Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: March 16, 2020 **CASE NO(S).:** PL130592

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PROCCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act,* R.S.O. 1990, c. P.13, as amended

Appellant(s):	Multiple Appellants
Subject:	By-law No. 569-2013
Municipality:	City of Toronto
OMB Case No.:	PL130592
OMB File No.:	PL130592
OMB Case Name:	Bahardoust v. Toronto (City)

Heard: January 6 to 13, 2020 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
City of Toronto (additional counsel)	M. Hardiejowski A. Hussain (Student at law) T. Wall
Greater Toronto Apartment Association	T. Helinski
Park Smart Inc. Epic Parking Control Services Inc.	K. Stavrakos
GWL Realty Advisors Inc.	J. Park
Deltera Inc. Concert Real Estate Corporation	J. Dawson and M. Foderick

Minto Properties Inc.

Triumphant Church of God in Canada	D. Tang
Toronto Faith Coalition, Inc.	
3636 Bathurst Street Limited	
14,15, 20 Carluke Crescent Limited	
3000 Dufferin Street Limited	
Rexlington Heights Limited	
1855 Jane Street Limited	
7-9-11 Crescent Place Limited	
Fisherville & Bathurst Limited	

DECISION DELIVERED BY G. BURTON AND D.S. COLBOURNE AND ORDER OF THE TRIBUNAL

[1] These are appeals by many owners of apartment buildings in the City of Toronto (the "City") objecting to provisions in the City Zoning By-law No. 569-2013 (the "By-law") which would prohibit the charging of fees for visitor parking spaces in apartment buildings in most residential areas of the City.

[2] The subject By-law has been challenged in many appeals but is now mainly in force, following resolutions of appeals by the Tribunal. The provisions under appeal here would apply to the Residential ("R"), Residential Apartment ("RA") and Residential Apartment Commercial ("RA and "RAC") zones only. The RAC subclass was created in 2014, and provided for size-limited commercial uses in apartment buildings. The challenged provisions would not apply to commercial zones (CR and CRE), which are principally located in the centre of the City and along designated Avenues. Parking requirements are lower here and may be shared with other uses.

[3] The two Zoning By-law Amendments at issue in the appeals (the ZBAs) are:

> *Residential Zone:*
>
> *10.5.8.1 (3) Charging for Visitor Parking*
>
> *In the Residential Zone category, no fee may be charged for a visitor parking space for an apartment building.*
>
> *Residential Apartment Zone:*
>
> *15.5.8.1 (2) Charging for Visitor Parking*

> *In the Residential Apartment Zone category, no fee may be charged for a visitor parking space for an apartment building.*

[4] Regulation 200.5.10.1(1) of the By-law (not under appeal) requires that visitor parking spaces be provided in apartment buildings. There is also the general provision in 10.5.8.1 (1):

> Use of Required Parking Space
>
> A parking space required by this By-law for a use in the Residential Zone category **must be available** for the use for which it is required.
> (emphasis added)

[5] There were two general issues expressed by the appellants:

1. Are the proposed amendments to Chapters 10 and 15 the proper mechanism to achieve the goal of reducing any overspill of vehicles from visitor spaces onto nearby residential streets?

2. Is the application of the By-law to all R and RA zones in the City justified?

[6] The City supported the ZBAs by the evidence of Michael Tedesco, a transportation engineer, and a land use planner, Alan Young. Mr. Young had had experience with the original North York by-law provisions which are the source of the proposed City-wide amendments.

[7] Mr. Tedesco highlighted that the ZBAs would apply only to the R, RA and RAC zones, predominantly located outside of the downtown centre of the City. The prohibition would not apply to the Commercial Residential (CR) or Commercial-Residential Employment (CRE) “mixed use” zones, which predominate within the central area and along designated Avenues. He illustrated the zones to which they would apply in Exhibits 1 to 3 of his Expert Witness Statement (“EWS”) (Exhibit 1, Tab 3).

[8] Mr. Tedesco knew of the appellants’ claim that the ZBAs were passed without any planning justification or background report. Thus he began a random survey to

provide statistics. He visited 72 mostly privately-owned apartment sites in the RAC zones only (there are 1,255 buildings in these zones, so he looked at about 15% of them, each having about 200 units). This was with a view to confirming his “reasonable expectation” that visitor parking in all Residential zones would be free of charge, **if** parking on nearby residential streets is predominantly free and available and there is little public transit nearby. He stated: “A fundamental component of the Study, therefore, has been to test the assertion that on-street parking in the vicinity of apartment buildings located in the RA/RAC zones is typically free.” (Exhibit 1, Tab 3, p. 12).

