SUPERIOR COURT OF JUSTICE
Judges' Administration
Court House
361 University Avenue, Room 170
TORONTO, ONTARIO M5G 1T3
Tel: (416-327-5284 Fax: (416) 327-5417

FAX COVER SHEET

Date: February 28, 2013

To: Mark Siboni and Jessica Braun	Fax No. 416 392 1199
Melissa E. VanBerkum	416 214 9915

From: Cheryl Alphonso, Judicial Assistant to The Honourable Madam Justice Susan Himel

No. of Pages (*incl. cover page*): 13

Message: 2312460 Ontario Ltd. and 748485 Ontario Ltd., and 2312460 Ontario Ltd., v. City of Toronto
CV-12-451200 & CV-12-452975

Reasons for Decision attached.

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CITATION: 2312460 Ontario Ltd. and 748485 Ontario Ltd., and 2312460 Ontario Ltd., v. City of Toronto, 2013 ONSC 1279
COURT FILE NO.: CV-12-451200 & CV-12-452975
DATE: 20130228

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
2312460 ONTARIO LTD. and 748485 ONTARIO LTD.	)	*Melissa E. VanBerkum*, for the Applicants
Applicants	)	
– and –	)	
CITY OF TORONTO	)	*Mark Siboni and Jessica Braun*, for the Respondent
Respondent	)	
- and –	)	
CITY OF TORONTO	)	*Mark Siboni and Jessica Braun*, for the Applicant
Applicant	)	
- and –	)	
2312460 ONTARIO LTD.	)	*Melissa E. VanBerkum*, for the Respondent
Respondent	)	
	)	**HEARD:** February 12, 2013

HIMEL J.

REASONS FOR DECISION

[1] The owner and operator of a property located at 1100 The Queensway, Toronto bring an application under Rule 14.05(3)(d) and 14.05(3)(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for a determination of their rights under a zoning by-law. The applicants seek a declaration that parts of section 3.A of By-law 514-2003 (the "By-law") are vague and void for uncertainty, that they are discriminatory in their application to the applicants and that the retail

use of the property by the applicant tenant may operate without contravening the By-law. The City opposes the declarations sought and asks that the application be dismissed. The City also brings an application under section 380 of the *City of Toronto Act, 2006*, S.O. 2006, c.11, Schedule A for injunctive relief.

FACTUAL BACKGROUND:

[2] On April 2, 2012, 2312460 Ontario Ltd. ("231") purchased a property located at 1100 The Queensway, Toronto. 748485 Ontario Ltd. ("748") leased the premises in order to operate a business known as Aren't We Naughty ("AWN"). AWN operates a chain of stores that sells goods such as lingerie, books, lotions, condoms and devices including vibrators. AWN sought confirmation of the permitted uses from the City's Building Department in order to satisfy a condition in the agreement of purchase and sale of the property.

[3] Zoning By-Law 514-2003 is part of Chapter 320 of the Etobicoke Zoning Code which deals with development along The Queensway between Mimico Creek and Kipling Avenue. The By-law was passed following a municipal planning process which involved public input and study and culminated in policies adopted by Etobicoke Community Council and City of Toronto Council in 2003.

[4] By-law 514-2003 provides as follows:

> 3.A. The following uses shall be prohibited: service stations and public garages; new and used car sales rooms and lots; the manufacture of confectionary; drive-through facilities; monuments related to cemeteries; adult video and massage parlours; and adult entertainment establishments as defined by the *Municipal Act, 2001*.

[5] On June 1, 2009, 748 submitted information to the City describing how they proposed to operate an "Aren't We Naughty" store on the premises at 1100 The Queensway and described the goods that they proposed to sell as "adult entertainment goods." The Zoning Examiner issued a Notice of Zoning By-law Compliance on December 14, 2009 in response indicating that the proposed retail use complies with the By-law. On January 19, 2010, the Zoning Examiner issued a second notice indicating that section 3.A of the By-law prohibited the sale of adult videos and "novelties" but permitted the sale of clothing and lingerie. To identify the required variances before finalizing its application, AWN applied to the City on October 14, 2009 for a "Preliminary Project Review." Staff of the City of Toronto determined that the proposed use was not permitted because of the By-law which prohibits properties from being used as "adult entertainment establishments as defined in the *Municipal Act, 2001*."

