

2008 CarswellOnt 7326
Ontario Superior Court of Justice (Divisional Court)

1673233 Ontario Inc. v. Brampton (City)

2008 CarswellOnt 7326, 173 A.C.W.S. (3d) 267, 244 O.A.C. 85, 52 M.P.L.R. (4th) 308

**1673233 Ontario Inc., carrying on business as Eurohaven SPA
(Applicant) and The Corporation of the City of Brampton and
Wendi Hunter, Manager of Vital Statistics, Licensing and Permits
and the Attorney General of the Province of Ontario (Respondents)**

Carnwath, J. Wilson, Kruzick JJ.

Heard: October 31, 2008

Judgment: December 2, 2008

Docket: Toronto 152/08

Counsel: Ron Sleightholm, for Applicant
Christopher C. Cooper, for Respondents

J. Wilson J.:

1 The applicant 1673233 Ontario Inc., carrying on business as Eurohaven Spa (Eurohaven) seeks to quash the February 27, 2008 decision of the Council of the Corporation of the City of Brampton (City Council). City Council refused to renew the applicant's body rub parlour license.

2 Eurohaven asserts that City Council was required to conduct a hearing in accordance with the *Statutory Powers Procedure Act, R.S.O. 1990, c. S.22* if it refused to grant the license in accordance with the decision of the Committee of Council (Licensing). The applicant argues that City Council breached its duty of procedural fairness by denying the applicant the right to a fair hearing, and that City Council acted contrary to the legitimate expectations of the applicant. Further, the applicant argues in all of the circumstances the decision of City Council was not reasonable.

3 Eurohaven seeks an order in the nature of *mandamus* from this court requiring the City to issue a license to Eurohaven to continue its business as a body rub parlour pending the outstanding re-zoning process.

4 The City issued a closure order and has fined the applicant for operating a body rub parlour without a license. These orders are stayed pending this application.

History

- 5 The history giving rise to this application is somewhat convoluted.
- 6 Eurohaven has operated a body rub parlour since 2001, in rented premises in the City of Brampton. That property was sold by the owner, forcing Eurohaven to move.
- 7 The applicant retained the services of a planner and a real estate agent to find an appropriate location to continue its business. The applicant purchased 7955 Torbram Road, units 1 and 2 (the New Premises) in 2006 with the intention of continuing its body rub business.
- 8 The applicant was advised by its planner and real estate agent that there should be no difficulty obtaining the change in zoning required in the New Premises to conduct a body rub parlour. Three other applications for zoning changes for specific units in the industrial plaza had been granted by the Ontario Municipal Board (the OMB) for two body rub parlours and a hair salon.
- 9 There is no evidence that the applicant or its agents sought information from the City staff with respect to the relevant zoning by-law and permitted use before purchasing the New Premises.
- 10 The applicant has been seeking to renew its license in the new location in the New Premises, which are located in an industrial plaza zoned business industrial. According to the City's Licensing By-law 1-2002, non-compliance with zoning is grounds for refusal to renew a license.
- 11 Sixty days after the purchase of the New Premises, the applicant discovered that only a small percentage of the space it bought could be used as a body rub parlour. The allocation recommended by the City for personal service businesses in the industrial plaza had been utilized in three previous minor variance applications granted by the Ontario Municipal Board.
- 12 The applicant then applied to the City of Brampton for a minor variance for the New Premises, pursuant to [section 45\(1\) of the *Planning Act*, R.S.O. 1990, c. P.13](#) before the Committee of Adjustment. It sought to have the New Premises re-zoned as personal service space.
- 13 On March 31, 2006 the Committee of Adjustment denied the minor variance requested by the applicant.
- 14 The applicant then appealed the Committee of Adjustment decision to the OMB.
- 15 In January 2007 the applicant submitted its application for a renewal of the license for the New Premises to the City of Brampton (the City). City staff were aware of the outstanding OMB appeal. The City accepted the license fee on January 2, 2007, but noted on the receipt sent to the applicant "above license to be issued subject to confirmation of proper zoning".

16 On March 22, 2007 the OMB dismissed the applicant's appeal from the Committee of Adjustment decision.

17 The zoning by-law allowed for 185 square metres for personal service space in the entire industrial plaza. The OMB decision notes that the zoning in the industrial plaza had been varied by the Committee of Adjustment on three previous occasions to allow increased space to 531 square meters for "personal services". During that same period the owners of the development applied to change the zoning for the entire development from business industrial to commercial. The OMB agreed with the City position that to grant "a variance approval [for the New Premises] in advance of the Council's decision on re-zoning would prejudice the re-zoning application review". The OMB concluded that the four-part test for a minor variance pursuant to [section 45\(1\) of the Planning Act](#) had not been met.

