CITATION: Middlesex-London H. U. and Middlesex County v. I.F. Propco, 2018 ONSC 3229
COURT FILE NO.: 515/18
DATE: 20180525

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Middlesex-London Health Unit, Applicant

AND:

The Corporation of the County of Middlesex and The Corporation of the City of London, Respondents

AND:

I.F. Propco Holdings (Ontario) 31 Ltd., Party/Intervener

BEFORE: Justice J.N. Morissette

COUNSEL: John H. McNair and V. Yang, for the Applicant

Wayne P. Meagher, for the Respondent, The Corporation of the County of Middlesex

Danilo Popadic, for the Respondent, The Corporation of the City of London

Jordan Goldblatt, for the Intervener, I.F. Propco Holdings (Ontario) 31 Ltd.

HEARD: May 7 and 8, 2018

ENDORSEMENT

OVERVIEW:

[1] The Middlesex London Health Unit ("the applicant" or "the MLHU") seeks a determination of rights that depend on the interpretation of a statute pursuant to r. 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The provision in question is s. 52(3) of the *Health Protection and Promotions Act*, R.S.O. 1990, c. H.7 (*HPPA*).

[2] Should this court agree with the interpretation of the respondents, the Corporation of the County of Middlesex ("the County") and the Corporation of the City of London ("the

City"), that consent is required under s. 52(3) of the *HPPA*, the applicant seeks leave under section 6(2) of the *Judicial Review Procedure Act,* R.S.O. 1990, c. J.1 (*JRPA*) for an order declaring that the statutory decision of the County to withhold consent to the proposed lease transaction was exercised unreasonably, invalidly, and without fairness.

[3] The applicant seeks an order setting aside the March 6, 2018 decision of the County, which refused to consent to the applicant's decision to enter into a new lease, and an order declaring that the applicant has the authority and capacity to enter into the lease with the consent only of the municipal council of the City.

[4] I.F. Propco Holdings (Ontario) 31 Ltd. ("Propco" or "the Intervener"), the owner of Citi Plaza (the location of the proposed lease transaction), has intervener status in the judicial review component of these proceedings. It seeks leave on an urgent basis to have this court set aside the County's resolution refusing to consent to the lease transaction.

[5] The Attorney General of Ontario was served and has decided not to intervene in this proceeding.

BACKGROUND FACTS:

[6] The MLHU is a Board of Health established under the *HPPA* to provide and oversee public health programs and services within the geographic areas of the City of London and the County of Middlesex. The MLHU serves a population of approximately 460,000 residents in London and in the communities of Adelaide-Metcalfe, Lucan-Biddulph, Middlesex Centre, North Middlesex, Southwest Middlesex, Strathroy-Caradoc, Thames Centre, and Newbury. These latter communities are all lower tier municipalities. The County of Middlesex is an upper tier municipality and the City of London is a single tier municipality.

[7] The MLHU receives funding through grants from the provincial Ministry of Health and Long Term Care and Ministry of Child and Youth Services, along with minor contributions from the County and the City.

[8] In 2016, the City contributed 17.38% and the County contributed 3.31% of the total funding to the MLHU.

[9] The MLHU provides its programs and services from three principal locations: its main office and headquarters in downtown London at 50 King St., London; 201 Queens Ave., London; and 51 Front St., Strathroy. All of these locations are leased from various landlords. The landlord at 50 King St. is the County.

[10] The MLHU has sought to move its main office and headquarters at 50 King St. to a new location.

[11] The selection of the Citi Plaza location followed an intensive review of the applicant's current and future space requirements and public and partner consultations with respect to a centralized location. The Citi Plaza site was chosen from proposals submitted in response

to a Request for Proposal (RFP) process conducted between December 2016 and June 2017.

[12] The County submitted one of the eight proposals received during the RFP process. It proposed a new long-term lease of the existing premises at 50 King St.

[13] The results of the RFP process were evaluated by an external consultant according to site selection, space needs, and technical and pricing metrics. The highest cumulative score was for the Citi Plaza. The lowest score was for the current location at 50 King St.

[14] The MLHU entered into a letter of intent on January 15, 2018 with the agent for the Intervener with respect to a proposed long-term lease at the Citi Plaza premises with a view to consolidating the applicant's London locations and moving operations to a reconfigured space. Essentially, the MLHU seeks to move its headquarters from 50 King St. to Citi Plaza located at 355 Wellington St. in London's downtown, which is some 800 meters away.

[15] The MLHU concluded during the site selection process that it would be prudent and desirable to gain the consent of both the County and the City for the proposed move to a new location.

[16] The City Council gave consent and approval for the proposed new lease on February 13, 2018.