[9] A charge for visitor parking could then lead to visitors parking on nearby streets.

[10] He disagrees with the appellants’ argument that users will avoid paid parking elsewhere by parking in visitor spaces if they are free of charge. His reason is that there is little paid on-street parking in residential zones, so that there is no reason for others to seek apartment visitor spaces.

[11] He included many factors for the 72 sites he chose: location, tenure [rental, condo or Toronto Community Housing Corporation (“TCHC”)], visitor parking free or otherwise, permit requirements and methodologies, shared parking with commercial uses, on-street parking availability and cost if any, in zones adjacent to RA zones as well.

[12] In his survey of 72 apartment buildings, he found only two buildings of the 33 that have free on-street parking nearby charge a fee for visitor parking (and only after 6 p.m.). Eleven had some pay parking, including five TCHC buildings. His premise was that if a fee were charged for visitor parking, there would be overflow onto nearby streets. Therefore there is a need for the prohibition on payment. He testified that his survey is a reasonable quantitative test to prove that there is no parking spillover onto nearby streets, and thus no need for landlords to charge a fee to prevent this.

[13] He addressed the appellants' argument that there is misuse of available visitor parking by both legitimate tenants and others living in units, and so-called "walkaways" (persons with off-site destinations, as Mr. Young stated – Exhibit 1, Tab 2, para. 3.19), as well as by criminal elements. The City admits there can be abuse, but affirms that this can be addressed by use of permit and display machines, increased surveillance by staff, the recording of license plates, and by gates at the lot entrances. If a payment is made, he testified, parkers feel entitled to park in visitor spaces, and this legitimizes the use. Any criminal use of visitors' spaces will be minimized by recording of licenses, as he proposes. Such signage and enforcement mechanisms will have a "scarecrow" effect, he argued, without requiring a payment for the visitor spaces. Any notional cost for maintaining visitor parking (that the By-law in fact requires) should be part of the landlords' cost of doing business, and payable from rental income. In his view there would be no need for the private enforcement now employed by landlords, should visitor spaces remain free of charge.

[14] Mr. Tedesco was challenged in cross-examination on his theory of a "reasonable expectation" that visitor parking would be free of charge where it is free on nearby streets. Of his 72 buildings, only 14 charged a fee (including five TCHC buildings), and 58 used other methods of enforcement. He did not directly study alternate control mechanisms, or so-called "off-lease" tenants or walkaways (those who park in visitor spaces but whose destination is nearby transit or office buildings). He responded that his survey, while basic, was only to study whether free parking was available nearby.

[15] Mr. Young provided expert land use planning evidence on behalf of the City in support of the ZBAs (Exhibit 1, Tab 2), and in Reply to Martin Rendl, expert for the appellants (Exhibit 1, Tab 7). He had been familiar with pay parking prohibitions during his employment with the City of North York, where the first such by-law (source of the present) was enacted in 1977.

[16] In his opinion the "evil" that is remedied by the prohibition is the possible use of nearby streets by spillover visitor parking. He relied on the findings of the Divisional Court in *Coinamatic Canada Inc. v. Toronto (City)*, 2003 CanLII 29752 (ON SCDC)

(leave to appeal refused, unreported, Mar. 2, 2004, Ont. C.A.) (“*Coinamatic”)*, to state that there is indeed a planning rationale for the By-law provisions (Exhibit 3, p. 418, and para 8, p. 420). This was an explicit finding by the Court. It stated as well that the power to pass pay parking prohibition by-laws are powers necessarily or fairly implied from the express power to restrict the use of land through zoning contained in section 34(1) (para. 6).

[17] Mr. Young referred to several studies conducted to facilitate the By-law. Some dealt with the need to review the issue of parking for multi-unit residential dwellings, including charging for visitor parking. In the Phase 1 IBI Report (Exhibit1, Tab 2, p. 4), it was noted that a later Phase 2 Report from staff was to address the issue of prohibition for charging for visitor parking (see also Exhibit 3, Tab 24, p. 915, para. 4). This study was not conducted, but Mr. Young stated that there was continuing support for such a provision in the subsequent study by Cansult Limited (“Cansult”) in 2007 (Exhibit 3, Tab 26). Abuses of visitor parking were set out at para. 3.3 (Exhibit 3, p. 997). A staff report (March 2007) affirmed that a charge for visitor parking at apartment buildings could better ration its use by deterring walkaways, but on the other hand, might unreasonably deter visitors from parking in designated spaces. This might then result in increased parking pressures on local residential streets.

