Case Name:

York Region Condominium Corp. No. 890 v. Toronto (City)

Between
York Region Condominium Corporation No. 890,
appellant, and
City of Toronto, Splendid China Square Inc.,
and Bruce Ashton in his capacity as Director of
Building and Deputy Chief Building Official of
the City of Toronto, respondents

[2005] O.J. No. 873
Court File No. 04-CV-281286CM2

Ontario Superior Court of Justice
T. Ducharme J.

Heard: January 10, 2005.
Judgment: February 8, 2005.
(18 paras.)

Counsel:

L. Richetti and M.L. Flynn-Guglietti, for the Appellant

S.B. Stein, for the Respondent, Splendid China Square Inc.

T.H. Wall, for the Respondents, City of Toronto and Bruce Ashton

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RULING RE STANDING

¶ 1 **T. DUCHARME J.**:— This is an appeal by York Region Condominium Corporation, No. 890 ("YRCC 890") pursuant to section 25 of the Building Code Act, 1992 of a decision of Bruce Ashton, in his capacity as Director of Building and Deputy Chief Building Official of the City of Toronto, to issue building permits "04 165947 HVA 00 MS", "04 165947 PLB 00 PS", and "04 165947 BLD 00 BA" (the "building permits") sought to be used by Splendid China Square Inc. ("Splendid China"). Broadly speaking, the basis of the appeal is that the building permits should not have been issued without the benefit of site plan review which the appellant says is required under section

41 of the Planning Act, R.S.O. 1990, c. P. 13. The appellant seeks a variety of remedies, interlocutory and otherwise, which would have the effect of preventing the respondents from acting pursuant to the building permits issued to Splendid China until such time as Splendid China and the City of Toronto have entered into a final and binding site plan agreement.

¶ 2 By way of a preliminary objection the respondent, Splendid China, submits that the appellant does not have standing to launch this appeal under section 25 of the Building Code Act, 1992. Briefly put, Splendid argues that there is no legal nexus between the concerns of YRCC 890 and the Splendid China building permit application.

THE PARTIES

¶ 3 YRCC 890 is the owner of the Pacific Mall. The Pacific Mall is a large "Asian-themed" mall located at 4300 Steeles Avenue East, on the north side of Steeles Avenue East and east of Kennedy Road, in the Town of Markham ("Pacific Mall").

¶ 4 The respondent, Splendid China, owns the property located at 4675 Steeles Avenue East in the City of Toronto. The building on this site was formerly a Canadian Tire retail store. Splendid has proposed a new Asian-themed mall at that site (the "China Mall") for which it obtained various building permits. The China Mall will be located immediately south of the Pacific Mall and is separated only by Steeles Avenue. Although directly across from one another, the China Mall is located in the City of Toronto, whereas the Pacific Mall is located in the Town of Markham.

¶ 5 The City of Toronto is the municipality having jurisdiction to enforce and implement the Planning Act within the City of Toronto. Bruce Ashton ("Ashton") is the Director or Building and Deputy Chief Building Official in the City of Toronto and is responsible for the issuance of building permits under the Building Code Act, 1992 for area in the City of Toronto in which the subject proposed development is situated.

THE TEST FOR STANDING

¶ 6 Section 25 of the Building Code Act, 1992, S.O. 1992, c. 23 deals with appeals relating to the issuance or non-issuance of building permits. Standing is addressed in section 25(1) which provides:

> 25 (1) Any person who considers themselves aggrieved by an order or decision made by an inspector or chief building official under this Act or the regulations, except a decision not to issue a conditional permit under subsection 8(3), may, within twenty days after the order or decision is made, appeal the order or decision to a judge of the Superior Court of Justice. (emphasis added)

¶ 7 The scope of the phrase "any person who considers themselves aggrieved" has been considered in a number of cases. In Giglio Enterprises Ltd. v. Edward Link, [1989] O.J. No. 1652 (Ont. Dist. Ct.), Zalev D.C.J. concluded that this class must be larger than the class "any person aggrieved". However, he went on to observe at page 18 of his reasons:

> In any event, it cannot include every person who, for whatever reason, has a personal axe to grind, whether real or fanciful, against the municipal authorities, Building Department, landowner, and those involved in the actual construction. At the very least there must be reasonable grounds for believing oneself aggrieved. (emphasis added)