[17] At its meeting on March 6, 2018, County Council determined that consent would not be given and instead resolved to request the Minister of Health and Long-Term Care to appoint an assessor to conduct an investigation of the conduct of the affairs of the MLHU pursuant to subsection 82(3) of the *HPPA*. The County passed the following resolution:

> That Middlesex County Council does not consent to the Health Unit's acquisition of property due to the order of approach taken by the Health Unit, the lack of study concerning County residents, and unanswered questions concerning the impact of the potential acquisition of property would have on County residents; and the Middlesex County Council request that a written letter be sent on its behalf further the process by assessment in accordance with s. 82 of the [*HPPA*].

STATUTORY INTERPRETATION OF S. 52 OF THE *HPPA*:

[18] The starting point for a review of delegated power is the underlying statutory scheme.

[19] The MLHU's position is that they are acquiring a leasehold interest in a portion of the Citi Plaza building which does not amount to acquiring or holding real property within the meaning of subsection 52(3) of the *HPPA,* with the result that no municipal consent is required.

[20] Both the City and the County's position is that consent of the councils of the majority of the municipalities within the jurisdiction served by the MLHU is required for the acquisition of a lease or leasehold interest in property. The City relies heavily on the French interpretation of the section in question while the County relies heavily on *City of Guelph v. Board of Health*, 2011 ONSC 5981 [*Guelph*] in support of their position that consent is required.

[21] The MLHU is one of a number of health units formed throughout Ontario, all of which share a common purpose as defined under section 2 of the *HPPA*:

> The purpose of this *Act* is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.

[22] To fulfil its purpose, the MLHU must operate out of a physical location that permits service delivery to its clients. As a result, section 52 of the *HPPA* grants the MLHU authority to acquire and hold property.

[23] Under s. 52(4) of the *HPPA*, a "majority" of municipalities are required to consent to an acquisition or holding of real property by a health unit.

[24] Subsections 52(3) and (4) of the English version of the *HPPA* stipulate the following:

> (3) A board of health may **acquire and hold real property** for the purpose of carrying out the functions of the board and may sell, exchange, lease, mortgage or otherwise charge or dispose of real property **owned by it**.
>
> (4) Subsection (3) does not apply unless the board of health has first obtained the consent of the councils of the majority of the municipalities within the health unit served by the board of health. [Emphasis added]

[25] Therefore, the issue to be decided is whether the phrase "acquire and hold real property" in s. 52(3) of the *HPPA* includes a lease of real property.

[26] In proceeding with the interpretation of s. 52(3) of the *HPPA*, this court has assessed the following:

- the ordinary meaning of the words in s. 52(3) of the *HPPA* in their entire context and considering the scheme and purpose of the *HPPA* and the Legislature's intention;
- the French language version of the *HPPA* (*protection et la promotion de la santé* (*Loi sur la*), L.R.O. 1990, chap. H.7);
- the *Legislation Act*, 2006 S.O. 2006, c. 21, Sched. F; and

- *Guelph.*

Ordinary and Purposeful Meaning of the Provision:

[27] The Supreme Court adopted the following approach to statutory interpretation at para. 21 of *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27:

> The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature].

[28] The starting point for every interpretive exercise is therefore to determine the "ordinary meaning" of the text, which is the meaning that would be understood by a competent language user upon reading the words in their immediate context.[1] The important phrase in s. 52(3) is "acquire and hold real property". More specifically, whether consent is required for the MLHU to enter the lease depends on the meaning of "hold" and "real property". "Hold" and "real property" carry specific legal meanings, and assessing the meaning of legal words often requires reference to *Black's Law Dictionary*[2], because interpretation of these words goes beyond their ordinary meaning.[3] Therefore, I have referred to *Black's Law Dictionary* in my analysis.

[29] "Real property" is defined in *Black's Legal Dictionary* as "[l]and and anything growing on, attached to or erected on it, excluding anything that may be severed without injury to the land".

[30] Real property does not usually include "leases", which are more often classified as "chattels real".[4] The fact that leases are classified as "chattels real" forms the basis of the applicant's position that "real property" in s. 52(3) does not include leases and therefore the consent of a majority of municipalities is not required to enter into the lease.

[31] However, in my opinion, the word "hold" in s. 52(3) of the *HPPA* is particularly important to the interpretative exercise. Neither party made submissions on the role of the word "hold" in interpreting s. 52(3), and Price J. did not analyze the word "hold" in *Guelph*, but I think it is an essential component of the meaning of s. 52(3).