[18] Council itself then reinserted the proposed prohibition of paid visitor parking into the By-law, after a previous reversal. Mr. Young stressed that there had been no request from owners for further study of this issue prior to the By-law amendments. He concluded that the amendments are justified, given the former North York By-law as well as the comprehensive review of parking standards during the consolidation process.

[19] He then addressed compliance and conformity with provincial policies, as required by section 3 of the *Planning Act* (the “Act”). While not directly addressed in the Provincial Policy Statement, 2014 (“PPS”) or the A Place to Grow: Growth Plan for the Greater Golden Horseshoe, 2019 (“Growth Plan”), Mr. Young finds support for the By-law requirement in references to Transportation Demand Management (“TDM”) as

defined therein. In both the PPS and Growth Plan, a required “transportation system” includes parking facilities, and “transportation demand management” is defined as:

> Transportation demand management”: means a set of strategies that result in more efficient use of the transportation system by influencing travel behavior by mode, time of day, frequency, trip length, regulation, route, **or cost**. (emphasis added).

[20] He stressed that the prohibition on paid visitor parking is justified as aiming at the most efficient use of such parking, and at reducing intrusion into nearby streets. It attempts to influence travel behavior by ensuring there is no cost disincentive to the visitor parking, which is required to be available by the By-law. Similarly, the Growth Plan encourages TDM policies to prioritize active transportation and transit usage. Mr. Young finds conformity with these policies in that the By-laws would ensure no economic disincentive to regular use of visitor spaces, promoting social interaction as the Growth Plan requires.

[21] Mr. Young also finds support for the By-law provisions in Policies 2.3.1.5(d) and 4.2.2 d) of the City’s Official Plan (“OP”). These discourage non-residential parking in Neighbourhoods and Apartment Neighbourhoods, and require sufficient off-street parking for residents and visitors in Apartment Neighbourhoods. He would extend this control to Neighbourhood designations in general, as well as to Residential and Residential Apartment zones. The proposed prohibition would reduce traffic and parking impacts on local streets.

[22] Mr. Young referred as well to the City of Toronto Municipal Code, Chapter 915. This prohibits parking on private property except as posted, with enforcement by (among others) municipal law enforcement officers (“MLEOs”). Thus, in Mr. Young’s opinion there are adequate tools available for landlords to control visitor parking without needing revenue from a charge for use of such spaces. Any existing charges would either have non-conforming status, or owners could apply for a rezoning or minor variance.

[23] In cross-examination Mr. Young admitted that the parking studies, IBI Group ("IBI") and Cansult, did not directly address the issue of paid visitor parking. He supported his conclusions in this hearing despite the fact that the Cansult study found only 56-57% of such spaces were usually occupied. The challenged provision in his view would still reduce overspill and other problems. He testified that it is a legitimate and useful part of a TDM policy. While a prohibition is not a typical zoning tool, its use here is consistent with active transportation goals, as are required in the Growth Plan.

Evidence of the Appellants

[24] The perspective of the operators of apartment buildings owned by the appellants was provided by Arnold Agulnik, General Manager of Princess Management ("Princess"), and a long-time manager-operator of multi-residential rental buildings in Toronto. He testified about his familiarity with operational issues, including visitor parking. He provided the example of two buildings in particular, 10 and 20 Teesdale Place, which are adjacent to the Victoria Park subway, a golf course and two TCHC buildings. There is a covered access to the subway. Visitors have paid for parking in the surface lots at the Teesdale buildings for about nine years, by a pay and display system. They tried a paper parking pass in the past, but this was effective only when an attendant was available. Before payment was required, many drivers parked and walked to the subway or the TCHC, leaving the visitor lot full and unavailable for actual visitors. In-house monitoring was not successful. Since payment was implemented there has been a noticeable improvement. Mr. Agulnik stated in cross-examination that Princess had chosen enforcement by Epic Parking Control Services Inc. ("Epic") (see evidence of Derrick Snowdy below). He had no data to justify the decision to charge, other than the observation that spillover parking was increasing before a charge was instituted. He had often noticed visitors' cars circling looking for a spot.