[6] Section 154 of the *Municipal Act, 2001*, S.O. 2001, c. 25 empowers a local municipality in a by-law to impose restrictions on adult entertainment establishments and provides as follows:

> 154(2) Any premises or any part of them is an adult entertainment establishment if, in the pursuance of a business,

(a) Goods, entertainment or services that are designed to appeal to erotic or sexual appetites or inclinations are provided in the premises or part of the premises;

[7] As there was no definition of "adult novelties" in the By-law or letter, AWN applied to the Committee of Adjustment for a minor variance to clarify which products could be sold at the property and to seek relief from the land use restrictions set out in the site specific By-law by obtaining a variance that would permit the proposed use. The Committee of Adjustment refused the application for variance on March 4, 2010. AWN appealed to the Ontario Municipal Board (The "OMB"). Following a four day hearing, the OMB released its decision on September 1, 2010. The OMB found that the proposed use by AWN for the sale of goods including lingerie, creams, and items that are described as "sex toys" would offend the By-law and refused the variance to the By-law. The OMB adopted the opinion of Franco Romano, a professional planner called by the City, concerning the meaning of "adult entertainment establishment." At p. 8 of the decision, the OMB wrote:

> Cognizant of Mr. Romano's caveat that it must have the sale of erotic goods as its 'focus" before a retail shop could be considered an "adult entertainment establishment", I find that only places of business selling solely or predominantly "goods appealing or designed to appeal to erotic or sexual appetites or inclinations" may reasonably be defined as an "adult entertainment establishment (or parlour)".

[8] AWN did not seek leave to appeal the OMB's decision. The City has not amended the use permissions in the By-law nor has it passed an interim control by-law that affects the area caught by the By-law. AWN opened its store pursuant to a lease on April 5, 2012. Although some of its stores sell videos, there are no adult video tapes offered for sale, rental or viewing at 1100 The Queensway nor are any services offered.

[9] Shortly after the store opened, City of Toronto inspectors attended at the property and determined that the premises were being used as an adult entertainment establishment contrary to the provisions of the site specific zoning by-law. They charged AWN with operating an adult entertainment establishment by selling goods "designed to appeal to erotic or sexual appetites or inclinations" at the property contrary to s. 3A of Zoning By-law 514-2003. On consent of the parties, the charge has been adjourned pending the determination of this application. Furthermore, the City brought an application for injunctive relief under s. 380 of the *Municipal Act* to prevent the applicant from using the premises. The parties agreed that the application for injunctive relief should be adjourned pending the result of the application brought under Rule 14.

ISSUES:

[10] The issues raised on this application are as follows:

(1) is the prohibition in the By-law regarding "adult entertainment establishments as defined in the *Municipal Act, 2001*" vague and void for uncertainty?
(2) is the By-law discriminatory in its application to AWN?

POSITIONS OF THE PARTIES:

[11] The applicants take the position that the provisions of the By-law are vague and should be struck from the By-law where s. 3.A of By-law 514-2003 provides, "adult entertainment establishments as defined by the *Municipal Act, 2001.*" The applicants argue that it is possible to define terms as shown by the City's licensing provisions for premises where adult entertainment services are offered. The decision of the OMB did not assist in providing certainty to the meaning of the terms. The applicants further argue that as various goods sold by the applicant are also sold in other retail establishments which are not deemed to be "Adult Entertainment Establishments", the application of the By-law provisions to AWN is discriminatory.

[12] The applicants argue that the City's position that the By-law is legal as its definition of an "adult entertainment establishment" is the same as in the *Municipal Act, 2001* is untenable given the jurisprudence. The City's own actions demonstrate the difficulty in understanding the By-law. The evidence led at the OMB from the City's District Manager of the City's Municipal Licensing and Standards Division was that the goods sold by AWN make it an "adult entertainment establishment" while other retail stores that sell the same goods (such as a drug store selling condoms or a pet store selling animal collars) are not, because they are not in the adult entertainment business, an argument that is circular. Further, they rely on what is described as a "primary purpose test" when no such test exists in the definition. The By-law is discriminatory because the interpretation of the By-law is based not on what is sold but who is doing the selling.

