

CITATION: Toronto District School Board v. City of Toronto, 2014 ONSC 5494
DIVISIONAL COURT FILE NO.: 299/14
DATE: 20140930

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN, ASTON AND SWINTON JJ.

B E T W E E N:)
)
TORONTO DISTRICT SCHOOL BOARD) *Gordon Petch and Zaid Sayeed, for the*
) Applicant (Appellant)
)
Applicant (Appellant))
)
- and -)
)
THE CITY OF TORONTO) *Kristen Franz and Nicholas Rolfe, for the*
) Respondent (Respondent on Appeal)
)
Respondent)
(Respondent on Appeal))
)
-and-)
)
HARBORD VILLAGE RESIDENTS) *Tim Gleason and Sean Dewart, for the*
ASSOCIATION) Intervenor
)
)
Intervenor)
)
) **HEARD at TORONTO: August 22,**
) 2014

Swinton J.:

[1] The Toronto District School Board (“the Board”) appeals from the decision of Corbett J. (“the application judge”) dated June 13, 2014, in which he dismissed the Board’s appeal from a

decision of the City of Toronto's Chief Building Official ("CBO"). The CBO had determined that an exemption found in s. 11(1)2 of *City of Toronto By-law 438-86* ("the By-law") did not permit a proposed use of one of the Board's secondary schools whereby a private company would refurbish and operate a sports recreational facility on the school property and share the facility with the school. The application judge held that the decision of the CBO was reasonable.

[2] At issue in this appeal is the proper interpretation of the exemption in the By-law and its application to the facts in evidence. Although I do not agree with the interpretation of the By-law given by the application judge, I would nevertheless dismiss the appeal, as the decision that the exemption does not apply to the Board's proposal is amply supported by the evidence.

Factual Background

[3] In September 2013, the Board submitted an application to the CBO for Preliminary Project Review ("PPR") of a proposed sports facility to be located on the property of Central Technical School ("the School"). The application was submitted on behalf of the Board by the principal of Razor Management Inc. ("RMI"), a private company.

[4] The Board intends to enter into a 20 year agreement with RMI whereby RMI will remediate the sports field of the School through decontamination of polluted ground, installation of artificial turf on the playing field, resurfacing of the track, installation of an inflatable dome (to be inflated from November to April), and construction of a clubhouse containing change rooms, washrooms and office space. RMI will maintain and manage the facility without cost to the Board.

[5] The School will have exclusive use of the facilities from 7 AM to 5 or 6 PM on school days during the school year. RMI will have the use of the facilities from 5 or 6 PM to midnight on school days and all day on school holidays, weekends and during the summer months. RMI plans to charge a fee to individuals and groups who wish to use the sports field for activities such as adult and children's soccer, football and frisbee. According to the evidence, the School will have use of the facilities approximately 30% of the time and RMI 70% of the time.

[6] The area in which the School is located is zoned R4. Along with residential uses, public schools are a permitted use. Section 11(1)2 of the By-law contains a "permissive exception" applying to school board lands that allows the Toronto District School Board and the Toronto Catholic District School Board to further develop land owned by them under certain conditions without the need to comply with other requirements of the By-law relating to matters such as height, massing, setbacks and parking. The exemption states:

Notwithstanding anything hereinbefore contained, none of the provisions of this by-law or of any restrictive by-law applies: (1997-0422)

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 these purposes (425-93) [emphasis added] ...

[7] The By-law also defines “accessory” as

Where used to describe a use, building or structure, means that the use, building or structure, is:

(i) naturally and normally incidental, subordinate in purpose or floor area, or both, and exclusively devoted to a principal use, building or structure; and (1995-0190)

.....

[8] In a decision dated September 13, 2013, a Zoning Examiner determined that the Proposal did not satisfy the requirement that the proposed use be “only for teaching or instructional purposes”, nor was it accessory to those purposes, given that the proposed use was a private recreational facility. The decision stated,

The proposed air supported structure over the existing playing field and new permanent building, intended for private use after school hours, will not be solely dedicated to educational purposes.