[25] Daryl Chong is President and Chief Executive Officer of the Greater Toronto Apartment Association ("GTAA"), with 400 members, 150 owners and managers. He had participated in stakeholder meetings on the subject topic in early 2012, along with

10 City staff. The GTAA and others have expressed strong opposition to the prohibition's inclusion in the By-law (see Exhibit 2, Tab 19).

[26] Derrick Snowdy of Epic is a designated MLEO and works as part of a Private Parking Enforcement Agency ("PPEA"). Epic is hired by the owners to enforce the Municipal Code on private property on behalf of the Toronto Police Service (at 80 sites, with 10,000 tickets issued in 2018). Revenues from ticketing are remitted to the City. He stressed that each property is unique, but he sees similar abuses in most visitor parking lots: tenants and off-lease persons in visitor spaces, walkaways, and use by criminal elements. He provided an in-depth and graphic description of enforcement mechanisms. He refutes the solutions suggested by Mr. Tedesco – as automated authorizations or machines malfunction, superintendents are ineffective or absent, and gates break down. Allowing payment for visitor spaces will actually reduce spillover onto nearby residential streets.

[27] In cross-examination Mr. Snowdy testified that paid parking in fact costs more to operate than the revenue from payments made. He was unaware of any pass through of costs to tenants. He reiterated his belief that rental buildings, without concierges like condos and with more turnover, require greater enforcement mechanisms like payment for visitor parking. Criminal elements would be deterred by the "scarecrow" effect of pay and display machines and obvious enforcement. He has seen no deterrent effect on walkaways for the past eight years when paid visitor parking has not been permitted.

[28] Ralph Bond, principal with BA Group, is a transportation planner called for the appellants. He outlined his expertise in conducting transportation planning and parking studies. He is a member of the 300-strong Canadian Parking Association. He has considered all of the above-mentioned documents in a "desktop review" and studied some of the buildings enforced by Epic in this manner as well. His conclusion is that the prohibition is too broad for this "non-problem", considering all the differing circumstances. From a TDM perspective, payment for parking influences behavior, encouraging carpooling, public transit and other modes, and permitting recovery of

expenses. A cost for parking results in reduced demand, so drivers will seek alternatives.

[29] He disputed the supposed findings of the IBI and Cansult Reports, saying they recommended only further study and not a prohibition. Only 15% of the few buildings studied by Mr. Tedesco had paid visitor parking. He argued that street parking is a scarce public resource, requiring careful management for the benefit of residents. He finds it unreasonable to prohibit payment close to CR zones, opining that paid parking is required to offset owners' costs in this case as well. It would not have an undesirable impact on adjacent residential streets, since other nearby uses (hospitals, colleges, medical/office buildings, places of worship, TCHC) can lead to even more parking on such streets. Even TCHC provides paid visitor parking at many sites, allowing for both supply and cost recovery.

[30] Mr. Bond was critical of Mr. Tedesco's study as not containing a sufficient quantitative component to assess the rationale for its conclusions. There is no "cascading effect' of a spillover onto residential streets, as he claimed. He found only two of the 72 buildings had paid visitor parking. Indeed, paid street parking is often required, and is controlled by the Toronto Parking Authority. The issue as he sees it is not one of reasonable expectation as Mr. Tedesco would have it, but what in fact people do in practice. He finds Mr. Tedesco's assumption that on-street parking is inherently problematic to be in error. It is not necessarily inappropriate to use street parking for tenants and visitors, as the City itself issues permits for such parking. He sees that the tools available for parking problems include: restricting on-street hours; City permits; and paid parking. Solutions must be individualized, he testified. Charging visitors is more equitable, he stated, as then the users pay. A fee is easy to implement and easily understood as a control mechanism. A cost for parking can allow the demand to be managed.

[31] In cross-examination Mr. Bond admitted that his desktop review was itself cursory, without specific study of municipalities not having a prohibition, nor enforcement costs or proper fee structures. He concluded, however, that there is no

justification for a prohibition of paid visitor parking at apartments in all residential areas. Free parking would result in fewer available visitor parking spaces, unless trespass is actively discouraged by enforcement.

[32] He recommends that apartments within 500 metres of the public uses above (hospitals, etc.) and major transit facilities not be subject to the prohibition.

[33] Mr. Rendl was qualified to provide expert planning evidence for the appellants. He stated that a prohibition of a use is not good planning. If the ZBAs are approved, he testified that:

- the owners cannot use a proven, effective means of enforcement against non-genuine visitors;
- the prohibition does not support transit use over the automobile; and
- it is applied inequitably geographically.

