

Court File No. CV-19-8313-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SUDBURY BUSINESS IMPROVEMENT AREA and TOM FORTIN

Applicants

-and-

CITY OF GREATER SUDBURY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page. THIS APPLICATION will come on for a hearing at a time and date to be agreed upon by both parties.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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Date: APR 08 2019

Issued by

" Peggy Fleming "

Local Registrar

Address of court office:

Superior Court of Justice - Civil
155 Elm St.
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TO:

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APPLICATION

1. The Applicants make application for:

- a. An Order quashing the By-laws (as defined below) in whole or, in the alternative, in part, for illegality pursuant to s. 273 of the *Municipal Act*, 2001, S.O. 2001, c.25;
- b. An Order declaring the By-laws to be illegal, invalid, void, *ultra vires*, and unenforceable for reasons which include the following:
 - i. Improper fettering of discretion;
 - ii. Improper delegation of the exercise of discretion;
 - iii. Bias;
 - iv. Bad faith;
 - v. The lack of jurisdiction to pass the By-laws; and
 - vi. Procedural irregularities in the passage of the By-laws;
- c. Such further and other temporary or permanent Order as this Honourable Court may deem appropriate;
- d. Such further and other temporary or permanent Order as the Applicants may request in an amended Notice of Application to be filed;
- e. Costs on a substantial indemnity basis; and
- f. Such further and other relief as this Honorable Court may deem just.

2. The grounds for the application are:

- a. The City of Greater Sudbury (the “**City**”) has established a long-term plan which includes a major initiative to rejuvenate its existing

“Downtown Community Area” (the “**Downtown**”). Said plan includes the modernization of its performing art facilities through upgrade or replacement with an arena/event center together with a new Hotel/Convention Centre, Art Gallery, and Library. This plan was established by the City and enacted through its Official Plan, zoning by-laws, and other planning instruments, documents, and public representations.

- b. The City's plan vis-à-vis the Downtown rejuvenation was well underway, with the arena as the first major component, when the City became involved with a local developer (“**Zulich**”) to build a new casino on his industrial lands well outside the Downtown. The developer convinced the City to relocate the new arena/event centre beside the casino and a proposed hotel also on his lands.
- c. Without studying the economic impact of this drastic change of direction on the Downtown and the local economy, or the socio-economic impacts of a City-owned arena/event centre being located and connected to a casino, the City rushed to approve the new arena/event centre. It therefore passed the By-laws subject to this appeal, namely the following:

Casino

- i. By-law 2018-60P approving Official Plan Amendment No. 92 to allow for the development of a gaming casino, passed on April 10th, 2018, as amended;

- ii. Zoning By-law 2018-61Z, passed on April 10, 2018, as amended by By-law 2018-70Z, passed on April 24, 2018, to permit the casino;

Arena/Event Centre

- iii. Zoning By-law 2018-63Z, passed on April 10, 2018, as amended by By-law 2018-72Z, passed on April 24, 2018, to permit an arena/event centre ("event centre");

Parking Lot

- iv. Zoning By-law 2018-62Z, passed on April 10, 2018, as amended by By-law 2018-71Z, passed on April 24, 2018, to permit a parking lot.
(collectively, the "**By-laws**")

- d. In passing the By-laws, the conduct of the City was marked by the following:
 - i. Improper fettering of discretion;
 - ii. Improper delegation of the exercise of discretion;
 - iii. Bias;
 - iv. Bad faith;
 - v. A lack of jurisdiction; and
 - vi. Procedural irregularities.
- e. Prior to the statutory public meetings leading up to the passage of the By-laws, the City pre-determined and approved the location of the arena/event centre and casino, thereby rendering the statutory public meeting, ostensibly to obtain and genuinely consider the views of the public as mandated by law, meaningless. City Council was biased,

fettered and/or delegated its discretion, and acted in bad faith prior to the approval of the Subject By-laws, and such constituted an error of law which render the By-laws null and void.

