> [T]o be upheld on a reasonableness standard, the decision must fall within a range of possible, acceptable outcomes which are defensible in respect of both the facts and the law.[7]

(d) The CBO's Decision

[19] Both sides agree that the proposed project does not comply with the City's zoning by-law unless it fits within the Exemption, which is set out in s.11(1) of the City's By-law 438-86:

> Notwithstanding anything hereinbefore contained, none of the provisions of this by-law applies:
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> …
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> 2. to any land, building or structure that, on June 16, 1986, was owned by the Board of Education for the City of Toronto or the Metropolitan Separate School Board as long as the land, building or structure is used only for teaching or instructional purposes, including purposes accessory thereto, provided the land, building or structure, and any addition thereto, is or was originally constructed for those purposes.

[20] On the basis of the materials before him, the Zoning Examiner decided that the Proposal would "not be solely dedicated to educational purposes" and therefore did not fit within the

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[6] *1218897 Ontario Ltd.* v. *Toronto (City)*, [2005] O.J. 4607, paras. 4-6, per Ducharme J.; *Runnymede Devel. Corp.* v. *1201262 Ont. Inc.* (2000), 47 O.R. (3d) 374 at 385-387 (S.C.J.).
[7] *Berjawi* v. *Ottawa (City)* [2011] O.J. No. 379, para. 12.

Exemption.[8] The Deputy Chief Building Official, on the basis of the materials before him, came to the same conclusion.

[21] Both the Zoning Examiner and the Deputy Chief Building Official rested their conclusions on the following findings:

(a) The proposed facilities would be used 30% of the time by the TDSB and 70% of the time as commercial recreational facilities by RMI;

(b) RMI would use the facilities intensively during the 70% of the time it controlled them;

(c) While there might be some instruction carried out during commercial use of the proposed facilities, the bulk of the commercial use of the facility would not include an instructional component;

(d) A commercial recreational facility is not a "school" use of the property.

[22] This analysis presupposes that the Exemption may apply where facilities are used for "teaching or instruction" that is not provided by or at the behest of the TDSB. The TDSB accepts this premise and on this basis takes issue with the CBO's decision. It does not challenge findings (a) and (b). However it disagrees with findings (c) and (d), without which, it argues, the decision cannot stand.

[23] In respect to finding (c), the TDSB argues that all of the activities at the proposed facilities will fit within the category of non-educational "teaching or instructional purposes, including purposes accessory thereto". I agree with the TDSB that the nature of the activities undertaken at the facilities during the periods that they are used by RMI will not differ in nature or quality, or for that matter in virtue, from the activities undertaken during the time the facilities are used by the TDSB. I reject an arid analysis based on whether "students" are being "taught" how to play football, or whether a person labelled a "coach" is present while "students" are using the facilities. Obviously an organized gym class would fall squarely within a traditional view of "teaching or instructional purposes", but the TDSB is hardly restricted to using its recreational facilities solely for curricular gym classes. The facilities would be used by RMI for the same essential purposes as they would be used by the TDSB.

[24] In respect to finding (d), the TDSB is correct in noting that a "commercial recreational facility" is not a defined "use" under the City's by-law. And I agree with the TDSB that the City's characterization of the proposed "use" by RMI as a "place of amusement" is questionable. I do, however, agree with the City's conclusion that the use to be made by RMI is not a "school" use for the simple reason that RMI is not a school. If the proposed facility was to be constructed on vacant lands, unconnected with a school, there would be no cogent argument that the proposed facility was properly considered a "school" within the by-law. Similarly, an existing commercial recreational facility that is rented out to private customers does not somehow

[8] Zoning Notice dated September 13, 2013, Respondent's Record, p.42.

become a "school" because a school starts to rent the facilities some portion of the time. Further and in any event, this finding is really beside the point: the issue is not whether the Proposal would be a "school use" of the property, or some other kind of "use". The parties have already agreed that unless the Proposal fits within the Exemption that it does not comply with the by-law.

The Proper Analysis

[25] Findings (a) and (b), described above, are determinations of fact. They are reasonable. They are not challenged by the TDSB. I accept them.

[26] Finding (c) is based on a legal premise that I consider to be incorrect – that the "teaching" or "instruction" referenced in the Exemption can be provided by persons other than TDSB or persons working at TDSB's behest. This interpretation has evolved to take account of incidental use of school facilities that does take place and has taken place for decades, and is not considered inconsistent with the character of TDSB facilities as "schools". I accept the City's general position that the Exemption can and should be interpreted to permit these incidental activities authorized by the TDSB. I do not accept that the City has correctly stated the principles that support this longstanding reasonable application of the Exemption.