[13] The respondent City takes the position that the premises being occupied by the applicants are being used as an adult entertainment establishment contrary to the applicable site specific zoning by-law 514-2003. This determination is based on the decision of the OMB issued in September 2010. The respondent argues that the By-law is not vague as the provisions provide "sufficient guidance for legal debate" as to the scope of the uses prohibited along The Queensway Avenue. In fact, the applicant was able to identify the use it intended to make of the premises and describe the nature of the goods they intended to sell when they submitted a request for review to City staff. They were able to make argument before the OMB, and the OMB was able to conduct its "mediating role" in adjudicating on the issue. The City submits that while there may be difficulties in interpretation and in enforcement, such difficulties cannot render a by-law invalid. Not until the particular factual situation is presented, can one know whether the by-law is breached. The by-law must be applied in a common sense way on a case by case basis.

THE LAW:

[14] Rule 14.05(3) provides:

> (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
>
> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

> (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

[15] In interpreting the meaning of the words of an Act, the court is to read the provisions in their entire context and apply the plain and ordinary meaning of the words: see *Quebec (Communaute urbaine) c. Notre-Dame de Bonsecours (Corp).* [1994] 3 S.C.R. 3. at pages 17, 18 and 20. In the recent case of *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326, the Supreme Court stated at para. 59:

> It is trite law that 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 and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21; and *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 21. In addition, every word of a statute is presumed to have a role in achieving the objective of the Act. No word or provision should be interpreted so as to render it mere surplusage: *R. v. Proulx*, 2000 SCC 5 [2000] 1 S.C.R. 61, at para. 28; *McIntosh*, at para. 21; *Rizzo*, at para. 21; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 6 and 210-2.

[16] In the case at bar, the By-law was passed pursuant to s. 154(2)(a) of the *Municipal Act, 2001*. The Act, the By-law and the Etobicoke Zoning Code do not define the term, "goods that are designed to appeal to erotic or sexual appetites or inclinations."

[17] In the case of *Hamilton Independent Variety and Confectionary Stores Inc. v. Hamilton*, [1983] O.J. No. 3, 134 D.L.R. (3d) 498, 20 M.P.L.R. 241 (C.A.), the Ontario Court of Appeal determined the validity of a licensing by-law that had incorporated, by reference the wording of para. 368(9) (a) of the *Municipal Act*, R.S.O. 1970, c. 284. That section is similar to s. 154(2) in the *Municipal Act, 2001* except it included definitions of "adult entertainment parlour", "goods", "to provide" "services" and "services designed to appeal to erotic or sexual appetites or inclinations". The court held that municipalities bear the onus to draft by-laws clearly in order that every citizen may understand and comply with them. The provisions enacted by the municipality in attempting to license and control the sale of "erotic" magazines were considered to be vague and uncertain. The term "erotic" in the legislation and the impugned licensing by-law did not define, amplify or describe what goods or magazines were meant to be included in the words "appealing to or designed to appeal to erotic or sexual appetites or inclinations." The court determined that it was impossible for a store owner to decide whether he or she was, in fact, selling "erotic" magazines covered by the by-law and went on to say:

> In my view, it is no answer to the vagueness and uncertainty argument in this case to say that the by-law incorporates the exact definitions of the *Municipal Act.* While the definition in an enabling legislation may deal in generalities when broadly granting the power to enact a by-law, the by-law itself must be sufficiently specific to enable the proposed licensee to perceive his obligations in advance. The mere repetition of the formula or definition in the Municipal "Act,

without specifying particulars, fails to give any indication of the scope of the by-law.

[18] In *913719 Ontario Ltd. v. City of Niagara Falls* [1995] O.J. No. 2275, 84 O.A.C. 149, 29 M.P.L.R. (2d) 1 (C.A.), a business appealed a conviction for operating an adult entertainment parlour contrary to the zoning by-law. The court followed *Hamilton Variety* and declared invalid parts of a by-law for lack of certainty. Austin J.A. cited *Hamilton Variety* at para. 2:

> The obligation of clarity is to enable every citizen to understand the by-law in order to comply with it....
>
> While the definition in an enabling legislation may deal in generalities when broadly granting the power to enact a by-law, the by-law itself must be sufficiently specific to enable the proposed licensee to perceive his obligations in advance.

[19] In the case of *697578 Ontario Ltd. v. Niagara Falls (City),* [2001] O.J. No. 5710, 28 M.P.L.R., (3d) 266, [2001] O.T.C. 1017 (Sup. Ct.) at para. 24, the court considered zoning for adult entertainment parlours which were defined as "premises that provided goods or services designed to appeal to erotic appetites." The court found that the language was vague and void for uncertainty.