18 The applicant did not seek review of the OMB decision.

19 After the release of the OMB decision the City staff informed Eurohaven on April 24, 2007 that its request for the license for the New Premises was denied. The City confirms in the letter returning the license fee that "[s]ince we cannot issue a license for premises that do not comply with the zoning we are returning your fee".

20 Eurohaven appealed the refusal by the City to grant the license to the Committee of Council (Licensing) (the Licensing Committee). The Licensing Committee is delegated the power by City Council to make recommendations about licensing issues for consideration and determination by the full City Council.

21 The Licensing Committee conducted a hearing and heard *viva voce* evidence on November 26, 2007. A city planner testified about the City's concerns with the number of commercial businesses operating at the development containing the New Premises, but noted that the re-zoning application and appropriateness of the cap on such businesses was still under review.

22 Nevertheless, the Licensing Committee recommended that City Council approve the applicant's request for a license subject to conditions, pending the re-zoning of the entire industrial complex, in its decision of January 25, 2009. The Licensing Committee reaffirmed the decision with one dissenting vote on February 13, 2008.

23 On February 27, 2008 City Council declined to follow the recommendation of the Licensing Committee and refused the applicant's request for a license. City Council did not conduct a further hearing. Hence this application.

24 The applicant has initiated an appeal to the OMB that is outstanding, questioning the delay by the City in processing the re-zoning application for the entire industrial plaza.

25 We note, regardless of the issue of delay, that it is the City's present position in the outstanding re-zoning application for the industrial plaza that the present allocation of personal service space of 531 square meters should be maintained but not increased. If the City's recommendation is followed, the New Premises will not be re-zoned as personal service space for a body rub parlour.

Standard of Review

26 If there is a duty to hold a hearing, the question is whether the applicable duty of fairness was adhered to. There is no applicable standard of review (see *London (City) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (Ont. C.A.) at para 10). If there was no duty to hold a hearing, counsel agree applying the criteria in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] S.C.J. No. 9 (S.C.C.) the appropriate standard of review for a decision of City Council with respect to licensing is reasonableness.

Issue 1. Was the City Council Required to Hold A Hearing?

27 When a municipality is required to hold a hearing, such as in this licensing appeal, City Council is entitled by legislation to delegate certain municipal issues to a properly constituted committee council.

28 Under section 23.5 (3) of the current *Municipal Act, 2001*, S.O. 2001, c. 25 [*Municipal Act, 2001*], City Council is entitled to delegate either the power to make recommendations to City Council, or delegate the power to make the decision in question. Under section 252, the previous governing section of the *Municipal Act, 2001*, City Council was entitled only to delegate the power to make recommendations.

29 There was some uncertainty whether section 252 or section 23.5 of the *Municipal Act, 2001* applies in this case. It was the *Municipal Statute Law Amendment Act, 2006*, S.O. 2006, c. 32 which added section 23.5 and repealed section 252. However, section 23.5 came into effect on January 1, 2007, and section 252 was repealed on January 1, 2008, creating a period of overlap. The Licensing Committee heard this matter on November 27, 2007 and rendered its decision on January 25, 2008.

30 When two or more provisions of a statute are applicable to the same facts, it is presumed that both are to apply fully. This presumption can only be rebutted where a conflict can be shown, or where it is clear that one of the provisions is intended to be an exhaustive declaration of the applicable law. (See *Ruth Sullivan, Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: Lexisnexis, 2008) at pp. 326-334, *Urban Outdoor Trans Ad v. Scarborough (City)* (1999), 43 O.R. (3d) 673 (Ont. S.C.J.), aff'd (2001), 52 O.R. (3d) 593 (Eng.) (Ont. C.A.))

31 Based upon our conclusions on the facts of this case that City Council delegated only the power to make recommendations to the Licensing Committee, both provisions apply without conflict. In effect, it makes no difference which of the two sections applies.

32 If City Council delegates power to make recommendations to a committee of council, and if the committee holds a hearing in accordance with the *Statutory Powers Procedure Act*, then the legislation is clear that City Council may consider the recommendations of the committee without a further hearing.

33 Sections 252(1) to (4), and section 23.5(1) to (3) provide:

MUNICIPAL ACT, 2001 [S.O. 2001, C. 25](#)

Hearings

252. (1) If a council is required by law to hold a hearing or give interested parties an opportunity to be heard before doing any act, passing a by-law or making a decision, the council may delegate that responsibility to a committee of council.

Actions of council

(2) The committee shall provide its recommendations to the council after which council may pass the by-law or make the decision.

No second hearing

(3) If the committee of council holds a hearing or gives interested parties an opportunity to be heard, council is not required to do so.

