

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: January 29, 2024

CASE NO(S): OLT-22-004846

PROCEEDING COMMENCED UNDER subsection 42(10) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended.

Applicant and Appellant:	Centurion (Dundas) Holdings Ltd.
Subject:	Cash-in-Lieu
Description:	Protest of Fee of Parkland Contribution Cash-in-Lieu
Property Address:	71 Main Street
Municipality/UT:	Hamilton
Municipal File No.:	Roll No 2518 260 2500 60000000
OLT Case No.:	OLT-22-004846
OLT Lead Case No.:	OLT-22-004846
OLT Case Name:	Centurion (Dundas) Holdings Ltd. v. Hamilton (City)

Heard: November 16-17, 2023 by video hearing

APPEARANCES:

Parties

Counsel

Centurion (Dundas) Holdings Ltd. Derek Schmuck

City of Hamilton Peter Krysiak

DECISION DELIVERED BY W. DANIEL BEST AND ORDER OF THE TRIBUNAL

[Link to the Order](#)

INTRODUCTION

[1] The matter before the Tribunal concerns an appeal filed by Centurion (Dundas) Holdings Ltd. (“Applicant”), pursuant to s.42(10) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended (“Act”), of the decision of the City of Hamilton (“City”) regarding the amount required for the cash-in-lieu fee contribution for parkland (“parkland fee”) paid by the Applicant under protest, related to the development project municipally located at 71 Main Street, Hamilton, Ontario (“Subject Property”).

[2] The Applicant’s position is that the calculation changes related to the parkland fee under the *More Homes Built Faster Act, 2022*, should apply to the development on the Subject Property based on the building permit issued on December 6, 2022. The Applicant argued that the parkland fee is not payable until the building permit permitting construction of the building is issued, not payable upon the issuance of an excavation or shoring permit.

[3] Conversely, the City’s position is that a building permit was issued on May 10, 2022, for excavation and shoring. As such, the regulatory parkland fee framework at that time of the issuance of this building permit should apply.

CONTEXT

[4] All the following statements are drawn from the sworn affidavits and Document Brief of the Parties in this hearing.

THE FACT SET

[5] The proposed development is for a nine-storey residential building with a total of 64 dwelling units (“project”) on the Subject Property.

[6] In February of 2022, a parkland fee calculation request for the proposed project was made. The fee was calculated based on By-law No. 22-218 5(4) ("By-law 22-218") which specifies a rate of \$13,069 per unit. When multiplied by 64 units, the total fee amounts to \$836,416.

[7] On May 10, 2022, a permit (22 109578 00 R3) was issued by the Building Department for excavation and installation of shoring for a future project on the Subject Property. Excavation depths and proposed shoring methods using tiebacks were reviewed for the purposes of issuing the permit. Construction Management Plan ("CMP") approval was also submitted as part of the required permit approval process for the shoring and excavation permit.

[8] On November 28, 2022, *Bill 23, More Homes Built Faster Act, 2022* ("Bill 23") came into force introducing a new provision into the *Planning Act* ("Act") that capped the parkland fee at 10 per cent of the value of the land, provided that no building permit for the development was issued prior to the Bill's in-force date.

[9] After Bill 23 came into effect, City Staff received a request to recalculate the parkland fee for the proposed project according to the changes that were introduced. According to the transition clause, if a building permit was issued before the Bill 23 in-force date of November 28, 2022, the changes do not apply.

[10] On December 5, 2023, the Applicant made the parkland fee payment of \$836,416 to the City in protest. The Applicant contends the amount should only be \$190,000.

[11] On December 6, 2022, a permit (22 104310 00 R3) was issued to construct the proposed project.

[12] The following materials were identified as Exhibits and marked as follows:

- Exhibit 1 - Document Brief of Centurion (Dundas) Holdings Ltd.

- Exhibit 2 - Hearing Affidavit of David Horwood sworn October 17, 2023.
- Exhibit 2A – Hearing Affidavit of David Horwood sworn June 8, 2023.
- Exhibit 3 – Hearing Affidavit of James Cameron (Revisions) sworn June 9, 2023.
- Exhibit 3A – Hearing Affidavit of James Cameron (Attachments) sworn June 9, 2023.
- Exhibit 4 – Hearing Affidavit of Gideon Gyohannes.
- Exhibit 5 – Witness Statement of Bertan Tanacar dated October 2, 2023.
- Exhibit 6 – Witness Statement of Sherif Rizkalla dated September 29, 2023.

[13] The Tribunal heard evidence on behalf of the Appellant from the following individuals:

- David Horwood
- James Cameron
- Gideon Gyohannes

[14] The Tribunal heard evidence on behalf of the Appellant from the following individuals:

- Bertan Tanacar
- Sherif Rizkalla

[15] Only Mr. Rizkalla was qualified as an expert witness in the area of the issuance of building permits under the *Building Code Act, 1992*, SO 1992, c 23 (“BCA”).

