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Real Estate

Planning Act problems with parking lots, leases, licences

By **Harjot Atwal**

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(May 1, 2020, 2:24 PM EDT) -- Long-term property values can fluctuate wildly. In times of economic recession (which is becoming more and more of a current concern with COVID-19), it is not uncommon to see an influx of applications brought forward by both landlords and tenants alike to strike down leases as property values decline. Strategically, the reason for this is simple: when the lease becomes more of a burden than a benefit to the applicant due to an economic downturn, any reason will suffice to have it declared invalid in order to free oneself of its obligations.

Enter s. 50 of the *Planning Act*, which landlords and tenants are prone to tactically utilizing in such circumstances. Essentially, unless an exception applies, a lease granted over part of a property will not create an interest in land if its term is for a period of 21 or more years (as the landlord will then retain the right to the non-leased abutting land and engage in the type of subdivision the Act is aimed at preventing).

One such exception is s. 50(9), which states the Act does not "prohibit the entering into of an agreement that has the effect of granting the use of or right in a part of a building or structure for any period of years." However, confusion comes into play here when considering parking lots. If they are underground, such as in the condominium context, it appears fair to say the s. 50(9) exception is applicable as they are then "part of a building or structure." However, what if the parking lot is outside, in the open air and not completely enclosed? Is it still part of the building or structure? Common sense seems to dictate the answer is "no."

However, in the case of *DeLuca Bros v. Windsor Essex Catholic School Board* 2020 ONSC 873, the opposite conclusion was reached. The applicant needed additional parking spaces for their expanding restaurant, and came to an agreement to share a newly constructed parking lot to be located on the neighbouring school's property. While the restaurant would only be able to use the parking lot during non-school hours, it was also required to pay for 50 per cent of the costs including the construction of an internal laneway and fencing. Many years later, the school board then tried to have the 99-year agreement declared invalid pursuant to the Act's 21-year requirement, likely motivated in part by the fact that the parking lot construction cost $50,000 in 1986 but was now worth approximately $500,000.

In deciding the parking lot was a "structure" of its own and ruling against the school board, the court first referenced the extremely broad *Canadian Dictionary of Law* definition which states that it includes anything "built or made on or affixed to or imbedded in land after being built or made elsewhere … [including] any building, structure, erection … sidewalk, road, roadbed, lane. ..."

This broadness was then used to justify the open-air parking lot as a separate structure due to its laneway and fencing improvements, even though such improvements are common to many if not most parking lots. Ultimately, the court held that the agreement was thus saved by the s. 50(9) exception in the restaurant's favour.

This is a problematic precedent, primarily because it exemplifies the old legal maxim that "hard cases make bad law." The court was clearly trying to protect the restaurant from being deprived of the valuable parking lot it half-paid for, and was accordingly unwilling to rule in favour of the school

board based on a technicality. However, in broadening the interpretation of "structure" in s. 50(9) to include parking lots with any improvement, is it not now possible to subdivide the parking lot land by means of 100-year leases in any way one desires? For example, could one not argue that 10 to 20 parking spaces with their own laneway make up a separate "part of a building or structure," s. 50(9) applies, and each 10-to-20 space portion is capable of being separately leased?

Why would I ever seek a *Planning Act* consent from the local planning appeal tribunal in such a scenario then, even if I were only looking to lease one space from my neighbour's large connected driveway? This sounds like unauthorized subdivision by long-term leases that run contrary to the purpose of the Act.

A further concern with respect to this decision are the consistent references to the term "exclusive use" in interpreting s. 50(9), as this term never appears in the Act. Rather, it has been used because the presence of "exclusive use," at common law, typically tends to weigh in favour of a contract being held to be a lease rather than a licence agreement.

As the agreement spanned 99 years contrary to the Act's 21-year requirement, it would have been declared invalid if found to be a lease. Instead, through emphasizing the restaurant's non-exclusive use occurred during non-school hours, and ignoring the fact that the wording of s. 50 repeatedly mentions simply "granting the use of or right in land" without mentioning exclusivity, the court was able to rule this was a valid licence agreement that complied with the Act.

While similar arguments involving s. 50(9) and leasehold interests have been used by applicants before, such as to try to avoid paying large amounts of land transfer tax by invalidating a lease (see *Sears Canada Ltd v. Scarborough Town Centre Holdings Inc.* 45 O.R. 3(d) 474), the somewhat judicially activist approach in this decision potentially allows landlords and tenants to go too far. Accordingly, one should perhaps be wary of relying too heavily on the reasoning used in DeLuca Bros for now, but it will be interesting to see if future decisions also follow this line of judicial thinking.

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