CITATION: *2495065 Ontario Inc. v. CIC Management Services Inc.*, 2023 ONSC 3923
COURT FILE NO.: CV-22-00682123-000
DATE: 20230704

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
2495065 ONTARIO INC.	*Brian Chung*, for the Applicant
Applicant	
– and –	
CIC MANAGEMENT SERVICES INC.	*Luke Johnston and Michael Nemanic*, for the Respondent
Respondent	
	HEARD: December 8, 2022

VELLA J.

REASONS FOR DECISION

[1] This Application raises the issue of whether the Respondent, CIC Management Services Inc. ("CIC"), is entitled to an additional payment under the "Bonus Density" price adjustment provision of an Agreement of Purchase and Sale dated December 10, 2018 (the "APS") from the Applicant, 2495056 Ontario Inc. ("Vandyk") as a result of a Minister's Zoning Order. The APS

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relates to a property municipally known as 39 Newcastle Street, Etobicoke (the "Property" also referred to as "39 Newcastle").

[2] Related to this issue is whether a security mortgage granted by Vandyk in favour of CIC to secure any additional funds payable under the Bonus Density provision should be discharged now.

[3] Vandyk seeks the following relief:

(a) A declaration that CIC is not entitled to any Bonus Density payments under the APS;

(b) A declaration that the Bonus Density (as defined in the APS) has not been achieved with respect to the Property;

(c) A declaration that Density (as defined in the APS) does not include density achieved for lands other than the Property; and

(d) An Order requiring CIC to discharge its Security Mortgage.

[4] CIC seeks an order that the Application be converted into a trial. In the alternative, CIC requests:

(a) A declaration that CIC is entitled to Bonus Density payments under the APS due now;

(b) A declaration that Bonus Density has been achieved with respect to the Property as of the coming into force on April 8, 2022 of a Ministerial Zoning Order, Ontario Regulation 337/22 (the "MZO");

(c) A declaration that Density, under the APS, includes all density achieved through the combined properties of 39 Newcastle St. and the adjacent properties owned by Metrolinx (the "Metrolinx Lands") by virtue of the MZO authorizing density for the combined properties as a single block of land;

(d) An order dismissing Vandyk's request that CIC's security mortgage be discharged.

[5] For the reasons that follow, the Application is granted in part.

Background

[6] Many of the facts underlying this Application are not in dispute.

[7] Vandyk purchased 39 Newcastle from CIC by way of the APS as a development property. It is vacant land and is located next to lands owned by Metrolinx and the Mimico GO Transit Station, which is also situated on Metrolinx's lands. It is Vandyk's intention to erect three towers,

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which will have a mix of residential and non-residential uses. 39 Newcastle is comprised of approximately 1.9 acres.

[8] The purchase price for 39 Newcastle, as set out in Article 1.1(1)(z) of the APS, is $89,938,727.45 (exclusive of HST) based on 809,529.50 square feet (the "Base Density"[1]) at $111.10 per square foot. This purchase price was based on the amount of density that the parties believed, as at the date of the APS, the Land Planning Appeal Tribunal ("LPAT") would approve.

[9] Payment was structured as follows: Vandyk would pay $5 million upon closing, the sum of $51,105,222.60 was secured by CIC by way of a vendor take back mortgage and the balance of $33,836,504.85 was to be paid on March 31, 2019.[2]

[10] The purchase price, however, had a built-in upside and downside contingency to reflect the possibility that the density ultimately approved could be more or less than what the parties estimated at the time of the APS. As stated, the purchase price was determined based on an assumed total gross floor area ("GFA") of 809,529.50 square feet (or 75,205.75 square metres) called the Base Density. The APS provides for a purchase price adjustment in the event that the allowable density approved by the "applicable Authority" falls short of, or exceeds, the Base Density, resulting in a decrease or increase in the purchase price respectively. The APS also set up a mechanism for repayment in the case of a reduction in price or additional payment in the event of an increase, in the Density ultimately approved.[3]

[11] In the event that the approved density of the Property exceeds the Base Density, CIC is entitled to what the APS calls a "Bonus Density". In order to secure the possibility of an upward adjustment to the purchase price on the basis that the Bonus Density is achieved, the APS provided for a security mortgage to be registered on the Property in the amount of $25 million (the "Security Mortgage"). The Security Mortgage, in turn, is stated in the APS to be maintained until the "Outside Date" which is also defined by the APS. On the other hand, if Base Density was not achieved, then the APS set out a formula for reducing the principal amount of the vendor take back mortgage.[4]

[12] Prior to the purchase of the Property by Vandyk, 39 Newcastle was the subject of an active site-specific development application with the City of Toronto. CIC appealed the City's zoning decision because the City had not rezoned the Property from regeneration lands to mixed use. It

[1] Base Density as defined at Article 1.1(1)(e) of the APS.
[2] Article 3.1(1) of the APS.
[3] Article 1.1(1)(l) of the APS.
[4] Article 3.2(4) of the APS.