[20] The issue of vagueness was considered by the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceuticals,* [1992] S.C.J. No. 67, 2 S.C.R. 606. In this case, the issue was whether s. 32(1)(c) of the *Combines Investigation Act,* R.S.C. 1970, c. C-23 infringed s. 7 of the *Canadian Charter of Rights and Freedoms.* Justice Gonthier held that vagueness can be raised under s. 7 of the *Charter* since it is a principle of fundamental justice that laws must not be too vague. It is also relevant to other *Charter* principles including the "minimal impairment" stage of the test developed in *R. v. Oakes,* [1986] 1 S.C.R. 103. The court in *Nova Scotia Pharmaceuticals* further outlined at para. 28 that "the doctrine of vagueness is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion."

[21] In deciding whether a law is too vague, the court is to consider factors such as the need for flexibility and the interpretative role of the courts, the impossibility of achieving absolute certainty and the possibility that many varying judicial interpretations of a given disposition may exist: see *Nova Scotia Pharmaceuticals* at para. 28. Further, the court wrote at para. 53:

> A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion.

[22] The court went on to say at para. 63:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide

> neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate....

[23] Finally, the court commented at para. 70 that the standard applies "...to all enactments, irrespective of whether they are civil, criminal, administrative or other...."

[24] In *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, 2 S.C.R. 1031, the Supreme Court applied *Nova Scotia Pharmaceuticals* and Justice Gonthier reiterated that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" and referenced the two rationales for the requirement of legal precision at para. 2. He went on in this case to explain at para. 47 that:

> Vagueness must not be considered in abstracto, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.

[25] The court then commented about the use by legislators of broad and general terms in legislation and that they will rely on the "mediating role of the judiciary to determine whether those terms apply in particular fact situations." The court wrote at para. 49:

> In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives. The s. 7 doctrine of vagueness must not be used to straight-jacket the state in social policy fields.

[26] In *City of Toronto v. 1291547 Ontario Inc.*, [2000] O.J. No. 4859 (Sup. Ct.) at para. 31, Nordheimer J. noted that courts have made it clear that difficulties in interpretation of the terms of a by-law or uncertainties in the meaning of words used will not be sufficient to render the by-law invalid. In *1121472 Ontario Inc. v. Toronto (City)*, [1998] O.J. No. 1851 (C.A.), the court held at para. 18:

> ...The by-law must be applied in a common sense way on a case by case basis and regard must be had to the reasons underlying the introduction of the "entertainment facility" category and the zoning restrictions pertinent thereto.

[27] However, in *Information Retailers v. Metropolitan Toronto*, [1985] O.J. No. 2667 (C.A.), the court noted at para. 44 that it is not sufficient for the City to argue that the words of the by-law are defined by the common understanding of the nature of adult entertainment goods:

> It is no answer for the municipality, having prescribed a definition broad enough to encompass these books, to say that booksellers would, as a matter of common

> understanding, be aware of the type of publication the by-law is designed to regulate or that the by-law can be subjected to a narrowing construction; nor is it any answer to say that the municipality can be relied on not to enforce the by-law with respect to "legitimate" books. Booksellers should not be left to guess whether or not it is intended that a particular book be within the purview of the by-law; nor should they be left to the vagaries of bureaucratic enforcement or, indeed, to the popular pressures that may arise to influence enforcement.

DECISION:

[28] The facts in this case are not in dispute. The issue is whether the provisions of a site-specific zoning by-law are so vague that they are void for uncertainty.

[29] The respondent City argues that decisions from the Supreme Court of Canada: *R. v. Nova Scotia Pharmaceuticals and Ontario v. Canadian Pacific Ltd.* have changed the approach to interpreting legislation on the issue of vagueness. I agree that the Supreme Court has outlined the test for whether a law is void for vagueness under s. 7 of the *Charter of Rights and Freedoms*. In *Ontario v. Canadian Pacific* at para. 2, the court wrote: "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." Vague laws have the potential to violate the principles of fundamental justice on the basis that: (1) citizens must be provided with fair notice of prohibited conduct and (2) there must be safeguards against selective and arbitrary law enforcement. Writing for the majority, Gonthier J. said at para. 47:

> ...the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an "area of risk". This does not necessitate an exercise in strict judicial line-drawing because, as noted above, the question to be resolved is whether the law provides sufficient guidance for legal debate as to the scope of prohibited conduct.