¶ 8 In Friends of Toronto Parkland v. Toronto (City) (1991), 6 O.R. (3d) 196 (Div. Ct.) the Divisional Court expressly approved the approach taken in Giglio. The Divisional Court found that section 15 (now 25) of the Building Code Act was intended to be dispositive of the issue of standing. At page 205 they observed:

> While the word "aggrieved" is not to be understood in some traditional sense relating to a person's legal interest, nevertheless, the legislature clearly intended that some threshold test be applied and it would be inappropriate to leave the whole matter either to the subjective whim of the appellant or solely to the discretion of the court.
> The word "aggrieved" is to be considered in its ordinary dictionary meaning and not as a legal term of art. . . . In our view, persons may be aggrieved within the meaning of that term in s. 15 though they have suffered no legal harm. It is the responsibility of the courts, when requested to do so, to determine if a particular administrative action is legitimately within the scope of the statutory power and an appeal is not to be barred simply because the appellant does not have a personal proprietary or pecuniary interest.

In upholding the decision of the motions judge the Court interpreted "any person who considers themselves aggrieved" as "any person who reasonably considers themselves aggrieved".

¶ 9 The appellant, YRCC 890, argues that the construction of the China Mall will create parking and traffic problems in the area and will have an adverse impact on the economic and commercial interests of the Pacific Mall. As a result of these concerns they submit they reasonably consider themselves aggrieved and therefore have standing to appeal.

¶ 10 The respondent, Splendid China, submits that there is no legal nexus between the concerns of YRCC 890 and the granting of building permits to Splendid China such that YRCC 890 can be said to reasonably consider itself aggrieved. In particular, Mr. Stein for

Splendid China makes the following submissions:

(a) The scope of a site plan review are strictly prescribed by s. 41(7)(a) of the Planning Act. None of these items authorize analysis or review of planning issues for the general area or off-site impacts such as street traffic volumes, intersection operations, or parking problems at neighbouring properties. It would be inappropriate and ultra vires of the City to embark upon investigation of these issues as part of site plan review. Thus, the concerns raised by YRCC 890 are not related to the decision they seek to appeal;
(b) There is a lack of substantive evidence related to parking or traffic problems alleged by YRCC 890. Mr. Stein points out that Splendid China will provide double the amount of parking required by the zoning by-law. As for traffic problems Mr. Stein submits that there is no evidence of any change in peak hour or other traffic from the Canadian Tire volumes or of any adverse traffic impact on Pacific Mall caused by the proposed construction;
(c) YRCC 890 has provided no evidence of any direct economic impact on the Pacific Mall; (d) YRCC 890 has no statutory right to be involved in the process of site plan review and consequently they should not be permitted to appeal on the basis that there was no site plan review.

I will address each of these points in turn.

¶ 11 With respect to the restrictions imposed on the site review process by section 41 (7) of the Planning Act, I am not persuaded that Mr. Stein's submission in correct. Section 41(7) provides, in part as follows:

(7) As a condition to the approval of the plans and drawings referred to in subsection (4), a municipality may require the owner of the land to,

(a) provide to the satisfaction of and at no expense to the municipality any or all of the following:
1. Subject to the provisions of subsections (8) and (9), widenings of highways that abut on the land.
2. Subject to the Public Transportation and Highway Improvement Act, facilities to provide access to and from the land such as access ramps and curbings and traffic direction signs.
3. Off-street vehicular loading and parking facilities, either covered or uncovered, access driveways, including driveways for emergency vehicles, and the surfacing of such areas and driveways.

It appears that the foregoing provisions are all directed to deal with problems relating to both parking and traffic. Consequently these concerns could be addressed in the context of the site plan approval process. Consequently, this is not basis for denying the appellant's standing.

¶ 12 Mr. Stein's second and third objections relate to the quality of evidence required to establish standing. His submission can be reduced to the proposition that one cannot claim to be reasonably aggrieved unless one can support one's concerns with substantive evidence. The appellant submits that the threshold test for standing under section 25 is relatively low and it is not an objective test determined on the basis of actual or quantifiable harm or loss.