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was recognized by both parties that an appeal could result in either an increase or decrease in the allowable density capacity for 39 Newcastle which, in turn, would affect the value of this Property.

[13] On February 11, 2020, the LPAT (now the Ontario Land Tribunal or "OLT") issued a decision and interim order which allowed CIC's appeal and approved a zoning by-law amendment redesignating the lands from regeneration areas to mixed use for development purposes.[5] LPAT's decision, *inter alia,* permitted the development of three residential towers that were 22 storeys (78.6 metres), 30 storeys (102.2 metres) and 36 storeys (119.9 metres) in height and a total aggregate GFA of 807,293.28 square feet or 75,000 square metres. No final order, however, has been issued by LPAT since various preconditions for approval have not been satisfied.[6]

[14] More specifically, the "gross floor area"[7], which is substantially the same as the definition of "Density" in the APS, approved by LPAT was 75,000 square metres comprised of a maximum of 62,700 square metres for residential purposes, a minimum of 2,350 square metres for non-residential purposes, and above grade parking and storage to a maximum of 10,600 square metres.

[15] However, at around the time that LPAT released its decision, the City of Toronto encouraged Vandyk and Metrolinx to coordinate efforts to implement a "transit-oriented development" or "TOD" of their combined lands given the proximity of the Mimico GO Station to 39 Newcastle and the Metrolinx Lands. This concept would allow Vandyk and Metrolinx to develop a coordinated and consolidated development plan over the span of their respective lands to, in part, facilitate and enhance the public access to the Mimico Transit GO Station. This TOD plan also included development of other surrounding lands owned separately by each of Vandyk and Metrolinx and unrelated to this proceeding.

[16] As a result, Vandyk and Metrolinx jointly submitted a TOD plan. They sought a Minister's Zoning Order from the Minister of Municipal Affairs and Housing to re-zone 39 Newcastle and the Metrolinx Lands surrounding the Mimico station to facilitate the development of their joint TOD plan.

[17] On April 8, 2022, the Minister granted a MZO by way of regulation which had the effect of re-zoning both 39 Newcastle and the surrounding Metrolinx Lands municipally known as 27-

[5] *CIC Management Services Inc. v. Toronto (City)*, OLT-22-003921, 2020 CanLII 12277 (Ont. L.P.A.T.)
[6] No order has been issued by LPAT as at the date of the hearing. The Ontario Land Tribunal (OLT) is the successor to the LPAT and other tribunals.
[7] Gross Floor Area is the description of what is the equivalent of a density measurement but provides for specific inclusions and exclusions of land uses such as outdoor versus underground parking.

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33 Newcastle St. and 1 Windsor Street.[8] In the MZO, these lands are collectively referred to as "Block 2".[9]

[18] In support of the TOD, Vandyk and Metrolinx submitted a Mimico Master Context Plan ("TOD Context Plan") dated September 23, 2020. An updated copy of Vandyk's TOD Plan dated November 10, 2021 (containing detailed architectural drawings of the proposed buildings with the three towers) was then submitted by Vandyk. The gross floor area for 39 Newcastle was substantially the same as was submitted to LPAT and would not exceed the Base Density.

[19] The MZO approved the total Density for all of the Block 2 properties (39 Newcastle and the Metrolinx Lands collectively) in the aggregate amount of 95,200 square metres (1,024,724.3 square feet). The MZO also amended the former Etobicoke Code and Zoning By-law to permit the development of 4 mixed-use towers which would have maximum heights, respectively, of 119 metres, 77 metres, 101.5 metres and 119.5 meters. In other words, the Minister approved a total aggregate density of 95,200 square metres spread over four towers on the Block 2 properties. Three of those towers were to be developed on 39 Newcastle by Vandyk and the remaining tower by Metrolinx on its lands. Unfortunately, the MZO does not allocate the approved density as between 39 Newcastle and the Metrolinx lands. However, the three Vandyk towers are substantially the same height as reflected in the TOD Context Plan.