[9] The Board then sought approval for a minor variance from the Committee of Adjustment, which was refused in April 2014. That decision is under appeal to the Ontario Municipal Board.

[10] In the meantime, the Board commenced proceedings in the Superior Court of Justice in February 2014, seeking a declaration that the exemption in the By-law applied to the Proposal. In materials filed for the court proceeding, Mario Angelucci, Director and Deputy Chief Building Officer for the City of Toronto, Toronto and East York District, filed an affidavit dated April 28, 2014 stating that he had reviewed the Proposal, and he confirmed the decision of the Zoning Examiner.

The Decision of the Application Judge

[11] Although the court proceeding commenced as an application for a declaration, the application judge characterized the proceeding as an appeal from the CBO under s. 25 of the *Building Code Act, 1992*, S.O. 1992, c. 23. After granting an extension of time to appeal, he heard and dismissed the appeal.

[12] The application judge interpreted the exemption as applying only where the land, building and structure owned by the Board is used for teaching or instructional purposes delivered by the Board and its employees or by those working on behalf of the Board (Reasons, para. 26).

[13] While the application judge did not expressly state that RMI’s proposed use was not a “purpose accessory thereto”, it is evident from his reasons that he concluded that the proposed use was not accessory to teaching and instructional purposes. For example, in paras. 35 and 36,

he discussed “non-school use of school facilities”, and concluded that it was reasonable to interpret the exemption as not prohibiting incidental use of school facilities that would not change the overall nature of the premises as a school. Earlier in his reasons, when he discussed the summary and disposition of the application, he had stated that “[c]ommercial exploitation of TDSB facilities is not a ‘school use’ of TDSB premises”. While incidental commercial use might be permitted, RMI’s proposed commercial use was not an “incidental use” of the Board’s facilities. Accordingly, the application judge concluded that the CBO’s decision that the exemption did not apply was reasonable.

The Issues on Appeal

[14] An appeal lies to the Divisional Court pursuant to s. 26 of the *Building Code Act*.

[15] On this appeal, the appellant argues that the application judge erred in interpreting the exemption to apply only where teaching and instructional activities are carried out by or for the Board. In doing so, he is said to have improperly interpreted the zoning by-law to regulate the “user”, rather than the “use” of the property. As he had concluded in paragraph 23 of his Reasons that the activities to be carried out by RMI were of the same “nature”, “quality” and “virtue” and for the “same essential purposes” as the Board’s activities in the facilities, it follows that the exemption should apply. As well, the appellant argues that the application judge erred in failing to provide any reasons why the RMI use was not an accessory use, as permitted by the By-law.

[16] The City of Toronto also takes issue with the interpretation of the exemption as applying only where teaching and instructional activities are carried out by or for the Board. However, the City argues that the decision is, nevertheless, correct, because the activities proposed by RMI are not “only teaching or instructional” in nature and purpose. Rather, RMI proposes to operate a private recreational facility. Moreover, the City argues that the application judge did deal with the “accessory use” argument, as he held that the commercial activity of RMI was not an incidental use of the School property, as required by the definition of accessory use in the By-law.

[17] The intervenor, Harbord Village Residents Association, argues that the legal interpretation of the exemption adopted by the application judge was correct, in that the proposed use must be for school purposes delivered by the named school boards in order for the exemption to apply. In the alternative, the intervenor argues that the application judge improperly overruled the CBO’s finding of fact that a large percentage of the activity contemplated would not be “only” for teaching and instructional purposes. Hence, the exemption does not apply.

The Standard of Review

[18] The application judge correctly held that the standard of correctness applies with respect to questions of law determined by the CBO. However, with respect to questions of fact and mixed fact and law, the decision is to be reviewed on a standard of reasonableness (*Berjawi v. Ottawa (City)*, [2011] O.J. No. 379 (S.C.J.) at para. 12).