- f. On August 22, 2017, Council passed by-law No. 2017-149, which authorized staff to negotiate and execute an "Option Agreement" between the City and Zulich. The "Option Agreement", however, was executed in June 2017, prior to the by-law authorizing its negotiation and almost a year prior to the passing of the By-laws themselves. Despite repeated requests and the commencement of appeals of the By-laws before the LPAT, Council refused to disclose the Option Agreement to the Applicants.
- g. The Applicants were provided the Option Agreement by a third party. Said agreement required Zulich to pay for all grading and servicing costs for the contemplated site, subject to the City contributing \$1M after such works had been completed and it had approved them. Zulich also agreed to use all reasonable efforts to complete the development of the entire "Sports and Entertainment District", at its own cost (save for the City arena/event centre) within five (5) years of the date of the City's exercise of its option at a purchase price of (\$10.00), failing which Zulich would pay to the City as liquidated damages the sum of \$100,000 per year in perpetuity until the entire project was substantially built.

- h. Subsequently, a media report indicated the City and Zulich either amended or replaced the Option Agreement whereat the City, and not Zulich, agreed to front-end the costs to service and grade the lands upon which the project was to sit at a cost of \$8.5M, notwithstanding that appeals of the By-laws before LPAT were still outstanding. The Option Agreement was requested by the Applicant and as of yet has not been produced.
- i. On November 22, 2018, a further media report quoted City Council and indicated that the City was preparing to execute a “Cost-Sharing Agreement” with Zulich during late November and subsequently execute an agreement with the contractor to allow for work to commence immediately. City staff were quoted as being unconcerned with respect to risks to the City if the appeals were successful.
- j. The approval of amendments to the Option Agreement and execution of the “Cost-Sharing Agreement” would create “facts on the ground” which could be anticipated to influence the outcome of the LPAT process, namely, the expense of \$8.5M for servicing the site on which the challenged project would sit.
- k. On July 31, 2018, the Mayor of the City wrote to Premier Ford, asked for a meeting between the Premier and the City’s “key partners,” and pleaded for the Premier’s “intervention” in the ongoing LPAT appeal of the By-laws. The Premier advised that he had requested the Minister of Municipal Affairs and Housing respond to the Mayor’s request and

that he had forwarded the Mayor's email to other Ministers, including the Minister of Municipal Affairs and Housing, the Minister of Economic Development, Job Creation, and Trade and the Minister of Infrastructure. The City refused to provide the Applicants with any further communications or developments which arose out of the Mayor's correspondence with the Premier.

- l. The email/letter exchange between Mayor Biggar and Premier Ford asking for the Premier's "intervention" in the LPAT appeal process was improper and, in combination the circumstances surrounding the Option Agreement and its amendment, presented several indicia of bad faith, bias, and/or the fettering of discretion.
- m. Further particularized grounds concerning the City's problematic conduct are contained in the Case Synopses and Written Argument of the Applicants, dated August 28, 2018 as submitted to the Local Planning Appeal Tribunal and are pleaded and relied upon herein.
- n. O. Reg 347/00 Requirements for Establishing a Casino or Charity;
- o. O. Reg. 81/12 Requirements for Establishing a Gaming Site;
- p. O.Reg. 425/00 Provincial Interest.
- q. *Municipal Elections Act*, 1996 S.O. 1996 Ch. 32.
- r. *Municipal Act*, 2001, S.O. 2001, c. 25.
- s. *Planning Act*, R.S.O. 1990 Ch. P.13.

3. The following documentary evidence will be used at the hearing of the application:

- a. The Affidavit of Tom Fortin;
- b. The Affidavit of Rowan Faludi;
- c. The Affidavit of Robert A. Dragicevic; and
- d. Such further and other material as this Honourable Court may permit.

DATE: April 8, 2019

MUNICIPAL LAW CHAMBERS

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SUDBURY BUSINESS IMPROVEMENT AREA et al.
Applicants

v.

THE CITY OF GREATER SUDBURY
Respondent

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceedings commenced at **Sudbury**

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