[30] In other words, the impugned laws must provide a delineated zone or area of risk: see *Jackson v. Vaughan (City)*, 2010 ONCA 118, [2010] O.J. No. 588 at para. 29. That same concept was discussed in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4, [2004] 1 S.C.R. 76 where the Supreme Court held at para. 16 that a law must set an intelligible standard for both the citizens it governs and the officials who must enforce it. A law must delineate a risk zone for criminal sanction or it will run afoul of section 7 of the *Charter*.

[31] The applicants argue that the jurisprudence from the Ontario Court of Appeal, the *Hamilton Independent Variety & Confectionary Stores Inc. v. City of Hamilton* case and the *Niagara Falls (City) v. Jorgensen* case, are relevant to the application of the principles concerning vagueness of a zoning by-law. These cases stand for the proposition that "the by-law itself must be sufficiently specific to enable the proposed licensee to perceive his obligations in advance.": see *Jorgensen* at para. 12. There is an obligation on a municipal council when drafting by-laws: "The obligation of clarity is to enable every citizen to understand the by-law in

order to comply with it." (*Hamilton* at para. 21) This concept was discussed by the Supreme Court of Canada in *Re City of Montreal and Arcade Amusements Inc.* [1985] 1 S.C.R. 368 where the court considered the definition for vagueness of a by-law and cited the authority, Pepin and Ouellette, *Principes de Contentieux Administrative* (1982) at p. 126 at para. 85 :

> In short, the vagueness must be so serious that the judge concludes that a reasonably intelligent man, sufficiently well-informed if the by-law is technical in nature, is unable to determine the meaning of the by-law and govern his actions accordingly.

[32] In *Regina v. Sandler* [1971] 3 O.R. 614 (C.A.), Kelly J.A. described the test of vagueness in a by-law at para. 18:

> When a municipal council purports to legislate under the powers found in the Municipal Act and thereby creates obligations to be observed by its citizens, the failure to observe which attracts punishment, it is to be expected that the by-law creating such obligations will itself be so explicit that a well-intentioned citizen seeking to observe the provisions of the by-law may, from a reading of the by-law, without the enlargements of its requirement by the order of a municipal servant, be able to satisfy himself that he has complied with its requirements.

[33] In *R. v. Ware,* [2005] O.J. No. 2447 (C.A.), the accused Ware and 564163 Ontario Limited appealed the dismissal of their summary conviction appeal from a conviction under a by-law that prohibited naked or partially naked exotic dancers from touching their patrons in what was described as an adult entertainment parlour. In considering the provisions of the by-law, the court applied the cases of *Hamilton Independent Variety* and *Niagara Falls (City) v. Jorgensen* to the issue of whether the provisions were void for vagueness.

[34] Applying the jurisprudence concerning the test for vagueness in a zoning by-law, the issue is whether a reasonably intelligent person could determine whether or not they were in violation of the by-law. The by-law must be clear enough that citizens can know what behaviour is impermissible under the by-law. In some cases, courts have applied concepts of vagueness under the *Charter* to a consideration of vagueness of a zoning by-law: see *Xentel DM Inc. v. Windsor (City)* [2004] O.J. No. 3656 (Sup.Ct.) and *Neighbourhoods of Windfields Limited Partnership v. Death* [2007] O.J. No. 5081 (Sup.Ct.). I do not consider the approach in the Supreme Court decisions, which consider vagueness with reference to the *Charter*, and the decisions of the Ontario Court of Appeal which consider vagueness of zoning by-laws with reference to the rule of law or common law principles to be significantly different. Whether a law is being declared void for vagueness contrary to the *Charter* or through the operation of the rule of law, the analysis is similar. The object of the exercise is to decide whether the law is sufficiently clear to allow a citizen to understand it in order to comply with it. To decide whether it is clear, the court is to consider the provisions in the context and to recognize the mediating role of the judiciary.