[19] On an appeal from the decision of the application judge, a standard of correctness applies with respect to questions of law. With respect to questions of fact, the standard is that of palpable and overriding error. With respect to questions of mixed fact and law, the standard is palpable and overriding error unless there is an extricable legal principle (*Ottawa (City) v. Ottawa (City) Chief Building Official*, [2003] O.J. No. 4530 (Div. Ct.) at paras. 92).

Did the application judge err in his interpretation of the exemption?

[20] The exemption in the By-law applies to lands, building or structures of the Board that were owned by it on June 16, 1986 if the land, building or structure is “used only for teaching or instructional purposes”. While the Zoning Examiner spoke of “educational purposes” in his decision and the application judge spoke of “school use”, the words used in the By-law are “only for teaching or instructional purposes.”

[21] The application judge held that the teaching or instructional activities must be delivered by teachers or other employees of the Board or those acting on behalf of the Board. However, there are no words in the By-law indicating that the teaching or instruction must be delivered by employees or agents for the Board in order for the exemption to apply.

[22] Indeed, the interpretation adopted by the application judge is inconsistent with previous court rulings that a municipality does not have jurisdiction to adopt a zoning by-law restricting the “user” of the lands, rather than the use, unless the legislation clearly permits such a restriction of a specific user (see, for example, *Greater Victoria School District No. 61 v. Oak Bay (District)*, 2006 BCCA 28 at para. 25). There are no provisions of the *Planning Act*, R.S.O. 1990, c. P.13 and, in particular, s. 34(1) of that Act (the power to adopt zoning by-laws), permitting such discrimination among users.

[23] In my view, the application judge erred in law in focussing on whether the proposed activity was carried out by Board employees or on behalf of the Board. Rather, the question to be determined, in the application of the By-law, was whether the proposed use was “only for teaching or instructional purposes.”

[24] In interpreting a by-law, as with other statutes, one looks first to the ordinary meaning. While the words “teaching or instructional purposes” are not defined by the By-law, the *Oxford English Dictionary*, 4th ed., defines “teaching” as “the imparting of information or knowledge; the occupation, profession or function of a teacher.” “Instruction” is defined as “act of instructing; teaching, education; the knowledge etc. taught; an instructive rule, a precept; information given to a person about a particular fact; a direction, an order.”

[25] The words of the By-law are clear: the use of the school site must be only for teaching or instructional purposes. There is no requirement that the teaching or instruction must be delivered by or for the Board.

[26] The appellant also argues that the exemption in the By-law should be interpreted in a manner consistent with the Toronto Official Plan, which provides in section 3.2.2.4 that shared use of school facilities will be encouraged. It states,

The addition of other uses on school sites, including other community service facilities, residential unit or office space, is permitted provided all uses can be adequately accommodated.

[27] It is true that Official Plans can assist in the interpretation of zoning by-laws, given that zoning by-laws are the means to implement official plans (*St. Mary's Cement Inc. v. Clarington (Municipality)*, 2012 ONCA 884 at para. 21). However, the zoning by-law is the applicable law to be applied (*Aon Inc. v. Peterborough (City)* (1999), 1 M.P.L.R. (3d) 225 (Ont. Ct. (Gen. Div.)) at para. 18; *Doublerink Arenas Ltd. v. North York (City) Chief Building Official* (1996), 33 M.P.L.R. (2d) 158 (Ont. Ct. (Gen. Div.)) at para. 6).

[28] Here, the By-law is clear: the use must be only for teaching or instructional purposes or accessory to those purposes.

Does the exemption for teaching or instructional purposes apply?

[29] The appellant argues that the application judge made a finding of fact that the activities to be carried out by RMI had the same essential purposes as those carried out by the Board (see paragraph 23 of his Reasons). Accordingly, the appellant argues, the exemption should apply.

[30] In my view, the application judge did not make a finding of fact that RMI's use was only for teaching or instructional purposes. At most, the comment in paragraph 23 was *obiter dicta*, and not a finding of fact, for he stated in paragraph 24 that RMI's use was not a "school use". He then stated that this finding was beside the point, as "the issue is not whether the Proposal would be a 'school use' of the property, or some other kind of 'use' " but rather whether the exemption applied.