[34] He took an investigative approach to the issue – is there a problem; if so, where; and is there undesirable overspill? Visitor parking must be available in sufficient numbers since the By-law requires it; and it must not be blocked. Inability to charge for it will in fact facilitate so-called walkaways. He finds that the restriction was enacted without sufficient study to justify it (EWS, paras.113-145). In fact, one planning staff report (March 5, 2007) had stated that paid visitor parking deters walkaways. As well, the scope of its application, with contiguous CR zones having apartment buildings that have paid visitor parking, is inequitable and ineffective.

[35] He stated in his EWS that paid visitor parking on the same lot as an apartment building is not a commercial parking lot, requiring a license, since it is only an ancillary use to the apartment use. There is no problem if owners charge, since public parking is not permitted in Residential zones under the By-law. The TCHC manages the visitor parking issue by charging a fee for such parking. On-street parking permits may be

purchased from the City. To have equal rights, owners ought to be able to enforce the availability of visitor parking spaces by charging a fee. Some now do this, and such parking is enforced through PPEAs. Fees recouped from visitors offset parking enforcement costs, and ticket revenues go directly to the City.

[36] The PPS and Growth Plan are at too high a level to have any direct application to this issue, other than the encouragement of public transit and active transportation. Free visitor parking spaces near transit stations will lead to walkaways, and is contrary to this goal. The City OP also does not directly cover the issue in residential neighbourhoods. In Mr. Rendl's opinion, the intent of the City OP transportation policies is contravened by the impugned provisions. He also stated that zoning by-laws do not normally require that a permitted activity such as laundry or fitness facilities be provided at no cost, as would be the case for visitor parking (EWS, para. 171). A zoning by-law is not the appropriate tool in his view to govern such matters. He also disputed Mr. Tedesco's use of a "reasonable expectation" test, as not an appropriate factor in a planning regulation. While expectations do enter into certain planning decisions, such as views or privacy, he still believes that there should be statistical backing for zoning changes.

[37] Should the By-law amendments be found to be a legitimate exercise and good planning, a study should be conducted to verify their geographical locations and extent. Mr. Tedesco mentioned exempting from the application of the ZBAs Policy Areas 1 (Downtown), 2 (Yonge and Eglinton), 3 (avenues and arterial roads), and 4 (Danforth close to Victoria Park), where there is good transit access. Mr. Rendl opined that the existing Policy Areas are inappropriate, as too close to other intensive uses and too broad in scope. If approved, owners would have to apply for a zoning change or minor variance if they wished to charge. Without a policy framework, these applications risk being assessed on an *ad hoc* basis.

[38] In cross-examination, Mr. Rendl opined that if a prohibition were to be applied to the entire City, it would be equitable but would not solve the problem. The same building type, apartments, would be differently treated in the CR zones, where paid parking is

permitted, and in the Apartment zones. The City's assumption or premise that people will migrate away from paid parking where possible has not been proven by solid data, and this assumption undercuts an effective, proven method of control. A more objective and statistical measure of the so-called problem is required, he said in redirect. An example is the Tall Building Guidelines: specific separation distances are required.

Participant

[39] Geoff Kettel, an experienced land use planner and community activist as president of several large ratepayer groups, gave evidence as a Participant on behalf of clients of Don Valley Community Legal Services. He concentrated his evidence on the large residential buildings on Thorncliffe Park Drive, where charging a fee for visitor parking is both unaffordable and unwelcome from a cultural perspective. Bike lanes have eliminated on-street parking there. He believes that charging a fee for visitors creates a commercial use for the benefit of the landlords, while tenants have to park elsewhere.

Submissions

[40] Gabe Szobel reinforced the City's view that these amendments are both good planning and justifiable. He finds particular support in policies 2.3.1.1 (f) and 4.2.2 of the OP. He also addressed the use of reasonable expectations as a test here, equating the phrase to "what do people generally do?" and here, "is a visitor more likely than not to avoid a visitor spot if there is free parking nearby?" Mr. Tedesco had found that only 2% of the 72 buildings he surveyed currently charge for parking. Almost half of these properties were located where there is free on-street parking. There could be significant impact on these if a charge were imposed on visitor parking. He found it to be a reasonable expectation that parking and on-street parking in RA and RAC zones is usually free (Exhibit 1, Tab 3, para. 4.1).

