TORONTO

STAFF REPORT
ACTION REQUIRED
Confidential Attachment

Challenge of Site Specific Zoning By-law 514-2003 by the Owners and Proprietors of 1100 The Queensway – Decision of the *Ontario* Superior Court of Justice

Date:	March 22, 2013
To:	City Council
From:	City Solicitor
Wards:	Ward 5, Etobicoke - Lakeshore
Reason for Confidential Information:	This report is about litigation or potential litigation that affects the City or one of its agencies, boards, and commissions. This report also contains advice or communications that are subject to solicitor-client privilege.
Reference Number:	

SUMMARY

The owners and proprietors of 1100 The Queensway commenced a court application to challenge site specific zoning by-law 514-2003 (the "site specific by-law"), and to strike out those portions of the site specific by-law that prohibit properties along The Queensway Avenue corridor from being used as "adult entertainment establishments, as defined by the *Municipal Act, 2001*."

This report concerns the decision made by the Ontario Superior Court of Justice in respect of this court application, and the status of the litigation.

The City Solicitor is seeking instructions regarding the litigation.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council adopt the recommendations set out in Confidential Attachment 2 to this report from the City Solicitor; and

2. City Council direct that the recommendations, if adopted, be made public at the conclusion of the meeting with the balance of the Confidential Attachment to remain confidential as it contains advice that is subject to solicitor-client privilege and pertains to litigation or potential litigation.

FINANCIAL IMPACT

Information on the financial impact of this report is contained in Confidential Attachment 2.

DECISION HISTORY

Clause No. 15 of Report No. 4 of the Etobicoke Community Council, headed "Avenues Study (Implementation Report (Phase 3) – The Queensway Between the Mimico Creek Valley and Kipling Avenue (Ward 5 – Etobicoke-Lakeshore)" (http://www.toronto.ca/legdocs/2003/agendas/council/cc030521/et4rpt/cl015.pdf)

Item MM47.17 – Request the City Solicitor attend OMB Appeal Hearing for 1100 The Queensway, and to defend the decision of the Committee of Adjustment to refuse the variance application (A1/10EYK) – by Councillor Milczyn, seconded by Councillor Grimes (http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2010.MM47.17)

ISSUE BACKGROUND

Queensway Avenue site specific by-law 514-2003 was passed by City Council at its meeting of May 21-23, 2003. Section 3A of the by-law provides that certain land uses are prohibited along the Queensway corridor between the Mimico Creek Valley and Kipling Avenue, including the use of lands as "adult entertainment establishments as defined by the *Municipal Act, 2001*".

In October 2009, the owners of 1100 The Queensway (the "Property") submitted information to the City describing how they proposed to operate a store selling "adult entertainment goods" at an Aren't We Naughty ("AWN") store on the premises. The owners sought a zoning clearance from the City to confirm whether they were authorized to open an AWN establishment at the Property.

The City advised that the proposed use was not permitted by the site specific by-law because using the property in the manner AWN intended would contravene the adult entertainment establishment restriction.

The owners of the AWN store applied to the City's Committee of Adjustment for a minor variance, seeking relief from the provisions of the site specific by-law. The Committee of Adjustment refused the Application. This refusal was subsequently appealed to the Ontario Municipal Board (the "OMB").

Over the course of a 4-day hearing, the OMB considered the appeal, ultimately deciding that there was no basis upon which the minor variance application could be granted. The OMB decision was released in September 2010 and was not appealed.

The AWN establishment on The Queensway opened in early April 2012.

City staff, once alerted to the presence of the establishment, attended at 1100 The Queensway, carried out an investigation, and determined that the premises were being used as an "adult entertainment establishment" contrary to the provisions of the site specific by-law. This determination was based, in part, on comments that the OMB made in disposing of the minor variance appeal in September 2010.

The City initiated a prosecution in connection with the alleged breach. In response to the City's investigation, the Property's owners and the owners of the AWN store (the "Applicants") brought a court application to challenge the validity of the "adult entertainment establishment" restriction. The Applicants asserted in the court application that these provisions of the site specific by-law were vague, uncertain, and discriminatory, and ought to be struck.