[16] At the direction of the Tribunal, the Parties filed closing submissions post-hearing. In addition, the Parties were further directed to include any submissions they may wish to make on the principles of statutory interpretation and their applicability to interpreting s.42(3.5) of the Act. In particular, this may include whether and how the Member should consider the contextual and purposive approach to statutory interpretation outlined by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27. The Applicant submission was received on November 28, 2023. The City submission was received on November 30, 2023.

[17] Following consideration of all the written materials, evidence and submissions, the Tribunal dismisses the Appeal.

LEGISLATIVE FRAMEWORK

[18] Bill 23 amended the Act by reducing or establishing maximums for parkland dedication requirements. The legislation establishes where the alternative rates for parkland dedication are used that:

- Establish the maximum alternative rate for parkland dedication to one hectare for each 600 net residential units proposed or at such lesser rate as may be determined by the municipality for the conveyance of land and one hectare per 1,000 units for cash-in-lieu; and
- Cap the alternative dedication rate at (a) where land proposed for development or redevelopment is five hectares or less in area, 10 per cent of the land or value of the land, as the case may be; and (b) where land proposed for development or redevelopment is greater than five hectares in area, 15 per cent of the land or the value of the land, as the case may be.

[19] It should be noted that the in-force date for the parkland dedication requirements is November 28, 2022, except for s. 42(1); new s. 42(1.1); new s. 42(3.0.3); s. 42 (4.30);

and s. 51(5) and (5.1), which come into effect on a date to be proclaimed by the Lieutenant Governor.

ISSUES BEFORE THE TRIBUNAL

[20] There are two fundamental issues before the Tribunal for determination:

- i. Is the permit issued on May 10, 2022 (22 109578 00 R3) for the purpose of excavation and installation of shoring a building permit in the context of the BCA and the Act?
- ii. Do the legislative changes as a result of Bill 23 related to parkland dedication apply in this appeal?

[21] To assist the Tribunal, the principles of statutory interpretation and their applicability to interpreting s.42(3.5) of the *Planning Act* will be applied as outlined by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.:

The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it. The interpreter must attend to text, context and purpose.

ANALYSIS

[22] For the reasons that follow, the Tribunal dismisses the appeal as:

- a) The permit issued on May 10, 2022, (22 109578 00 R3) for the purpose of excavation and installation of shoring is a building permit under the BCA; and
- b) As the first building permit was issued prior to November 28, 2023, the legislative changes to parkland dedication as a result of Bill 23 does not apply in this appeal.

Is Permit #22 109578 00 R3 A Building Permit

[23] The BCA provides the legislative framework for regulating the construction, renovation, change of use, and demolition of buildings in the province. Each municipality in the province is responsible for the enforcement of the Act in its area of jurisdiction. The Chief Building Official is the key municipal official in this realm.

[24] O. Reg. 332/12 Building Code (“OBC”) under the BCA sets the minimum standard for the design and construction of all new buildings and for additions, alterations and change of use of existing buildings. The Code is a mandatory document used by architects, engineers, designers, builders, suppliers and manufacturers with regard to construction projects which are regulated by the Code. The purpose of the Code is to set minimum standards for construction to minimize the risk to the health, safety and welfare of the public.

[25] Sections 42(3.3) (3.4) (3.5) of the Act provides for the framework for the conveyance or payment in lieu that is applicable in this appeal.

(3.3) A by-law that provides for the alternative requirement authorized by subsection (3) shall not require a conveyance or payment in lieu that is greater than,

(a) in the case of land proposed for development or redevelopment that is five hectares or less in area, 10 per cent of the land or the value of the land, as the case may be; and

(b) in the case of land proposed for development or redevelopment that is greater than five hectares in area, 15 per cent of the land or the value of the land, as the case may be. 2022, c. 12, Sched. 5, s. 8.

(3.4) If a by-law passed under this section requires a conveyance or payment in lieu that exceeds the amount permitted by subsection (3.3), the by-law is deemed to be amended to be consistent with subsection (3.3). 2022, c. 12, Sched. 5, s. 8.

(3.5) Subsections (3.3) and (3.4) do not apply to land proposed for development or redevelopment if, before the day subsection 12 (11) of Schedule 9 to the *More Homes Built Faster Act, 2022* comes into force, a building permit has been issued in respect of the development or redevelopment unless the land proposed for development or redevelopment is designated as transit-oriented community land under

subsection 2 (1) of the *Transit-Oriented Communities Act, 2020*, 2022, c. 21, Sched. 9, s. 12 (11).