¶ 13 Only a few cases have explicitly discussed the quality of evidence required to establish standing under section 25 of the Building Code Act. The starting point of any analysis must be Friends of Toronto Parkland which established a low threshold for standing. In this regard, I would adopt the comments of Feldman J., as she then was, in Loblaws Inc. v. Ancaster (Town) Chief Building Official, [1992] O.J. No. 1879 (Ont. G.D.):

> In [Friends of Toronto Parkland] the court allows for the broadest of nexus between the interests of the applicant and the decision to issue the building permit. In that case, the appellant public interest group had no proprietary or pecuniary interest in the decision, but rather felt that the development in question was not in the public interest for various reasons. The court would not have denied them standing on that basis, but because they had already tried to stop the development through several other routes within the planning process, with no success, the court was of the view that the applicant was now trying to use an appeal regarding the alleged non-compliance of the parking component of the permit as another route to accomplish their original purpose and questioned the bona fides of their subjective feelings of being aggrieved by the decision to issue the permit. (emphasis added)

A similar view of the threshold for standing was expressed by Howden J. in Rotstein v. Oro-Medonte (Township), [2002] O.J. No. 4990 (S.C.J.) at para. 18:

> Section 25(1) does not limit rights of appeal only to those who are aggrieved or seriously affected by a CBO decision but to any person "who considers themself aggrieved ...". In other words, the test suggested by Section 25(1) for standing is a relatively low threshold. It is certainly not a purely objective one determined on the basis of actual or quantifiable harm or loss. Though the section appears on its face to express a purely subjective test, the court requires some threshold to be applied in order to maintain the integrity of the process, focus scarce judicial resources, and

> ensure that the appeal procedure is not open to misuse by those who simply have some personal axe to grind and "feel" aggrieved without any nexus of interest or effect to the decision. (emphasis added)

¶ 14 As a result of this low threshold, there are several cases where standing has been granted to appellants based on little or no evidence. Indeed, in Loblaws Inc., Justice Feldman acknowledged the limitations of the evidence in that case:

> The respondent says that the evidence of the applicant supporting its position is not probative as to the alleged negative economic impact of the Price Club, without for example, comparative figures showing the effect of other Price Club outlets on other grocery stores in close proximity. I agree that such evidence might have been more cogent.

Nonetheless she granted standing to the applicant based on the applicant's assertion that the Price Club would directly compete with two major retail grocery stores he operated in the area.

¶ 15 Similarly, in Heifer Group Ltd. v. Listowel (Town) Chief Building Official, [1996] O.J. No. 1017 (Ont. G.D.) standing was granted to the applicant to appeal the granting of a building permit to build a Zellers store in Listowel. The case is striking in two respects. First, the applicant owned no land in Listowel. Rather, he was a builder that intended to construct a large Wal-Mart in a neighbouring town. Second, the court found, "sufficient evidence of an identifiable potential adverse financial impact to give the applicant standing" on the basis that the Zellers store being developed in Listowel would be more competitive because the building permit permitted construction in excess of the size permitted by the zoning by-law. This despite the fact the neither store had been built and no prospective studies were submitted to the court.

¶ 16 The recognition of this low threshold for standing and the preceding cases suggest that Mr. Stein's second and third objections cannot prevail. In my view, the appellant has established a reasonable basis for their feeling aggrieved by the granting of the challenged building permits. First, it seems obvious that an increase in traffic will result from the conversion of an unused Canadian Tire building to a multi-unit retail mall. Second, the materials filed by the appellant satisfy me that traffic in the area of the Pacific Mall is already problematic, a situation that could well be exacerbated by the opening of the China Mall. Third, the fact that the two malls are located near one another and are both Asian-themed suggest that the China Mall will compete with, and may well have an adverse economic impact on, the Pacific Mall. While the appellant's evidence might not be sufficient for them to prevail on the appeal proper, it is more than enough for them to be granted standing.

¶ 17 As for Mr. Stein's fourth argument, I am of the view that the issue of whether or not the appellant has a statutory right to participate in the site review process is largely

beside the point. The more appropriate question is whether the appellant's concerns could be addressed through the site review process with, or without, their participation. In any event, while this argument may be relevant to the appeal proper, it is no reason to deny the appellant standing.

¶ 18 For all these reasons, I find that the appellant has established that it reasonably considers itself aggrieved by the challenged decision to issue the building permits and consequently I would grant it standing under section 25 of the Building Code Act, 1992 to appeal that decision.

T. DUCHARME J.

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