[32] The Supreme Court has instructed that the words of an Act are to be read "in their entire context", and therefore "real property" must be read in conjunction with the preceding word "hold" and the rest of the provision and the rest of the *HPPA*. In *Black's Law Dictionary*, "hold" is defined first as "to possess by lawful title". Importantly; however, "hold" is also defined as "[t]o take or have an estate from another; to have an estate on

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[1] Ruth Sullivan, *Statutory Interpretation* (2nd ed.) (Toronto: Irwin Law, 2007) at pp. 49–50.
[2] Bryan A. Garner, ed., *Black's Law Dictionary* (9th ed.) St. Paul: Thomas Reuters, 2007)
[3] Sullivan, *supra* note 1 at pp. 66–67
[4] See Garner, *supra* note 2 at p. 973.

condition of paying rent or performing services" and *Black's Law Dictionary* then gives an example of a person holding a property "under lease".

[33] Therefore, the word "hold" in s. 52(3) of the *HPPA* could refer to a purchase of real property ("hold real property in fee simple" for example) or a lease of real property ("hold real property under a lease").

[34] I also note that "acquire" is defined in *Black's Law Dictionary* as to "gain possession or control of". Therefore, the inclusion of the word "acquire" also does not limit the application of the section to purchases of property only.

[35] Therefore, in my opinion, while "real property" on its own does not usually include leases, the phrase "acquire and hold real property" does include leases.

[36] Additionally, the purpose of subsection 52(3) of *HPPA*, in my view, is to require health boards to be accountable to municipalities with respect to transactions involving real property. In *Guelph,* Price J. concluded that the purpose of s. 52 is described as follows:

> The intent of sections 52(3) and (4) is to enable a board of health to incur capital costs for such purposes as acquiring facilities, furniture and equipment that a health unit needs in order to deliver its services. It is self-evident that a health unit needs to incur capital costs for such purposes. It is equally self-evident that it has no reason to incur such costs for other purposes, such as to trade in real estate. The Board may incur capital costs provided that it obtains the consent of two of its three constituent municipalities. This is sufficient to ensure that the Board is incurring such costs for the proper purposes of the Health Unit and not for an extraneous or improper purpose.

[37] It would make little sense for the Legislature to intend to give municipalities the right to consent to (or deny) a capital cost incurred by purchasing real property, but not to consent to (or deny) the similarly large capital cost of a long term lease of real property.

[38] Additionally, the words "owned by it" at the end of s. 52(3) support the conclusion that "acquire and hold real property" includes leases. Again, the Supreme Court has been clear that words must be read in their entire context, so "acquire and hold real property" must be interpreted with reference to the entire section, including the phrase "owned by it".

[39] The MLHU submits that phrase "owned by it" is indicative of the conclusion the real property must be owned in order for the MLHU to require consent to acquire and hold it. The City and the County submit that it would lead to a redundancy if I were to find that the inclusion of "owned by it" at the end of the provision means that "acquire and to hold real property" only refers to ownership of real property.

[40] I agree with the respondents on this point.

[41] The inclusion of "owned by it" is rendered meaningless and redundant if "acquire and hold real property" is interpreted to only reference transactions involving ownership of real property. In other words, if "acquire and hold real property" were to be interpreted as only applying to ownership of real property, the meaning of s. 52(3) would be exactly the same with or without the inclusion of "owned by it" at the end of the section. Therefore, to give meaning to all words and avoid redundancy, the inclusion of "owned by it" must be interpreted as a distinguishing factor from the real property acquired or held in the first part of s. 52(3).

[42] Therefore, when interpreting the phrase in the entire context of the provision, including the meaning of the word "hold" and the inclusion of "owned by it", and with reference to the purpose of the provision the meaning of "acquire and hold real property" in s. 52(3) of the *HPPA* must include leaseholds.

French Language Version of the *HPPA*:

[43] The French language version of the *HPPA*, when read in conjunction with the English version, also supports the conclusion that the s. 52(3) applies to leases of real property.

[44] Subsections 52(3) and 52(4) in French version of the *HPPA* stipulate the following:

> (3) Le conseil de santé peut acquérir et détenir des **biens immeubles** dans le but de remplir ses fonctions et il peut vendre, échanger, louer, hypothéquer, grever ou aliéner d'une autre façon un bien immeuble dont il est le propriétaire.
>
> (4) Le paragraphe (3) ne s'applique pas à moins que le conseil de santé n'ait d'abord obtenu l'assentiment de la majorité des conseils municipaux de la circonscription sanitaire qui est de son ressort.

[45] "Biens immeubles" is a Civil Law concept and can be translated to mean "immovables".

[46] As noted, real property does not usually include leases. However, immovables do include leases. Therefore, the issue is whether "real property" in the English version of s. 52(3) includes leases, because the French version of the section uses terminology that includes leases.