[26] Section 42(6.1) of the Act references the requirement for parkland fee payment prior to the construction of a building:

(6.1) If a payment is required under subsection (6) or (6.0.1), no person shall construct a building on the land proposed for development or redevelopment unless the payment has been made or arrangements for the payment that are satisfactory to the council have been made. 2006, c. 23, s. 17 (1); 2015, c. 26, s. 28 (5).

[27] The BCA defines a building permit under Section 8 of the Act as follows:

8(1) No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefor by the chief building official. 1992, c. 23, s. 8(1); 1997, c. 30, Sched. B, s. 7(1).

[28] Under the definitions of the BCA, construct means:

to do anything in the erection, installation, extension or material alteration or repair of a building and includes the installation of a building unit fabricated or moved from elsewhere and "construction" has a corresponding meaning.

[29] Ontario Building Code ("OBC") Division B, Part 4 s. 4.2.5 outlines the design, structure and construction of excavations and conformance requirements.

[30] Derek Schmuck, Counsel for the Applicant argued that the only interpretation of s. 42(3.5) of the Act that creates consistency from other By-laws and Statutes is that the term Building Permit only refers to the permit allowing construction of the building on the Subject Property. Mr. Schmuck then provided an overview of examples that he describes as 11 key documents that were produced at the hearing.

[31] Mr. Schmuck argued that in accordance with the s. 42(2.1) of the Act, the amount of the parkland fee should have been calculated on the day a building permit was issued or the first permit. Mr. Schmuck presented the City's Development Charges

(“DC”) Deferral Agreement which he argued requires that DCs be paid prior to the issuance of a building permit.

[32] Mr. Schmuck referenced the City’s Building By-law No. 15-058 (“By-law 15-058”) that contains the definition of permit which “means permission or authorization given in writing by the Chief Building Official to perform work regulated by the Act and the Building Code, or to occupy a building or part thereof, or to change the use of a building.” Mr. Schmuck contended that the By-law 15-058 states that a permit is written permission to perform work regulated by the BCA, such as excavation of a site for a future building. He acknowledged that the Excavation and Shoring Permit was a permit, but it was not a building permit properly defined.

[33] Mr. Schmuck argued that s. 4.1 and 4.2 of By-law 15-058 contrast Permits with Building Permits. In addition, he premised s. 4.4(3) of the same By-law 15-058 explains that the holder of a Conditional Permit does not have permission to construct beyond the point authorized by the Permit. He argued that this confirms the Excavation and Shoring Permit, properly analyzed, was a Conditional Permit under BCA. not a Building Permit.

[34] Mr. Schmuck provided three witnesses who were not qualified to provide expert opinion evidence but lay evidence to support the Applicant’s position.

[35] James Cameron is the President of Legacy Constructors Inc., the contractor hired for the project. Mr. Cameron has a long history in the construction industry and provided an overview of the many types of permits in addition to building permits. It is Mr. Cameron’s view that the excavation and shoring permit was not a building permit.

[36] David Horwood, the Vice President and Secretary of the Applicant, stated that no building permit was issued prior to November 28, 2022, which was the day that Bill 23 came into force. In his evidence, Mr. Horwood indicated that the only permit issued was an interim or conditional shoring permit issued on May 10, 2022.

[37] Gideon Gyohannes, a professional structural engineer, was asked by Mr. Cameron to provide comments on the shoring aspect of construction projects as it relates to the proposed project on the Subject Property.

[38] Mr. Gyohannes provided the following comment on “general considerations of shoring and shoring elements”:

I am writing to comment on general considerations of shoring and shoring elements. Shoring and its components are considered "temporary" in the sense that when the underground structure of the new building is completed, the piles and tiebacks are no longer needed. Shoring is not considered to be structural, nor part of the building element.

Shoring will be designed based on the city clearance requirements for the underground utilities/City of Hamilton's road right-of-way, including local water and wastewater utilities. Upon completion of the structure all shoring elements are considered to be redundant and not required for building structure. It should be noted that a shoring permit shall not allow elements of the building structure to be constructed. For structural elements, a building permit is required.

[39] Peter Krysiak, Counsel for the City advised that this is simply an appeal about statutory interpretation and what is a building permit. Mr. Krysiak submitted that the Tribunal must determine if a shoring and excavation permit is a building permit. He continued that the statutory issue can only be resolved by applying the correct interpretation to the appropriate legislation.

[40] To support the City's position, Mr. Krysiak presented two witnesses. Bertan Tanacar, Senior Property Officer and Appraiser for the City was deemed to be a lay witness. Sherif Rizkalla, Supervisor of Building and Engineering was qualified by the Tribunal as an expert witness in the OBC. It should be noted that Mr. Rizkalla is a professional engineer and is a qualified Inspector under the BCA.

