

Andrew Parley
416-865-3093
aparley@litigate.com

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Ontario Court of Appeal Restricts Municipality's Use of Interim Control By-Laws

In a recent decision, *Hummel Properties Inc v Niagara-on-the-Lake (Town)*, the Ontario Court of Appeal affirmed that the Town of Niagara-on-the-Lake's enactment of an interim control by-law ("ICBL") was illegal. The decision, summarized below, has important implications for municipalities, developers, and builders across Ontario.

Background

This case dealt with residential development in the Town of Niagara-on-the-Lake. After the 2018 election campaign, which focused heavily on controlling development in the Old Town, the Lord Mayor-Elect directed town staff to draft an ICBL aimed at controlling development that might adversely affect the Old Town's historical character.

ICBLs are planning tools that can be unilaterally invoked by municipalities to temporarily suspend existing zoning rights and restrict land use while the municipality conducts a land use planning study or review. An ICBL lasts for 1 year, but it can be extended for one additional year. There is no right of appeal for a landowner during the first year, but an ICBL that is extended for a second year can be appealed. Once an ICBL ceases to be in effect, a municipality cannot impose another ICBL on the same lands until 3 years later (known as the "3-year cooling off period").

The ICBL in this case was enacted by Council in December 2018 and was extended until November 2020, at which time it was repealed ("Old Town ICBL"). It covered lands owned by the Appellant, Hummel Properties Inc., and prohibited a variety of activities, including subdivision of land. The Appellant had already submitted a development application for six townhouse condominium units, which was outside the built-up areas of the Old Town, but within the area covered by the Old Town ICBL. The Appellant's development was delayed by the Old Town ICBL. At the time the Old Town ICBL was passed, another ICBL which restricted cannabis-related use of lands was already in existence on the same lands ("Cannabis ICBL").

The Appellant brought an application under s. 273 of the *Municipal Act* to quash the Old Town ICBL for illegality and bad faith. It also claimed damages for misfeasance in public office and misrepresentation and requested a trial to determine the quantum of damages. The Appellant argued that the Old Town ICBL was illegal because:

- It purported to prohibit subdivision of land, despite the fact that s. 38 of the *Planning Act* only authorizes ICBLs relating to the use of land;
- It violated s. 38(7) of the *Planning Act* because it was in place during the 3-year cooling off period;
- It was adopted by an illegal process, including an insufficiently transparent meeting process; and
- It was passed in bad faith.

The application judge dismissed the Appellant's application. He concluded that the illegality issues were moot because the challenged by-law had been repealed and that there was no bad faith.

Court of Appeal Decision

In a unanimous decision, Lauwers J.A. allowed Hummel's appeal.

1. The legality of the ICBL was not moot

The Court of Appeal determined that the Application Judge erred by finding that the Appellant's arguments of illegality were moot because they remained relevant to the Appellant's outstanding claim for damages.

2. The ICBL was illegal because it did not relate to "land use" as required by s. 38 of the *Planning Act*

The Court of Appeal accepted that s. 38 of the *Planning Act* deals with "land use" which it found was different than division of land. The Court's reasons confirm that "land use" (Part V) is the subject and purpose of zoning by-laws and that "division of land" (Part VI), including subdivision, is dealt with separately. The Court of Appeal expressly rejected the Town's argument that "land use" includes subdivision. Since s. 38 of the *Planning Act* requires ICBLs to be enacted for land use/use of land, and the ICBL in this case prohibited subdivision, the Court of Appeal accepted that the ICBL was illegal because it purported to restrict activity beyond the statutory powers set out in s. 38.

3. The ICBL was illegal because it was enacted within the three-year cooling off period under s. 38(7)

The Old Town ICBL was in place during the 3-year cooling off period of the previous Cannabis ICBL. The Town argued that there could be two ICBLs on the same land if they targeted different purposes (in this case, cannabis and preserving the Old Town). The Court of Appeal rejected that argument and affirmed that there cannot be two ICBLs on the same land enacted for even completely different purposes within the 3-year cooling off period.

In doing so, the Court of Appeal accepted that s. 38(7) is to be enforced strictly in light of the concerns for the rights of property owners in the context of ICBLs. The Court of Appeal rejected an earlier line of cases based on *Re Burlington (City) Interim Control Re By-law 4000-589* (1988), 22 O.M.B.R. 233 (which allowed for two different ICBLs if they were for completely different purposes) and instead adopted another line of authority—the strict approach—which refuses to permit two ICBLs (regardless of purpose) to be enacted on the same land at the same time.

Importantly, the Court of Appeal also accepted that this strict interpretation is consistent with the Supreme Court of Canada's observations in *London (City) v RSJ Holdings Inc*, where it recognized that the draconian effects of ICBLs require strict compliance with substantive and procedural statutory requirements. The Court of Appeal affirmed that this "strict approach" to interpreting ICBLs is now the settled, correct view and that this promotes certainty, finality, stability and predictability as important features of the rule of law.

4. The ICBL was adopted by an illegal process

The Court of Appeal set aside the Application Judge's findings that the process for adopting the by-law was not illegal. The Court of Appeal was concerned with the Application Judge's refusal to engage on this issue, noting that he gave "short shrift" to the Appellant's arguments. Citing *RSJ,* the Court's reasons reflect a concern about the lack of transparency in the adoption of the by-law, and in particular, the notice (or lack thereof) provided about meetings and what discussions occurred behind closed doors. The Court of Appeal held that issue could be relitigated in the context of a trial between the parties.

5. The Application Judge erred by finding there was no bad faith

The Court of Appeal affirmed that it is common ground that a by-law passed in bad faith is illegal. Since the Application Judge's finding of bad faith was connected to the illegality issues discussed above, the Court of Appeal's decision to overturn all of the Application Judge's findings in that respect

also led to the conclusion that the bad faith finding should be set aside as well. The Court of Appeal held that issue could be relitigated in the context of a trial between the parties.

Key Takeaways

The Court of Appeal's decision has important implications in the municipal, land use planning, and building industries. Some key takeaways are:

- **Pay attention to the contents of ICBLs:** ICBLs are only permissible if they regulate use of land as contemplated by s. 38 of the *Planning Act*. The decision confirms that all parties should pay close attention to the details of any ICBLs to ensure that the true target of any ICBL is related to the use of land. Efforts to broaden the scope of ICBLs into unrelated planning matters—like subdivision—will result in the ICBL being struck down for illegality.
- **Municipalities must adhere to the 3-year cooling off period**: the Court of Appeal's decision provides a welcome clarification to conflicting lines of municipal board and court decisions on whether two ICBL's can be enacted at the same time if they target different planning purposes. The Court of Appeal's decision is now the highest and leading court decision on this point and expressly confirms that there is no exception or carve out for the 3-year cooling off period.
- **Imposing limits on municipal powers:** The Court of Appeal's decision also affirms that, although municipal legislation like the *Planning Act* is generally interpreted broadly, where the legislature imposes limits on those powers (here, s. 38 had express limitations of the ICBL power), those provisions must be interpreted strictly to ensure due compliance with the substantive and procedural statutory requirements.
- **Transparency**: The Court of Appeal's decision also affirms that courts expect municipalities to comply with the open meeting and transparency requirements articulated by the Supreme Court of Canada in *RSJ Holdings*. The Court of Appeal's reasons demonstrate that such issues must be taken seriously, particularly when dealing with decisions which can deprive landowners of rights.

Our expert litigators Andrew Parley and Amy Sherrard successfully represented the Interveners, the Ontario Home Builders' Association and the Niagara Home Builders' Association.