[47] The Supreme Court summarized the principles of bilingual statutory interpretation in *R. v. Daoust*, 2004 SCC 6 and held at paras. 28–30 that the following steps must be followed:

1) First, the court must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning".

    a) If there is an ambiguity in one version but not the other, the two versions must be reconciled—the court must look for the meaning

that is common to both versions. The common meaning is the version that is plain and not ambiguous.

b) If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version.

2) Second, the court must determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with the lawmaker's intent.

[48] Only the English version contains an ambiguity. The meaning of "real property" is uncertain with respect to leases, but "biens immeubles" is not. It includes leases. Therefore, the two versions must be reconciled. The common meaning that is plain and not ambiguous is that leases are included in the definition of both "real property" and "biens immeubles".

[49] In the second step of the *Daoust* test, the court must then assess whether the inclusion of leases in the terms "real property" and "biens immeubles" is in accordance with statutory interpretation principles.

[50] I have already concluded that leases are included in the meaning of "acquire and hold real property" when s. 52(3) is assessed in its entire context with reference to its purpose. The common meaning between "real property" and "biens immeubles" is therefore consistent with the statutory interpretation of the provision.

[51] Therefore, the French version of s. 52(3) of the *HPPA* provides further support for the conclusion that under s. 52, the MLHU must have the consent of the majority of municipalities to enter into the lease with Propco.

The *Legislation Act*:

[52] Part VI of the *Legislation Act* stipulates how Ontario statutes are to be interpreted. Section 92(1) of the *Legislation Act* provides:

> 92 (1) A provision of an *Act* that creates a corporation,
>
> (a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;
>
> ....

[53] As described by Price J. in *Guelph*, s. 92(1) of the *Legislation Act* restricts the power of the MLHU to contract for, acquire, hold, and dispose of personal property, and s. 52(3) of the *HPPA* then expands the power of the MLHU to acquire and hold real property if consent

is received. In essence, the MLHU submits that s. 92(1) of the *Legislation Act* is important to the interpretation s. 52(3) of the *HPPA*, because if the definition of "real property" in the *HPPA* includes a lease, the MLHU would lose the right granted by s. 92(1) of the *Legislation Act* to hold personal property without municipal consent.

[54] I note at the outset that leases cannot necessarily be categorized as personal property on account of being "chattels real" and would therefore not fall under the s. 92(1)(a).

[55] Even if leases are included in the ambit of s. 92(1) of the *Legislation Act*, sections 46 and 47 of the same *act* stipulate that its instructive provisions respecting statutory interpretation apply to all Ontario statutes, unless a contrary intention appears in a statute or its application leads to an interpretation inconsistent with the context.

[56] Therefore, in my opinion, the argument that the inclusion of a lease in "real property" under s. 52(3) of the *HPPA* creates a problematic conflict with s. 92(1) of the *Legislation Act* is not persuasive. That is because s. 47 of the *Legislation Act* specifically says that its interpretative provisions do not apply if a contrary intention appears or an outcome inconsistent with the context of the *HPPA* would result.

[57] Accordingly, given that this Court finds that "acquire and hold real property" in s. 52(3) of the *HPPA* applies to a leasehold and consent is required, a conflict could arise. However and at the risk of repetition, s. 47 of the *Legislation Act* mandates that if there is a conflict with another Act, such as the conflict over the consent requirement for decisions regarding personal property in the *Legislation Act* and *HPPA*, the *HPPA*'s provisions take precedence over the provisions of the *Legislation Act*.

Guelph Case

[58] The County's reliance on *Guelph* is misplaced.

[59] While I agree with Price J.'s conclusion that leases are included in s. 52(3) of the *HPPA*, he did not undertake a statutory analysis nor did he have to do so. The issue before him was moot because the municipalities had given their consent by the time he heard the matter.

[60] Price J.'s *obiter* comments that leases are included in s. 52(3) of the *HPPA*, appear to be based on reliance on other statutes, which explicitly define real property to include leases. The inclusion of leases in the definition of "real property" in other acts, such as the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) and the *Canada Revenue Agency Act*, S.C. 1999, c. 17 (or in other Acts listed in the County's factum), does not lead to the conclusion that "leases" are included in s. 52(3). I say this because in those acts, the Legislature specifically stated that leases are included in those particular Acts.

[61] For example, the *Income Tax Act*, s. 248(4) stipulates:

(4) In this Act, an interest in real property includes a leasehold interest in real property but does not include an interest as security only derived by virtue of a mortgage, agreement for sale or similar obligation. [Emphasis added]

[62] The *Canada Revenue Agency Act*, s. 75(1)(a) stipulates:

> 75(1) The Agency may, in its own name or in the name of Her Majesty in right of Canada,
>
> (a) Acquire real property by purchase, lease, gift, devise or otherwise; and [Emphasis added]
>
> ...