As a result of the court application, the parties agreed to put off the prosecution until the court application was decided. The City also launched its own counter-application. In the event that the City was able to resist the court challenge and the site specific by-law was found to be sufficiently clear and precise, the City's counter-application would compel the closure of the AWN store.

The challenge to the site specific by-law was heard on February 12, 2013. The Ontario Superior Court of Justice released its decision on February 28, 2013. A copy of this decision is attached as Attachment 1 to this report.

The Arguments Made Before the Superior Court of Justice

The court application challenging certain provisions of site specific by-law 514-2003 relied heavily on the decision of the Ontario Court of Appeal in *Hamilton Independent Variety and Confectionary Stores Inc. v. Hamilton (City)* ("*Hamilton Variety*"), which was released in 1983.

The *Hamilton Variety* case involved the challenge of a Hamilton by-law that was designed to grant the municipality authority to license and regulate "adult entertainment parlours". The section of the Hamilton by-law that was identified as being too vague was the provision that aimed to regulate the sale of goods – specifically, erotic magazines.

The by-law defined these goods as "…magazines appealing to or designed to appeal to erotic or sexual appetites or inclinations".

In our case, the Applicants focused on almost identical language (in relation to goods), which had been incorporated by reference into site-specific zoning by-law 514-2003.

In striking out the portion of the Hamilton by-law that aimed to regulate goods, the Court of Appeal concluded that the phrase "…appealing or designed to appeal to erotic or sexual inclinations…" was too vague. There was no definition, amplification or description of what magazines were meant to be captured in these general words. The Court of Appeal went on to note that, in relation to services, the Hamilton by-law was more specific. The portion of the Hamilton by-law that related to services included details in terms of the services' principal features or characteristics, as well as specifics as to how these services were advertised.

In our case, the City responded to the court application by arguing that the language the Applicants were asking the Court to strike was not vague because this language provided "sufficient guidance for legal debate". The Supreme Court of Canada had recently used this phrase in describing the test to be applied when considering claims that a statute is too vague. The Applicants and the City were able to make arguments before the OMB about the "adult entertainment establishment" definition, and the OMB was able to adjudicate the issue. The City cited these facts as evidence that the language being challenged could provide guidance for legal debate, and was thus sufficiently clear. The City also argued that, although there may be difficulties in interpretation and in enforcement, if the site specific by-law is applied in a common sense way on a case by case basis, any difficulties in interpretation could be overcome.

The Decision of the Superior Court of Justice

The Court released its decision on February 28, 2013, ruling in favour of the Applicants.

The case turned on the extent to which the language in section 154 of the *Municipal Act, 2001* (which was incorporated by reference into the By-law), provided sufficient guidance to a reasonably intelligent person as to what constitutes "[g]oods, entertainment or services that are designed to appeal to erotic or sexual appetites or inclinations…".

In her decision, Justice Himel highlighted how laws must:

(1) provide citizens with fair notice of prohibited conduct; and

(2) be clear enough to safeguard against selective and arbitrary law enforcement.

The Court determined that the language in the *Municipal Act, 2001*, referenced in the site specific by-law failed to meet these criteria. Justice Himel highlighted how the word "goods" is not defined in the By-law (or in the *Municipal Act, 2001*). She also identified how there was no definition, amplification, or description of what items were meant to be

included in the general words "designed to appeal to erotic or sexual appetites or inclinations". In her view, no reasonably intelligent person could determine when he or she was violating the By-law with any degree of certainty. The Court also concluded that adopting a common sense or a contextual approach to interpret the site specific by-law could not fill any gaps in the language used.

COMMENTS

Additional information and further legal advice are contained in Confidential Attachment 2 to this report.

CONTACT

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SIGNATURE

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Anna Kinastowski
City Solicitor

ATTACHMENTS

Attachment 1: Decision of the *Ontario* Superior Court of Justice, released on February 28, 2013 (Public)

Attachment 2: Confidential Attachment