[41] Mr. Szobel also argued that the appellants have not proven that charging a fee is either necessary or effective to prevent misuse. Surveillance is required, whether by a

permit system or otherwise, payable from rents. Zoning itself is an exercise in inequity, he submitted. Here there is no need for a backup study, since the longstanding North York by-law was accepted by Council as a precedent. Cost recovery should not play a role in any assessment of the "good planning" argument. The Tribunal has long found that financial return should play no part in its consideration of the planning merits. In *Jannock Properties Ltd. and Mississauga (City)*, 2004 CarswellOnt 1549, at para. 68, it stated:

> Historically, when dealing with appeals of planning matters, the Board has given little consideration, if any, to the landowner's ability to achieve a specific level of profit on a particular proposal. The Board makes decisions about what type of use should be planned for over the long term, in accordance with the principles of good planning, which reflect the public interest. In the event of a conflict between the public interest and the landowner's desire to generate profits, the public interest must prevail. This case demonstrates again, the wisdom of refusing economic issues to colour planning matters or decide planning cases.

[42] John Dawson stressed again the lack of a planning rationale behind the ZBAs, and the circumstances of their enactment as essentially a political act. He sees Policy 2.3.1.1 f) of the OP as the "nub" of the City's case: developments in areas close to Neighbourhoods should attenuate parking impacts on adjacent streets so as to not diminish the Neighbourhoods' residential amenity. All parties agreed that abuse of visitor spaces is an issue, but do not agree that a fee will solve this. Mr. Dawson emphasized Mr. Snowdy's evidence that behaviour will change if people see that parking availability is enforced – the so-called "scarecrow" effect. Mr. Tedesco's survey did not observe persons turning away to avoid paid spaces. Mr. Dawson submitted that what people generally **do** is the test, when they see paid spaces and free spots nearby. This issue should not be judged on the test of "reasonable expectations". An observed percentage of only 2% of Mr. Tedesco's properties included paid visitor parking, a figure causing Mr. Dawson to term the By-law prohibition a solution without a problem.

[43] Since every building has a different set of factors, Mr. Dawson argued, paid visitor parking is only one tool, and not the only one. Mr. Rendl, he said, testified that paid parking is only one control option among many. He reviewed many of the other methods mentioned by the witnesses, especially Mr. Snowdy. He submitted that there

is inequity in the existing power to charge a fee in CR zones, but not in contiguous R and RA zones. Planning decisions must consider both the existing and planned context. He finds insufficient rationale for asserting that both are met.

[44] Konstantine Stavrakos reviewed the studies by IBI and Cansult, finding that in effect neither recommended a prohibition of charging for visitor spaces. Cansult studied occupation rates and spillover, but did not end by supporting a ban. The 2007 Staff Report concluded that a prohibition on paid spaces should apply to rentals in mixed use areas only. The GTAA had repeatedly asked the City at that time for examples of a parking issue, and received none. Mr. Stavrakos argued then that any problems are merely speculative or theoretical. Landlords generally use paid visitor parking where on-street parking is already restricted. Its use is therefore location-specific, as it should be. The City does not say that payment is a problem, only that it could be. The probability of problems, and their magnitude, are not mentioned in the City's evidence. Other solutions could be effective, as the objectors' witnesses stated, and methods the City put forth (gates, trained staff, apps, tenant controls, ticketing with no payment) were unworkable. He argued against the application of any such prohibition to geographic areas, since parking abuses are so varied throughout. Landlords use paid visitor parking only where it is needed, and the decision should be theirs.

[45] Tom Halinski concurred with submissions made, and added that the prohibition does nothing to resolve the issue of non-genuine visitors. The City is merely assuming a potential impact, and saying that there is an unrealistic expectation that visitor parking will be free in some zones and not in others. He termed it "nonsensical" to base the ZBAs By-laws on an apprehension of a problem, without a planning analysis. An analysis should include, at a minimum, the numbers of visitor spaces used improperly, whether there is enforcement, and the number of walkaways. The appellants on the other hand have provided evidence that parking is made available as is required, and so meet the policy intent for TDM in provincial policy statements and the OP. If approved, the restrictions should not be applied to the four Policy Areas (close to transit, etc.).