[63] The applicant submits that the specific inclusion of leases in the definition of real property in other acts and the exclusion of any references to leases in the *HPPA* supports the opposite conclusion than that reached in *Guelph*. In other words, the absence of the word "lease" in s. 52(3) might indicate that the Legislature did not intend leases to be included.

[64] However, I have already determined based on other interpretive principles that leases are included in s. 52(3), and the failure to specifically include the word "lease" in s. 52(3) does not, in my opinion, undermine that conclusion.

Conclusion on Statutory Interpretation of s. 52(3) of the *HPPA*:

[65] I find that through the application of principles of statutory interpretation, the applicant is required to obtain the consent of a majority of the municipalities it serves in order to enter into the lease with Propco at Citi Plaza. The ordinary and legal meaning of the words in their entire context and bearing in mind the purpose of s. 52 of the *HPPA* leads to the conclusion that to "acquire and hold real property" includes the applicant's decision to hold real property under a lease. The use of the words "biens immeubles" in the French version of the *HPPA* bolsters my conclusion. Therefore, for all of these reasons, a lease is included under s. 52(3) and that the MLHU must obtain the consent of the majority of municipalities under s. 52(4).

LEAVE FOR JUDICIAL REVIEW:

[66] Pursuant to s. 6(2) of the *JRPA*, applications for judicial review can be brought in the Superior Court with leave, where the case is one of "urgency" and "the delay required for an application to the Divisional Court is likely to involve a failure of justice".

[67] The applicant and the intervener both submit that leave ought to be granted, because both would suffer substantial and irreparable pecuniary loss as a result of any delay and a failure of justice would result.

[68] The intervener has afforded the applicant a further deadline to June 4, 2018 to allow the MLHU to waive a condition in the letter of intent requiring it to obtain the County's consent. If MLHU does not waive this condition, the applicant will lose the opportunity to contract with its preferred landlord at its preferred location.

[69] The next Divisional Court sitting in London is six months away, but there are also a significant number of cases awaiting a date for hearing at the November sittings. That delay is significant to Propco, which says it cannot continue to hold open 68,000 square feet of leasable space in downtown London for that length of time.

[70] For these reasons, I grant leave to proceed with the judicial review in the Superior Court.

JUDICIAL REVIEW:

Grounds to Set Aside the County's Decision

[71] Both Propco and the MLHU submit that this Court ought to quash the decision rendered by the County on March 6, 2018 withholding its consent to the proposed lease.

[72] In *Catalyst Paper v. North Cowichan*, 2012 SCC 2, the Supreme Court of Canada described the court's supervisory powers over municipalities at paras. 11–12 as follows:

> Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review.
>
> A Municipality's decisions and bylaws, like all administrative acts, may be reviewed in two ways. First, the requirements of procedural fairness and legislative scheme governing a municipality may require that the municipality comply with certain procedural requirements, such as notice or voting requirements. If a municipality fails to abide by these procedures, a decision or bylaw may be invalid. But in addition to meeting these bare legal requirements, municipal acts may be set aside because they fall outside the scope of what the empowering legislative scheme contemplated. This substantive review is premised on the fundamental assumption derived from the rule of law that a legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly.

[73] Therefore, the County's decision could be set aside on two grounds:

1) On the basis that procedural requirements, which would include the duty of procedural fairness and freedom from bias either real or apprehended were not met;

2) On the basis that the decision was beyond the scope of its empowering legislation or was in other words, illegal.

Duty of Fairness and Reasonable Apprehension of Bias

The Duty Owed by the County

[74] The MLHU submits that the County's decision to withhold consent is a breach of its duty of fairness. More specifically, the MLHU argues that the County breached its obligations of procedural fairness because bias or a reasonable apprehension of bias existed.

[75] The County responds that there is no evidence of Council bias respecting its decision on consent and that its decision is entitled to deference.

[76] It is recognized that there is a duty of fairness owed by every public authority making an administrative decision that is not of a legislative nature and that affects the rights, privileges, or interests of an interested party. Furthermore, politically accountable decision-makers, such as municipal councils, owe the duty to act fairly like other public authorities.[5]

[77] Procedural fairness requirements imposed upon decision makers vary from the full range of procedures commonly associated with judicial proceedings (notice, disclosure of evidence, right to a hearing) to substantially less formal methods of decision-making.

[78] The duty of procedural fairness requires that there be no bias or reasonable apprehension of bias on the part of the decision maker.[6] Normally, however, the allegation raised against a decision maker is that of reasonable apprehension of bias, rather than actual bias.