[31] In any event, if the application judge did make a finding that the activities of RMI were "only teaching or instructional" in purpose, he made a palpable and overriding error of fact. When one looks at the application filed by RMI and the information provided respecting the similar operation of an inflatable dome at Monarch Park Collegiate, it is evident that the proposed activities are not "only" for teaching or instructional purposes. It is true that there may be an instructional component to children's sports such as soccer. However, one cannot characterize the adult soccer and frisbee leagues as having an instructional purpose. Nor does individual payment for use of the track suggest there is any instructional component. Rather, much of RMI's proposed use is for private recreational activities.

[32] The CBO's finding that the bulk of the RMI use would not include an instructional component was a reasonable finding of fact, based on the information provided to the City. Given this finding of fact, it follows that the proposed use did not fall within the exemption, because it was not "only" for teaching or instructional purposes.

[33] The remaining question to be addressed is whether the proposed use has a purpose accessory to teaching or instructional purposes.

Did the application judge err in holding that the proposed use was not accessory?

[34] To qualify as an accessory purpose, the proponent must satisfy three criteria: the use is naturally and normally incidental; it is subordinate in purpose or floor area, or both; and it is exclusively devoted to a principal use, building or structure. The CBO held that the private use of the facilities for recreational purposes approximately 70% of the time was not a natural use of school property nor normally incidental to school use. Therefore, it was not a permissible accessory use.

[35] The application judge held that RMI's proposed commercial use was not "incidental" to school use, and therefore, the CBO's conclusion was reasonable. While the application judge made no explicit reference to the definition of accessory use in the By-law, it is evident that he was applying the proper test.

[36] Given the evidence, RMI's use cannot be said to be "naturally and normally incidental" to the School's use of the facilities. A commercial recreational use of the type proposed is not a natural or normal use of school property. Nor is the use incidental, given the commercial recreational use would occupy 70% of the time the facility is in operation. Indeed, the evidence shows that the Monarch Park facility, which is somewhat smaller than the facility proposed here, has 10,000 users a week. The School has 1,800 students.

[37] The appellant relies on *Doublerink Arenas Ltd.*, cited above, to support its argument that the proposed use is incidental. That case involved the use of property owned by York University for the construction and operation of a commercial ice rink facility that would be shared by a private company and the university. The application judge in that case held that the commercial use was permitted by the applicable by-law, a by-law that is differently worded from the By-law in the present case. Notably, among uses explicitly permitted on York's lands was "accessory commercial use to a university use". "Accessory use" was defined as a "use naturally and normally incidental to, subordinate to and devoted exclusively to the main use of the premises."


[38] Unlike the York by-law, there is no reference to a permitted commercial use of Board lands in the present By-law. The CBO reasonably concluded that the private recreational use proposed was not naturally and normally incidental to the teaching and instructional activities carried out by the School on the site, nor was it naturally and normally incidental to school use. Accordingly, the application judge properly upheld the CBO's decision.

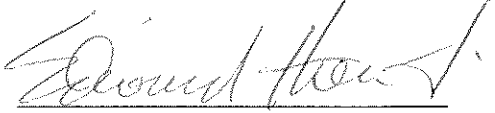
Conclusion


[39] For these reasons, the appeal is dismissed.

[40] The intervenor does not seek costs and none are awarded to it.

[41] If the appellant and the City cannot agree on costs, counsel may make brief written submissions on costs through the Divisional Court office within 21 days of the release of this decision.


Swinton J.


Then J.


Aston J.

Released: SEP 30 2014

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DIVISIONAL COURT

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B E T W E E N:

TORONTO DISTRICT SCHOOL BOARD

Applicant (Appellant)

- and -

THE CITY OF TORONTO

Respondent
(Respondent on Appeal)

-and-

HARBORD VILLAGE RESIDENTS
ASSOCIATION

Intervenor

REASONS FOR JUDGMENT

Swinton J.