[41] Mr. Schmuck's objected to Mr. Rizkalla being qualified as an expert witness as he was not impartial and biased as an employee of the City. The Tribunal was satisfied that Mr. Rizkalla was aware of his responsibilities and duties to the Tribunal as an expert witness as outlined in his Acknowledgement of Expert's Duty. The Tribunal

reminded the Parties it is acutely aware when an expert witness steps outside of those responsibilities and duties and would take appropriate measures if it occurs.

[42] Mr. Tanacar advised that he calculated the original parkland fee in accordance with By-law 22-218. When requested to recalculate the parkland fee upon the introduction of Bill 23, he determined that Bill 23 was inapplicable, and a recalculation was not necessary.

[43] Mr. Rizkalla stated that Mr. Rizkalla testified that the OBC is a regulation under the BCA which governs various construction activities including excavation and shoring. He also noted that s. 42 of the Planning Act is applicable law to the OBC.

[44] Mr. Rizkalla stated that the May 10, 2022, permit was a building permit issued under the BCA because it permitted activities governed by that Act. He explained that excavation included the removal of rocks and soil from the ground to prepare foundations for buildings and that shoring included building a temporary structure with retaining walls and tiebacks to support the sides of the excavation. He defined that these were construction activities.

[45] Mr. Schmuck in his cross-examination and closing submission impugned Mr. Rizkalla's evidence. The Tribunal was not persuaded and is satisfied that Mr. Rizkalla provided evidence that was necessary and reliable and that he was properly qualified and stayed within the area of his qualification.

[46] In reviewing the evidence before it, the Tribunal used the principles of relevance and value.

Relevance of the Evidence

[47] The relevance of the evidence presented by Applicant on the whole did not assist in rendering a decision and it did not increase or diminish the fact at issue which is simply that the evidence did not disprove that a permit issued under the BCA was not a

building permit. Although this can be a low bar, the lay witnesses did not have a level of familiarity with the BCA, OBC, Act, and the specificities around the issuance of a permit to prove the position of the Applicant.

[48] The evidence presented by the City was factual and relevant to the issue of what constitutes a building permit. Mr. Rizkalla relied on his professional judgment and determined that shoring and excavation was a construction activity that required a building permit issued under the BCA. He confirmed that it is common for developments to require more than one building permit (such as what occurred here). He advised that building permits are required for any work that leads towards the eventual erection of the building structure, rather than only the construction phase where the building structure is erected. Of note is that in the OBC there is an entire section of the Building Code that specifically governs excavation and shoring.

Value of the Evidence

[49] On the whole, the evidence of the City provided a greater probative value than that of the Applicant and as such carried greater weight with respect to reliability and credibility.

Statutory Interpretation

[50] To assist the Tribunal, the principles of statutory interpretation and their applicability to interpreting s.42(3.5) of the Planning Act will be applied as outlined by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27:

The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it. The interpreter must attend to text, context and purpose.

[51] Mr. Krysiak provided the following regarding statutory interpretation:

The purpose of Bill 23 was to increase housing supply. The subject section imposed a cap on the max amount of parkland requirement presumably to provide some financial relief to developers. However, the legislature wanted that relief to apply to development that began after November 28, 2022, rather than to apply retroactively. Retroactive application could go back years, creating financial unpredictability for municipalities. The Appellant's interpretation would create such a scenario and benefit developers whom the *Planning Act* never meant to benefit. This offends the interpretative approach of balance between the grammatical and ordinary sense of the words and the purpose of the legislation. Lastly, a Tribunal decision that a type of building permit is not a building permit would open the floodgates for parties to dispute the existence of building permits when it benefits them to do so.

[52] Mr. Schmuck's main argument is that:

The only interpretation of s.42(3.5) of the Planning Act that creates consistency with the other relevant provisions from other By-Laws and statutes, is for the phrase "Building Permit" to refer to the permit allowing construction of the building in question.

[53] Unfortunately, when looking at the Statutes as a whole, the main argument presented by the Applicant does not hold. Conversely, the arguments and evidence presented by the City are sound and provide text, content and purpose.

[54] The Tribunal is persuaded by the position of the City and determines that based on the foregoing that Permit #22 109578 00 R3 is a building permit in accordance with the BCA, OBC and the Act.

Does Bill 23 Apply in Determining The Parkland Fee

[55] As it has been determined that the first building permit was issued on May 10, 2022, for the proposed project on the subject Property, the Bill 23 changes do not apply.

[56] The Tribunal finds that Mr. Tanacar applied the correct interpretation with respect to the Act and By-law 22-218. Based on the evidence and submissions, the calculated fee of \$836,416 is correct and the Applicant is not entitled to any reimbursement of the parkland fee.

ORDER

[57] **THE TRIBUNAL ORDERS** that the appeal is dismissed.

“W. Daniel Best”

W. DANIEL BEST
MEMBER

Ontario Land Tribunal

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