[79] The rule against bias or reasonable apprehension of bias is designed to prevent conduct by decision-makers that would undermine public confidence in the integrity of the decision-making process and hence in the legitimacy of the decision. Thus, the law requires not only that the decision-maker be impartial in fact, but that it appear to be impartial.[7]

[80] As with other aspects of procedural fairness, what constitutes a reasonable apprehension of bias depends on the context and the function performed by the administrative decision

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[5] Donald J.M. Brown and The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Carswell, 2017) at p. 7–30; *Congregation des temoins de Jehovah v. Village of La Fontaine*, 2004 SCC 48.

[6] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 645.

[7] Brown and Evans, *supra* note 5 at p, 11-4.

maker. Where the decision maker plays a primarily adjudicative role, the requirement of impartiality will more closely resemble the standard expected of judges. Conversely, where the decision maker has an administrative or policy role, the requirements will be less stringent.

[81] Accordingly, prior involvement with issues before a tribunal in the regulatory environment may not always rise to a reasonable apprehension of bias. As stated in *Newfoundland Telephone* at pp. 638–639:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

[82] In its decision, the Supreme Court acknowledged that a member of the Public Utilities Board, a former municipal politician and consumer advocate, could express concerns about issues coming before the Board during an investigative stage, as long as this did not indicate a closed mind on the part of the member. Once the adjudicative stage was reached, where the issue was a rollback of salaries and benefits of utility executives, the reasonable apprehension of bias test applied, as it would in adjudicative settings.

[83] The decision in *Newfoundland Telephone* was based on the Supreme Court's decision in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, which concerned a planning decision made by elected municipal councillors. The Supreme Court held that:

> [t]he party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile.

[84] In sum, in the context of municipalities where councillors have expressed a pre-judgment on an issue, a stricter test applies to establish a reasonable apprehension of bias, or essentially a "closed mind".

[85] However, the closed mind test only applies to questions of bias arising from issues of pre-judgment. For example, the Supreme Court in *Old St. Boniface*, specifically said at p. 1198 that even though the test varied for municipalities in circumstances of pre-judgment, the test when applied to issues of pecuniary interests is still whether "a reasonably well-informed person [would] consider that the interest might have an influence on the exercise of the official's public duty".

[86] The issue in this case stems from the County's financial interest in the lease.

[87] Courts have routinely held that a duty to act without bias or reasonable apprehension of bias arising from a financial interest is a fundamental component of the duty of fairness.

[88] The Supreme Court has recognized that having a financial interest in a matter is considered the most serious form of bias.[8] The Supreme Court also recognized at p. 636 of *Newfoundland Telephone* that the duty of fairness applies to all administrative bodies and that procedural fairness "simply cannot exist if an adjudicator is biased." The Court went on to say that "the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness."

[89] For example, in *Trans-West Developments Ltd. v. City of Nanaimo*, 1980 CanLII 729 (B.C.S.C.), a municipal council's decision to refuse the re-conveyance of property lost in a tax sale was vitiated where the decision benefitted the city financially, even though no individual councillor obtained a personal benefit.

[90] Therefore, the County had an obligation to act without bias or a reasonable apprehension of bias. The test to determine whether bias or a reasonable apprehension of bias existed is whether an informed person, viewing the matter realistically and practically, would conclude that the County could decide the issue fairly.

Breach of Duty of Fairness and Existence of Reasonable Apprehension of Bias

[91] The applicant was afforded the procedural opportunities, but submits that it did not receive the benefit of a fair and impartial decision-making in the County's decision to withhold the required statutory consent pursuant to ss. 52(4) of *HPPA*.

[92] Finally, the applicant submits that by reason of the County's inherent bias, conflict of interest and lack of impartiality, the duty of fairness was not met.

[93] Accordingly, here, the question to be answered is whether there is a reasonable apprehension of bias.

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[8] See *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 71; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 49

[94] At para. 46 of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. the Supreme Court of Canada adopted the following test for a reasonable apprehension of bias as enunciated by de Grandpré J. in dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[95] Circumstances that might lead to an allegation of reasonable apprehension of bias include a personal financial interest in the outcome of a proceeding, prior or existing relationships with parties or counsel, prior involvement with the issue in dispute, and conduct of the decision maker during the hearing that suggests partiality.

[96] Here, the County had a direct, pecuniary interest in the decision that it made to withhold consent to the MLHU lease on March 6, 2018. The revenue source for the County on the existing lease at 50 King St. amounts to half of the funding it provides to the MLHU.

[97] The County has a direct and conflicting commercial interest in whether it gives or refuses consent to the applicant's proposed new lease, because the County is the current landlord. It derives in excess of $600,000 annually from base rent for 50 King St., London. It is in the County's interest to maintain the applicant's existing tenancy pending the County's future redevelopment of 50 King Street.