[46] Jason Park stressed that the issue is multi-faceted, but that paid parking is an effective tool, in use in fact at City Hall, by Toronto Parking Authority, Toronto Transit Commission, Metrolinx and TCHC. Its very simplicity and certainty are a plus. It had not been recommended in any previous study, and should not be applied throughout the City. Mr. Tedesco found only two instances of spillover out of his 72 buildings in the RAC zones (only). The *Ballantry* case (below) has no application since actual spillover was observed there, and in the drive-through case (*TDL Group Ltd. v. Toronto* (City), 2003 CarswellOnt 7658) there was no outright prohibition of the use.

Is the By-law Prohibition authorized?

[47] There was a late challenge to the By-law provisions based on previous caselaw. It must be noted that the Tribunal does not have the jurisdiction to declare the ZBAs to be invalid. It can decide a question of law, but in this matter, it can only determine whether the ZBAs are authorized by section 34(1) of the Act as constituting good planning.

[48] Mr. Dawson argued on behalf of the appellants that the By-law provisions resulted in "people zoning", as proscribed by the Supreme Court in *R. v. Bell* (1979) 10 O.M.B.R. 142, 18 DLR (4th) 161 ("*Bell"*). There the Court found that zoning by-laws could be unreasonable and illegal on many grounds, one of which was whether they posed an unreasonable or gratuitous interference with rights not justified in the minds of reasonable people. Mr. Dawson submitted that this principle governed the present appeal, in that the prevention of a charge for visitor parking was using the zoning power to govern landlords' ability to recoup expenses, rather than a legitimate control over the use of their properties.

[49] In response, Mr. Szobel relied on the finding of two decisions directly related to the topic of use of the zoning power to control charges for visitor parking. (See the second, *Ballantry,* below). In the first, the Divisional Court considered such a by-law in *Coinamatic Canada Inc. v. Toronto (City)*, 2003 CanLII 29752 (ON SCDC) (leave to appeal refused, unreported, Mar. 2, 2004, Ont. C.A.). There the source material for the

present By-law amendments [s.6A(8)(f) of North York By-law No. 7625] was challenged as beyond the City's zoning power. The Divisional Court upheld the legality of prohibiting the charging of fees for visitor parking at residential apartment buildings by use of the zoning power.

[50] The Divisional Court made no reference to the *Bell* decision. It held:

> [5] Section 34(1) of the *Act* provides that zoning by-laws may be passed by City Council dealing with, among other things, restricting the use of land, restricting, erecting, locating or using of buildings, loading or parking facilities. In our view, the municipal purpose of City Council's power to pass zoning by-laws dealing with land use, restricting or using buildings and loading or parking facilities is clearly set out in s.34(1) of the *Act*. Further, the power to pass pay parking prohibition by-laws are powers necessarily or fairly implied from the express power to restrict the use of land through zoning contained in s.34(1).

[51] There, as here, was a submission that there was insufficient planning rationale to support the By-law. The Court found that since North York professional planning staff had recommended that the By-law be passed, there was indeed such support for Council's action. Staff had stated that such a prohibition might lead to increased on street parking and might result in inconveniences to residents in apartment buildings. Yet the Court supported the challenged By-law despite a lack of a more specific statement of the planning rationale. While this is not dispositive of the issue in the present appeal, it is persuasive.

[52] Mr. Dawson had also argued that the City has no legislative authority to interfere with the common-law rights of property owners, such as by setting prices or hours. Pricing is not a zoning matter, he stated. As mentioned in *Bell,* he argued that these amendments would be an unreasonable or gratuitous interference with rights, not justified in the minds of reasonable people. In *Coinamatic,* however, the Divisional Court accepted the City's argument (para. 6) that the pay parking prohibitions for required visitor parking spaces for apartments regulate the intended **availability** of those facilities; and that the impact on landlords' interests is consistent with 34(1) of the *Act*.

[53] Mr. Szobel countered that no group or person was being targeted by the prohibition. It is merely a limitation on a performance standard, similar to limits on the size of parking spaces. Limitations on an accessory use does not constitute downzoning, he argued.

DISCUSSION, ANALYSIS AND FINDINGS

[54] The Tribunal finds that the ZBAs under appeal are an authorized exercise of the City's power to zone. We are satisfied that the availability of section 34(1) to support the present almost identical By-law amendments was settled by the Divisional Court in *Coinamatic.* However, it cannot approve the ZBAs as enacted.

