

COURT FILE NO.: 07-DV-1363

DATE: 20081002

**SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)****RE:** THE GREENSPACE ALLIANCE OF CANADA'S CAPITAL v. CITY OF
OTTAWA, 1374537 ONTARIO LTD AND FINDLAY CREEK PROPERTIES
LIMITED**BEFORE:** Cunningham, A.C.J., McKinnon, J. & Bellamy, J.**COUNSEL:** Linda McCaffrey, Q.C. and Will Amos, for the Applicant

Timothy Marc, for the Respondent, City of Ottawa

William Hunter and Jennifer Mesquita, for the Respondent 1374537 Ontario Ltd
& Findlay Creek Properties Limited**HEARD AT OTTAWA:** October 2, 2008**ENDORSEMENT****By the Court:**

[1] The application for judicial review is moot. For reasons which follow, we will not exercise our discretion to hear the judicial review.

[2] Greenspace Alliance appealed two zoning by-laws 2006-380 and 2007-103 to the Ontario Municipal Board (OMB). Their appeal was not heard because OMB Member Denhez gave effect to the respondents' Motion to Dismiss. Subsequently, Chair Hubbard of the OMB declined to direct a review of the Member's decision, pursuant to s.43 of the *Ontario Municipal Board Act* because of the applicant's failure to meet the required test under Rule 115 of the OMB's Rules.

[3] Long before these appeals started, the City of Ottawa was in the process of harmonizing the existing zoning by-laws of the eleven former, pre-amalgamation municipalities, and implementing its Official Plan. It did so via By-law 2008-250. That By-law specifically repeals the two previous By-laws 2006-380 and 2007-103. The new By-law subjects the lands at issue to the same uses as the two earlier By-laws.

[4] Before the adoption of the Comprehensive Zoning By-law, the City of Ottawa engaged in an extensive series of consultations with the community through information sessions, open

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houses, and public meetings, far beyond what was required under the *Planning Act*. It released various drafts of the Comprehensive Zoning By-law including drafts surrounding the two zoning by-laws that are the subject of this application. As of May 14, 2008, the provisions of the new Comprehensive Zoning By-law was finally determined by the Council of the City of Ottawa. The final draft was made publicly available on June 2, 2008. Later that month, on June 25th, Council adopted the By-law.

[5] As required under the Ontario *Planning Act*, the City of Ottawa published in newspapers the notice of adoption of this Comprehensive Zoning By-law, informing those who had made oral or written submissions of the right to appeal to the Ontario Municipal Board. The applicant had made written submissions with respect to certain lands but chose not to make submissions with respect to the lands embraced by By-laws 2006-380 and 2007-103. As a result, it had no right to appeal the Comprehensive Zoning By-law in respect of those lands.

[6] The appeal deadline was July 17, 2008. Seventy-seven appeals were filed. The applicant did not appeal the Comprehensive Zoning By-law in respect of the subject lands.

[7] The Ontario Municipal Board has set aside the week of October 20, 2008 for a pre-hearing to allow the City of Ottawa to bring a motion to have the unchallenged provisions of the Comprehensive Zoning By-law come into effect and to set dates for the hearings of appeals with respect to the Comprehensive Zoning By-law. None of those appeals affect the subject lands. It is anticipated that the OMB will approve the Comprehensive Zoning By-law in relation to the subject lands the week of October 20, 2008 pursuant to subsection 34(31) of the *Planning Act*, because that subsection specifically provides for the bringing into force of those parts of the By-law that are not in issue.

[8] If for some unforeseen reason the OMB does not pass the undisputed portions of the By-law during the week of October 20, those portions will nonetheless come into force once all appeals relating to other lands embraced by the comprehensive By-law have been withdrawn or finally disposed of. In that event, the portion of the By-law relating to the subject lands will be deemed to have come into force on the day it was passed, June 25, 2008. Such is the effect of subsection 34(30) of the *Planning Act*.

[9] As such, there is no live controversy with respect to zoning By-laws 2006-380 and 2007-103 because the tangible and concrete dispute between the parties has disappeared. They have been superseded by the Comprehensive Zoning By-law and, therefore, the matter is moot.

[10] The court may nonetheless elect to address a moot issue if the circumstances of the case warrant it. In *Borowski v. Canada (Attorney-General)*, [1989] 1 S.C.R. 342, the Supreme Court of Canada identified factors warranting the exercise of discretion to hear a matter that is moot. These include the following: (1) collateral consequences for the parties; (2) judicial economy; and (3) the need for the court to demonstrate a measure of awareness of its proper law-making function. The court must be sensitive to its role as the adjudicative branch in our political framework. In our view, the circumstances of the present case do not meet this test and the

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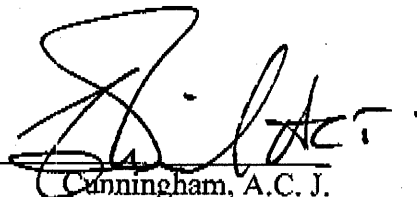
applicant has not met its onus to satisfy us that we should proceed with the judicial review application. We, therefore, decline to exercise our discretion to hear the matter.

[11] In the present case, there are no collateral consequences to the parties. When the Comprehensive Zoning By-law comes into force, as it will, the matter will be at an end. Any true adversarial relationship between the parties in respect of the subject lands will cease.

[12] With respect to the aspect of judicial economy, we are not satisfied that this case presents issues of broad public importance beyond the present litigants, and we do not believe that the law will remain unsettled if we do not hear the matter. The OMB in 2007 did not hold that the Provincial Policy Statement did not apply to the impugned By-laws, as suggested by the applicant. What the OMB did find was that the applicant had provided no evidence that the City of Ottawa failed to comply with that Policy. Furthermore, the issue of the dimensions of the boundary is not something we would have examined in the judicial review.

[13] This case will have limited or no application to any other lands. An issue of great significance to the applicant for judicial review is the effect of the Provincial Policy Statement. That issue is not engaged within the confines of this judicial review, and any decision we might make would not inform any other potential or outstanding litigation. We are mindful that a decision of this court could potentially intrude on the legislative powers of the province or the City of Ottawa.

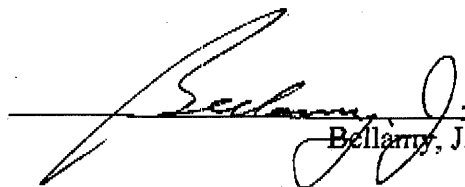
[14] We shall entertain brief submissions on costs to be filed within 30 days upon a schedule agreed upon by counsel.



Cunningham, A.C. J.



C. McKinnon, J.



Bellamy, J.

DATE: October 2, 2008