[98] The decision made by the County is also made in the context of its severance and rezoning applications for 50 King Street and 399 Ridout Street in London to permit the redevelopment of those lands.

[99] The decision certainly did not meet the legitimate expectations of the MHLU, which in the context here are very important.

[100] Further, with the existence of the amendment to the current lease between the MLHU and the County, County Council (or a future one) would be at liberty to require the applicant to vacate in twelve months' time. I have kept this in mind and note that with the decision to withhold consent to the Propco lease, the County benefits financially in the interim.

[101] The County has also conflated the MHLU's process of location analysis and site selection with services review. The uncontroverted evidence establishes that County residents will continue to be served in Middlesex communities with no reduction of service levels.

[102] The outcome of a future service review has no direct bearing upon the location decision, inasmuch as there is no question that MLHU's main office will remain in the City of London, consistent with the County's own proposal.

[103] Further, the question of "holding real property" is not a question of service delivery. For the County to have used a lease approval process to raise such irrelevant and unnecessary considerations undermines any legitimate basis for its decision. Accordingly, the decision itself was untethered from any factual foundation.

[104] Council's decision on March 6, 2018 to request the Minister to appoint an assessor to ascertain whether the applicant was complying with the *HPPA*, sends the message that the County is not happy with a MLHU decision that does not accord with the County's financial interests.

[105] A reasonable and informed person would conclude that the County's financial interest had an influence on its final decision to deny consent to the MLHU. The County's position undermines the integrity of the process. This Court finds that a reasonable person would and could reasonably perceive an appearance of bias for four reasons:

1) the County has a lease with the applicant;

2) the County after its own unsuccessful bid now withholds consent to the successful bidder, the intervener Propco;

3) the existence of the amendment to the current lease between MLHU and the County could result in the County unilaterally requiring the applicant to vacate in twelve months' time without it having alternate accommodation. By withholding consent, the County can see what it can do with 50 King Street in future, while keeping the MLHU captive in a contract; and

4) public confidence in the process is eroded, because there can be no reasonable perception of fairness when the Country acted without justification.

Conclusion on the Duty of Fairness and Reasonable Apprehension of Bias

[106] Based on the foregoing analysis, this Court finds that the decision by the Council to refuse consent has been made in circumstances of reasonable apprehension of bias, conflict of interest, lack of impartiality, and unfairness and it can be set aside on that basis.

Illegality of the Decision

[107] The intervener argued that this court ought to set aside the County's resolution to withhold consent on the basis that its resolution exceeded its statutory authority.

[108] The County is authorized by s. 52(4) the *HPPA* to withhold its consent.

[109] However, ss. 272 and 273 of the *Municipal Act 2001*, S.O. 2001, c. 25 circumscribe the Court's judicial review powers of certain municipal decisions as follows:

> 272 A by-law **passed in good faith** under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.
>
> 273(1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for **illegality**.
>
> (2) In this section,
>
> "by-law" includes an order or resolution. [Emphasis added].

[110] Therefore, in order to be set aside on the basis that the decision exceeded the County's statutory authority, the resolution of the County to refuse consent to the lease must have been illegal.

[111] The County's position is that it is appropriate for Council to ask legitimate governance questions concerning the costs, services, and timing impacts that the proposed lease would have on citizens of the County. It further submits that those questions have either gone unanswered or were answered unsatisfactorily.

[112] Propco submits that there is only one defensible outcome in this case: the County must consent to the lease transaction. Propco argues that the denial of consent is simply not defensible. The other tactic that was adopted (referral to an assessor) was not appropriate and in fact was rejected by the Ministry.

Meaning of Illegality

[113] The question then is what "illegality" means in the context of s. 273 of the *Municipal Act, 2001*.

[114] The standard of review for assessing whether a municipal decisions was "illegal" is correctness.[9] However, while the appropriate standard of review is correctness, courts are cautioned in cases involving municipal challenges to require "clear demonstration" before concluding the decision is illegal and it must apply a deferential standard.[10]

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[9] *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273 at para. 12 citing *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 at para. 39.

[10] *Friends of Lansdowne, supra* note 9 at paras. 12–13 citing *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at para. 36.

[115] Garson J. provided a helpful summary of the interpretation of s. 273 in *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934. The meaning of "illegality" in s. 273 can include the failure to comply with statutory procedural requirements and bad faith.[11]

[116] As stated by the Court of Appeal in *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55 at para. 42

> [M]unicipal by-laws properly enacted are not to be lightly quashed; they are not open to review even if they are unreasonable. It is a pre-condition to that immunization from review, however, that the by-law be "passed in good faith". This, in turn, reinforces the essential character of a valid and legal by-law: it must be enacted in good faith.