[55] The availability of the zoning power to control paid parking was sufficiently reiterated in the decision of the OMB (as it then was) in *Ballantry Homes v Oakville (Town),* 2017 CanLii 23188 (ON LPAT), ("*Ballantry")*. While that case involved paid parking in commercial zones, the availability of the zoning power to control paid parking was not questioned. Indeed, the Town of Oakville ("Oakville") had had such a prohibition on paid parking since 1965 (para. 3). As Mr. Szobel stated, the City is not relying on *Coinamatic* as authority to enact such a by-law, it is settled law. The Tribunal notes that the Divisional Court panel there was a very experienced one.

[56] Respecting conformity with Provincial Policy and policy statements, the Tribunal would agree with the member in the *Ballantry* decision that parking facilities are included in TDM strategies aimed at the efficient use of infrastructure, and increased use of public transportation. As stated there, the definition of TDM in both the PPS and the Growth Plan requires consideration of costing measures to achieve this (para. 68). No detail is required, merely that municipalities have considered and implemented TDM measures that meet the provincial objective (para. 70). Similarly, the City here has addressed the direction in its OP policies to reduce reliance on automobiles, and to encourage alternate means of transportation. The Tribunal would support this intention, if not the resulting extent of this prohibition as enacted.

[57] The appellants here have not made an application to a court to challenge the subject amendments in the approximately six years since they were enacted, as Mr. Szobel argued. However, they are entitled to await the results of the present appeal. The landlords' evidence here has raised sufficient doubt about the extent of the challenged By-law amendments that the Tribunal cannot support them as a good planning exercise.

[58] The Tribunal's analysis of Mr. Tedesco's evidence is that his limited statistical findings do not prove his thesis. They do not assist in supporting the claim that the ZBAs constitute good planning. The study was not wide enough nor clear enough respecting whether spillover parking was indeed occurring, and how this might relate to paid visitor parking. There was insufficient statistical analysis and in essence a lack of clarity as to exactly what he intended to prove. "Reasonable expectation" that a theory or tenet is true does not appear to the Tribunal to be a sound test for assessing the planning merits of a proposal. We believe that there is insufficient hard evidence here that there is verifiable spillover onto nearby streets in the subject R, RA and RAC zones, as Mr. Tedesco claimed. Since he found so few landlords presently charging for visitor parking, the relationship of such charges to nearby streets with free or available parking was not established. Nor was there any evidence of the effectiveness of the older North York source material for these ZBAs.

[59] Respecting the 72-building study conducted here, it is noted that in *Ballantry,* Oakville had considered 10 technical studies prepared for it prior to enacting its by-law. These included a technical paper, and various town meetings were held over a number of years (para. 4). The Tribunal is satisfied to rely on the finding in *Coinamatic* that such a provision is an acceptable use of the zoning powers (para. 5). However, the planning rationale for these amendments and the geographic extent of its application to the chosen designations is another matter. If very few landlords require paid visitor parking at present, when it is not proscribed, it would lead to the conclusion that such payment has little or no ill effect on nearby streets.

[60] The Tribunal agrees with Mr. Rendl and Mr. Bond that a more in-depth study should be conducted to verify their geographical locations and extent. Mr. Bond stated in his reply evidence: “This would require extensive survey work of an entirely different kind to confirm if the “spillover” exists, who the “spillover” is related to and if it is a problem that could not be addressed by implementing the tools described above in item 2.3.” (Exhibit 1, Tab 13, p. 2, referring to restricting on-street hours; parking permits; or paid parking).

[61] The Tribunal finds that the extent of the application of the ZBAs requires more specificity. As it stands, objecting owners in all of the broad zoning categories mentioned must apply for a zoning change or minor variance. Without a clearer policy framework, these would have to be determined on an *ad hoc* basis.

[62] As an aside, Mr. Tedesco provided both an initial expert witness statement (Exhibit 1, Tabs 1 and 3) as well as written reply evidence to most of the appellants’ witnesses Messrs. Snowdy, Bond and Rendl (Exhibit 1, Tabs 5 and 6). The experts for the appellants followed the same pattern (Exhibit 1, Tabs 13 and 14.) These were in addition to their oral evidence. The Tribunal found that the pattern of written evidence in chief as well as written reply, and even written responses to reply evidence, all then intermingled in oral evidence, made the decision-writing task difficult. Differences could have been more effectively outlined in the oral evidence.

[63] The Tribunal therefore allows the appeals, and orders that the Zoning By-law Amendments are not approved.

“G. Burton”

G. BURTON
MEMBER

“*D.S. Colbourne*”

D.S. COLBOURNE
MEMBER