



January 24, 2019

Bruce H. Engell
T: 416-947-5081
bengell@weirfoulds.com

City of Vaughan Committee of Adjustment
2141 Major Mackenzie Drive
Vaughan, ON L6A 1T1

File 00172.00022

Attention: Christine Vigneault, Secretary-Treasurer

Dear Ms. Vigneault:

Re: Icona Condos – Committee of Adjustment file no. A136/18 (3201 Highway 7, Concord)

You have asked for our opinion on an issue regarding the minor variance application (the “**Application**”) filed by 1406284 Ontario Inc. (“**Icona**”) to the Committee of Adjustment for the City of Vaughan (the “**Committee**”) for the property municipally known as 3201 Highway 7 (the “**Property**”).

Specifically, you have asked us:

- i. whether the non-disclosure of a restrictive covenant on the application form has an impact on the processing of the Application; and,
- ii. whether the restrictive covenant is a matter for the Committee to consider in dealing with the Application.

CONCLUSION

In our opinion:

- i. in the circumstances of this case, the non-disclosure of the restrictive covenant is not a basis for the Committee to refuse to proceed to consider the Application; and
- ii. the restrictive covenant, in this situation, does not appear to be relevant to the Committee’s application of the four tests.

FACTS

Purchase and Restrictive Covenant

The Property is the current site of the Vaughan Hilton Garden Inn, and was sold to Icona in 2005. The Vendor retained neighbouring lands. The Property was made subject to a restrictive covenant agreement (the “**RC Agreement**”) between Icona and the Vendor which restricted the use of the Property. The RC Agreement runs until 2045, although it appears the main restriction may expire in 2025. The RC Agreement provides that the Property “shall not be used for any purpose other than the construction, development, operation and management of a hotel with meeting and banquet facilities and any purposes ancillary or incidental thereto including without limitation, restaurant and lounge facilities”. Schedule “C” to the RC Agreement also provided that:

Section 2

Unless specifically permitted in writing by [the Vendor], no person (including, without limitation, [Icona]) will apply for development approval or a building permit with respect to the Burdened Land or commence construction or installation of any Improvements on the Burdened Land without first:

a) Providing to [the Vendor] reasonably detailed plans and specification of the Improvements...

...

b) Obtaining the approval of [the Vendor] thereto in writing...

At the time Icona purchased the Property, the Official Plan designation and zoning allowed for residential uses. Although these instruments have changed somewhat over time, the Official Plan and zoning still allow for residential uses.

Original Development Application

Icona proceeded to seek approvals from the City for a residential development on the Property. Apparently, it did this without the Vendor’s consent. However, we are not aware of any proceedings brought by the Vendor to stop Icona from going forward with its development process.

In an application heard March 29, 2018, Icona brought an application before the Superior Court (the “**Court Application**”) seeking the deletion of the restrictive covenants in order to proceed with a proposed residential redevelopment. On July 6, 2018, Justice Cavanagh ruled that Icona was not entitled to an Order deleting the restrictive covenants from title to the Property.

Current Application

On July 19, 2018, Icona submitted the current Application seeking a number of variances to the Property. The variances sought relate to the built form of the proposed buildings, and do not seek to vary the uses permitted on the Property pursuant to the zoning by-law. The Application Form submitted did not indicate that the Property was subject to any restrictive covenant, despite section B(3) of the form requiring that the applicant identify any restrictive covenants.

On December 11 and 21, 2018, counsel for the Vendor sent letters to counsel for Icona to object to Icona proceeding with the Application without the Vendor’s consent. The Vendor threatened to bring proceedings in Court to enforce the RC Agreement. On January 10, 2019, the Vendor’s lawyer also wrote to the Committee to oppose the Application.

On January 10, 2019, counsel for Icona wrote to the Committee to respond to the January 10, 2019 letter arguing that the RC Agreement was not a proper consideration for the Committee as it does not form any part of the four tests contemplated by the *Planning Act*.

On January 10, 2019, the Committee adjourned the consideration of the Application pending receipt of legal advice on how to proceed.

OPINION

1. *Should the non-disclosure of the restrictive covenant on the Application Form affect whether the Committee should proceed with the Application*

We do not know why the RC Agreement was not referred to in the Application Form. However, the existence of the RC Agreement has now become known to the Committee. The Committee is therefore able to proceed to consider the Application and consider what impact the RC Agreement may have on its disposition of the Application. In doing so, the Committee’s jurisdiction remains that set out in the *Planning Act*, with the four tests set out.

In our view, the Committee has an obligation to consider the Application under the legislation and the restrictive covenant issue should not, procedurally, prevent the Committee from doing so.

2. *Is the restrictive covenant a matter for the Committee to consider in dealing with the Application*

When considering a minor variance application, the Committee must consider whether the Application meets the four tests, as set out in section 45 of the *Planning Act*, namely:

1. Does the variance maintain the general intent and purpose of the Official Plan?
2. Does the variance maintain the general intent and purpose of the Zoning By-law?
3. Is the variance desirable for the appropriate development or use of the land?
4. Is the variance minor?

In order for a restrictive covenant to be a consideration in a minor variance application before the Committee, it must be relevant under one of the four tests. In this respect, it appears that the third test, “desirable for the appropriate development or use of the land”, is likely the only one where a restrictive covenant could be relevant.

From our understanding of the situation, it appears that the RC Agreement is in force and applies to the Property. It appears that Icona recognized the existence and applicability of the RC Agreement on the Property, as its Court Application sought the deletion of the restrictive covenant from title to the Property. Icona does not appear to have argued that it did not exist, or did not apply – instead, it sought to have the Court relieve it from having to comply with it.

It is therefore necessary to determine if the RC Agreement is relevant to the Committee’s consideration under the third test.

In general, there may be circumstances in which a restrictive covenant can be relevant to the Committee’s considerations in a minor variance application, which is why an applicant has to disclose the existence of any such restrictive covenants on the application form. Whether it is a relevant consideration under the four tests will depend on the specific facts of the application, and should be considered by the Committee in all cases.

In respect of this Application, we note that residential uses are already permitted by the zoning by-law. The Application does not seek to vary those use permissions. Instead, it is focussed on a variety of built-form provisions in the zoning by-law. As a result, it is difficult to understand how the Committee's consideration of the RC Agreement could fall into its application of the four tests.

The parties to the RC Agreement understand that they have recourse to the Courts to resolve issues of the validity, the interpretation and the enforcement of the RC Agreement. Icona initiated the first proceeding. The Vendor has indicated that it will bring enforcement proceedings against Icona if it continues to pursue development which it considers to be contrary to the RC Agreement.

The Committee is not given power under the *Planning Act* to consider the validity, the interpretation and the enforcement of the RC Agreement. The Committee process is also not set up and equipped to allow the Committee to deal with such issues. Those issues, as recognized by both Icona and the Vendor, are matters which the Courts have jurisdiction over and are equipped to address.

As a result, it is our view that the RC Agreement does not appear to be relevant to the Committee's application of the statutory tests which it is to consider when hearing the Application.

Please do not hesitate to contact us should you have any questions.

Yours truly,

WeirFoulds LLP



Bruce H. Engell

BHE/SRR

12661146.5