[117] A by-law can be deemed to have been passed in "bad faith" if "[c]ouncil acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government".[12]

[118] The standard to establish bad faith on the part of a municipal council is high, because there is a presumption of good faith that must be overcome.[13]

[119] In addition, a by-law that is within the authority of a council to enact may still be set aside or declared invalid if its real purpose is to accomplish by indirect means an object which is beyond its authority.[14]

[120] Therefore, in addition to quashing the decision on the basis of a reasonable apprehension of bias, the County's decision could also be quashed if I find that the decision was illegal on account of bad faith.

Analysis on Illegality and Bad Faith

[121] Municipalities are not given "veto" rights over decisions of health boards, but only a check to ensure that funds are not being used for an extraneous or improper purpose.[15]

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[11] *Detlor v. Brantford (City)*, 2013 ONCA 560 at para. 28 citing *London (City)*, *supra* note 9 at para. 40;
[12] *Drake v. Stratford (City), 2010 ONSC 2544* at para. 41 (varied at 2011 ONCA 98 but not on this point), citing *H.G. Winton Ltd. and Borough of North York*, 20 O.R. (2d) 737 (Ont. Sup. Ct. (Div. Ct.)) at p. 744.
[13] *London (City)*, *supra* note 9 at para. 100.
[14] *Barrick Gold Corp. v. Ontario (Minister of Municipal Affairs and Housing)*, 2000 CanLII 16929 (C.A.) at para. 59.
[15] *City of Guelph v. Board of Health*, 2011 ONSC 5981at para. 60

[122] The County participated in the very same RFP process as Propco. Propco scored, objectively, the highest while the County scored the lowest out of the eight proposals.

[123] County Council adopted a third option—that it could seek a s. 82 assessment under the *HPPA*, a proposal drawn up by the Chief Administrative Officer of the County, Mr. Rayburn, in advance of the Council meeting. The Ministry rejected this option as one not available to Council when considering a lease transaction.

[124] The County submits that its refusal was based on service delivery and its impact on costs.

[125] The uncontroverted evidence is that the MLHU will incur no further costs in moving as proposed. Therefore, costs cannot be a legitimate factor in the County's decision. In any event, the current location's major flaw identified through the RFP process was that remaining at 50 King St. (owned by the County) was more costly.

[126] Finally, it appears from the evidence that the County took the opportunity in the request for consent to re-assess service delivery and to leverage a review of services in the context of approving a lease.

[127] In this Court's view, the County's decision was guided by factors irrelevant in respect of its narrow statutory duty.

[128] Accordingly, the County's decision was exercised in bad faith, because there was no legitimate basis upon which it could deny consent. The County's attempt to justify the decision on the basis of entirely irrelevant factors is disingenuous. It also sent an arbitrary request to the Minister for an assessment that ultimately was denied. These actions taken by the County are clearly its attempt to accomplish by indirect means an object which is beyond its authority—namely, protecting its financial interests by ensuring that the MLHU remains at 50 King Street.

Conclusion on the Illegality and Bad Faith

[129] Therefore, in addition to being set aside on the basis of a reasonable apprehension of bias, the County's decision to refuse consent should also be set aside on the basis of illegality and bad faith.

CONCLUSION:

[130] For all of these reasons, including the finding of reasonable apprehension of bias and of illegality, the County's decision to withhold consent is hereby set aside.

[131] Remitting the decision to the County for reconsideration is not appropriate. Its financial interest in the outcome and its past failure to properly assess the MLHU's request raise the same concerns about a real or reasonable apprehension of bias.

[132] It the County had exercised its authority properly and in accordance with its defined mandate its consent would be inevitable.

DISPOSITION:

[133] This Court orders:

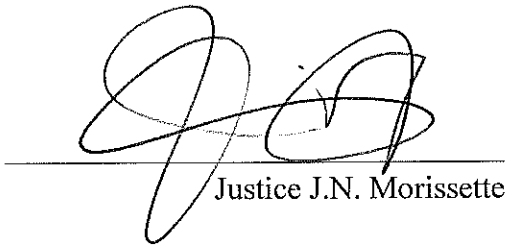
1. That the statutory decision of the County to withhold consent to the proposed lease transaction was exercised invalidly;

2. That County's Council's decision to withhold consent on March 6, 2018 is hereby set aside; and

3. That the applicant has authority and capacity to enter into the lease on the basis of the consent of the municipal council of the City on February 13, 2018.

COSTS:

[134] Should the parties be unable to agree on the issue of costs, I may review brief written submissions by no later than June 15, 2018.



Justice J.N. Morissette

Date: May 25, 2018