[35] Municipalities are creatures of statute which have been delegated authority to exercise legislative, administrative and quasi-judicial powers. A municipality must act within its defined

jurisdictional sphere and the courts will apply doctrines such as unreasonableness, discrimination, bad faith and uncertainty to determine whether a municipality has exceeded its jurisdiction. With respect to uncertainty and vagueness, the court will intervene to ensure that municipal by-laws are such that what is required for compliance is clear: see S. Makuch, N. Craik, S. Leisk, *Canadian Municipal and Planning Law*, 2nd Edition, (2004: Thomson Carswell Limited) at p.94. At p. 102, the authors write:

> A municipal by-law may also be found invalid on the basis of vagueness or uncertainty, the test for which is where a reasonably intelligent reader (or well-intentioned citizen) cannot ascertain the meaning or application of the by-law. There is a duty on the municipal council to express the meaning of a by-law with certainty so that every citizen may understand the by-law in order to comply with it.

[36] In approaching the relevant provisions of the By-law in this manner, I find that they are vague and void for uncertainty. For example, the By-law does not define the word "goods". Moreover, what a person considers to be erotic or appealing to their sexual appetites or inclinations can vary widely. It is unclear, in fact, whose erotic or sexual appetites or inclinations the By-law is referring. The court in *Hamilton* dealt with a by-law which incorporated the same section of the *Municipal Act* as the By-law at issue in this case. The Court of Appeal was unable to determine what was meant by "appealing to erotic or sexual appetites or inclinations." In *Hamilton*, storeowners were placed in the same situation as magazine vendors. As there was no definition, amplification or description of what magazines were meant to be included in the general words "appealing to or designed to appeal to erotic or sexual appetites or inclinations", the court concluded that it was impossible for a store owner reading this by-law to decide whether he was in fact selling "erotic" magazines covered under it. Similarly, in the provisions of the By-law before me, it is impossible to tell whether an item meets the definition of "erotic". There is no guidance in the By-law on the term "designed to appeal." That term could relate to the design of the goods, packaging, marketing, location or function of the item. In my view, no reasonably intelligent person could determine when he was violating the By-law with any degree of certainty.

[37] A good such as a dog collar and leash could be viewed as erotic or appealing to the sexual appetite by one person and considered not erotic by another. Further, no citizen would be able to appreciate what is meant by the words "adult entertainment establishments as defined by the Municipal Act, 2001." No official would be able to enforce the By-law. Neither a common sense approach nor a contextual analysis can fill in the gaps. The reality is that the City is able to use specific words and definitions in order to give meaning to the legislative intent. To date, it has not done so. Moreover, while the City has authority to enact a site specific zoning by-law, the application of the by-law cannot result in a contravention of its provisions by one person and permissible conduct by another for the very same activity. Again, a pet store might sell leashes and collars and not be considered an "adult entertainment establishment." Another store that sells the same items could be classified as such.

[38] This is comparable to the situation in *Hamilton* where a store selling adult magazines such as Playboy and Penthouse would not run afoul of the by-law but a store selling adult

magazines classified as "erotic magazines" would have violated the by-law: see para. 19. The by-law provisions were held not to be sufficiently clear to allow a merchant to determine whether or not he is in contravention of the by-law. The same item in one store is acceptable while, at another store in the very same area, it is not.

[39] Furthermore, unless the provincial legislature has expressly conferred powers on the municipality to provide different rules or regulations for different categories of individuals or groups, it is discriminatory for the municipality to pass a by-law which has that effect: see *Bunce v. Cobourg (Town)* [1963] 2 O.R. 343 (C.A.).

RESULT:

[40] For the reasons outlined above, I find that the provisions in section 3A of By-law 514-2003 are so vague that the applicants are unable to understand the provisions in order to comply with them. Where provisions of a by-law are so vague, they should be struck down as they are void for uncertainty. "The duty of a municipal council in framing a by-law is to express its meaning with certainty": see *Hamilton, supra* at para. 20. I also conclude that the consequences of this site-specific by-law are such that they discriminate against the applicants. Accordingly, the application brought under R. 14.05 for declaratory relief is granted.

[41] In accordance with s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 and Rule 57.01, I exercise my discretion and I fix costs at $15,000 inclusive of fees on the partial indemnity scale and disbursements and HST in favour of the applicants to be paid by the City within 30 days. The parties have agreed and I deem this amount to be fair and reasonable in the circumstances of this case.

Himel J.

Released: February 28, 2013

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SUPERIOR COURT OF JUSTICE

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2312460 ONTARIO LTD. and 748485 ONTARIO LTD.

Applicants

– and –

CITY OF TORONTO

Respondent

- and –

CITY OF TORONTO

Applicant

- and –

2312460 ONTARIO LTD.

Respondent

REASONS FOR DECISION

Himel J.

Released: February 28, 2013