Proceedings

(4) If the decision to be made by council on a matter is a statutory power of decision within the meaning of the *Statutory Powers Procedure Act*, that *Act*, except sections 17, 17.1, 18 and 19, applies to the committee and to the hearing conducted by it.

Delegation re hearings

Application

23.5 (1) This section applies when a municipality is required by law to hold a hearing or provide an opportunity to be heard before making a decision or taking a step, whether the requirement arises from an Act or from any other source of law.

Delegation authorized

(2) Despite subsection 23.2 (1), sections 9, 10 and 11 authorize a municipality to delegate to a person or body described in that subsection the power or duty to hold a hearing or provide an opportunity to be heard before the decision is made or the step is taken.

Rules re effect of delegation

(3) If a municipality delegates a power or duty as described in subsection (2) but does not delegate the power to make the decision or take the step, the following rules apply:

1. If the person or body holds the hearing or provides the opportunity to be heard, the municipality is not required to do so.

2. If the decision or step constitutes the exercise of a statutory power of decision to which the *Statutory Powers Procedure Act* applies, that *Act*, except sections 17, 17.1, 18 and 19, applies to the person or body and to the hearing conducted by the person or body.

34 The applicant asserts that the City Council had delegated decision-making power to the Licensing Committee. Therefore City Council, in accordance with section 23.5, was required to conduct a further hearing in the appeal from the Licensing Committee's decision to issue a license. By failing to conduct a second hearing the applicant argues that City Council was in breach of its duty of fairness.

35 We disagree.

36 It is clear from both the reasons of the Licensing Committee and the Minutes of the City Council meeting that City Council had delegated to the Licensing Committee the power to make recommendations only, not the power to make the licensing decision.

37 The Licensing Committee was required to adhere to the principles of natural justice and the standards stipulated in the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22.

38 The applicant concedes that the Licensing Committee in conducting the hearing on November 27, 2007 respected all procedural requirements and there is no breach of procedural fairness.

39 In accordance with the procedure outlined in Licensing By-Law 1-2002 sections 53 and 54, that City Council may make the final decision without a further hearing if a committee of City Council has conducted a compliant hearing. City Council is then authorized to make any decision permitted in law including refusing to grant a license.

40 Sections 53 and 54 of Licensing By-law 1-2002 provide:

Council to Make Final Decision

53(1) The panel shall provide its recommendations to Council, after which Council may make the final decision.

(2) When it makes the final decision pursuant to Section 53(1), Council is not required to hold a hearing or hear any further deputation.

(3) Council is not required to give reasons for its decision.

(4) Notice of Council's decision shall be given to the parties that were at the hearing before the panel, and any other persons as Council may direct, and notice shall be given within ten days after the date Council makes its decision.

54. Council may make any decision permitted by law and may:

refuse;

refuse to reinstate;

revoke

suspend; or

grant a licence upon terms and conditions

or any combination of these.

41 We conclude the applicant's assertion that City Council was required to hold a second hearing, and by failing to do so was in breach of principles of natural justice is without merit.

Issue 2. Was the Decision of the City Council to Refuse the Licence Reasonable?

42 We conclude that City Council's decision to refuse the license was reasonable.

43 Non-compliance with zoning for body rub parlour premises is grounds for refusal of a license under its licensing By-law.

44 By the terms of [section 154\(1\) of *Municipal Act, 2001*](#), Brampton has the right to restrict the number of adult entertainment establishments in the City. Brampton had restricted the number of adult entertainment establishments to a total of 8. At the time of the applicant's appeal, there were 11 licensed adult entertainment establishments in existence.

45 The recommendation of the Licensing Committee was to issue a license subject to conditions pending the re-zoning application. At the time of the hearing before the Licensing Committee, the City's position with respect to the re-zoning of the New Premises was under consideration. The City's position is now clear. With respect to the outstanding re-zoning application of the entire

industrial plaza, the City planning staff are not recommending any increase in the allocation of personal service space.

46 The City's refusal to grant the license pending the re-zoning makes practical sense as it is not presently the City's position that the allocation of personal service space will increase to accommodate the New Premises as a body rub parlour as a result of the re-zoning.

47 For these reasons we conclude that the decision of City Council to refuse to grant the license to the applicant meets the test of reasonableness. Therefore the applicant's request for an order of *mandamus* pending the re-zoning is dismissed.

Consent Re: Stay of This Order and Costs

48 On consent the parties agree to extend the order of Dunn J. staying any action by the City for a period of thirty days from the release of this decision.

49 The parties made submissions as to costs. They agreed that costs would follow the event, and counsel were very close in their recommendation with respect to the appropriate *quantum* of costs payable by the losing party. We fix costs in the amount of \$14,000.00 payable by the applicant to the respondents within 30 days.

Application dismissed.