[27] The Exemption has been in the City's by-law since the 1950's. It was enacted to encourage the TDSB's response to climbing enrolments in a growing city experiencing the post-war baby boom. The Exemption was not enacted so that the TDSB could exploit its facilities commercially to raise money for TDSB purposes.[9]

[28] This is not to say that commercial exploitation of TDSB facilities is a bad thing. Rather, it is to say that it presents potential concerns when it comes to planning and zoning issues. The Proposal illustrates some of these concerns. Intensive commercial use of recreational facilities could present significant traffic, parking, noise and even policing concerns. There may be concerns about its overall impact on the character of the neighbourhood. There are obvious benefits to enhanced athletic facilities at a high school. And there are obviously benefits to having and encouraging the use of recreational facilities by the general public. But just because there may be benefits does not mean that legitimate planning concerns should not be addressed through the usual process.

[29] This is the second time the TDSB has proposed a contract with a private firm to enhance athletic facilities at a public school. It did so previously at Monarch Park High School. The Committee of Adjustment granted the variance for Monarch Park.[10] The TDSB has 176 high schools in Metropolitan Toronto. It is not suggested that the TDSB will plan similar projects at all of these schools. But if, in the TDSB's eyes, the Monarch Park project has been a success and the Central Tech Proposal is implemented successfully, then the TDSB may wish to consider

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[9] See Lehman Affidavit, Respondent's Record, para. 3.
[10] The question of whether a variance was needed was not litigated in connection with the Monarch Park project.

similar arrangements at other schools. Four other proposals are apparently in the planning stages now.

[30] In principle, there is no reason why these sorts of projects need be limited to playing fields. Projects could be considered for other kinds of athletic facilities such as hockey rinks and tennis courts. And, conceptually, potential projects need not be limited to sporting facilities. One could imagine similar arrangements involving food services, parking, auditoria, and even classroom facilities.

[31] This case is not about whether the Proposal is a good plan. It is not about whether "public-private" contracts for enhancement of public school facilities are in the public interest. What is of concern, in this case, is the proper process for a proposal such as the one in issue. If the Exemption applies then it is the TDSB, and the TDSB alone, that decides on whether to implement these sorts of projects. If the Exemption does not apply, then the TDSB requires a variance to the City's zoning by-law through a process that requires consultation and potential input from affected members of the community.

[32] For example, suppose the TDSB constructed parking facilities for its staff and students. There would be a good argument that these facilities would fall within the Exemption and could be built without a minor variance from the Committee of Adjustment. However, a private multi-storey parking garage, some of which would be used by staff and students, but most of which would be used commercially, would not fit within the Exemption.

[33] In my view this analysis is ineluctable but for one practical interpretive problem: the Exemption applies for facilities "used only for teaching or instructional purposes".

[34] Schools have long permitted some community groups or members to use school facilities for purposes other than "teaching or instructional purposes, including purposes accessory thereto" by the TDSB. I do not have a comprehensive list of these uses, which range from casual use of basketball courts, to weekly meetings of scout groups, to polling stations during elections. I understand from the record that there has been more intensive use of school facilities for non-school purposes in recent years, but I do not have more than anecdotal information about the intensity of these uses.

[35] The City justifies non-school use of school facilities by its interpretation that "teaching and instruction" may be provided by persons other than the TDSB or persons working at TDSB's behest. In this way the City has respected the absolute nature of the word "only" in the by-law. In reality, however, the City does not police the incidental use made of schools by non-TDSB persons, nor should it: so long as these incidental uses do not affect the nature of the facility and its use as a "school", this should be a matter for the TDSB to manage. In substance, the City has interpreted the word "only" to mean "almost always" or perhaps "principally", and in this way has allowed use of school facilities by persons other than the TDSB.

[36] The City's conclusion that the Exemption should not prohibit incidental non-TDSB use of school facilities permits sensible use of school facilities by groups such as scouts. These incidental uses do not change the overall nature of the use made of the premises as a school. This interpretation is reasonable and consistent with the history and purpose of the Exemption.

The Proposal does not fit within the Exemption, properly interpreted in this way, and the CBO's decisions to this effect are reasonable. The application is dismissed.

[37] This is not a case for costs.

D.L. CORBETT J.

Date: June 13, 2014