[20] After receiving the MZO, CIC asserted that Bonus Density had been achieved as a result of the Minister's approval of the aggregate density of 95,200 square metres/1,024,724.3 square feet and, on May 5, 2022, demanded payment in accordance with the Bonus Density provision of the APS. In its view, the entire 1,024,724.3 square feet must be fully imputed to 39 Newcastle on the basis that 39 Newcastle was effectively consolidated with the Metrolinx Lands for purposes of the APS by the MZO. The amount demanded is in excess of $18 million. Vandyk replied that Bonus Density had not been achieved, as, in its view, the MZO was based in part on its own Architectural Plans, prepared by its architect, SvN ("SvN Architectural Plans"), which had been submitted as part of the joint submission and those plans show that the density sought by Vandyk amounted to an aggregate of 72,148.97 square metres or 776,605 square feet allocated to three towers it proposes to build which is under the Base Density. Vandyk argues that the balance of the 1,024,724.3 square feet approved by the Minister is implicitly allocated to the Metrolinx development on its own lands.

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[8] The MZO was issued in the form of a regulation: O. Reg. 337/22 (Zoning Order – City of Toronto).

[9] Block 1 consisted of another property owned by Vandyk and other properties owned by Metrolinx.

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Agreement of Purchase and Sale

[21] The issues raised in this Application centre around the contractual interpretation of the APS and the Minister's Zoning Order released April 2022.

[22] Of most import to this exercise of contractual interpretation:

(a) At Article 1.1(1), the APS provides the following definitions of particular relevance to the issues in dispute:

(i) "Authority" means, *inter alia,* the agency, board, tribunal, or provincial governmental department "having jurisdiction over the whole or any part of the Property, this transaction or the parties";

(ii) "Density" is the "sum total area of each floor level of a building, above and below the ground, measured from the exterior of the main wall of each floor level…" (excluding from that calculation certain stipulated designated use areas such as a parking lot built below grade) "as approved by the applicable Authority with respect to the Property only…";

(iii) "Base Density" is 809,529.5 square feet;

(iv) "Bonus Density" is any "Density" achieved in excess of Base Density;

(v) "Closing Date" is March 31, 2019;

(vi) Outside Date as "the date which is the earlier of (i) ten years from the Closing Date and (ii) the date of registration of the condominium with respect to the last tower to be constructed on the Property".

(b) "Property" is defined as 39 Newcastle St., Etobicoke, Ontario (with the associated legal description) as per Article 1.1(1)(x) and Schedule A attached to the APS;

(c) The purchase price is defined as $89,938,727.45, exclusive of HST, "based on 809,529.5 square feet of Density at $111.10 per square foot, subject to Article 3.2 (the price adjustment clause);

(d) Article 3.1 set out the payment structure of the purchase price, again subject to s. 3.2;

(e) Article 3.2(1) provides that: "If as a result of the decision of the Ontario Municipal Board or Local Planning Appeal Tribunal, following the hearing scheduled for August 2019 (the "Decision"), rather than achieve Bonus Density, the Property is approved for Density which is less than the Base Density, then there shall be a set off against the

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principal amount" of the vendor take back mortgage in accordance with the formula stipulated in this clause;

(f) Article 3.2(2) provides that if Vandyk "achieves Bonus Density as a result of the Decision or at any time after it is rendered up to the Outside Date" then Vandyk is to pay an additional amount of consideration in the sum of $90 per square foot achieved over Base Density;

(g) Article 3.2(4) deals with the Security Mortgage and provides, in part, that it "shall mature and expire on the Outside Date unless there are amounts owing by the Purchaser pursuant to Article 3.2(2)". Furthermore, the Security Mortgage will be partially discharged on the date of registration of any condominium with respect to those condominium units on 39 Newcastle again "unless any amounts are then due under the Security Mortgage";[10] and

(h) Clause 7.10 is a standard entire agreement clause, and specifically provides that the APS "supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written".

[23] The price adjustment clause does not depend on what is actually built. Rather, the price adjustment is based on what the "applicable Authority" approves is the maximum allowable density that can be built.

The MZO and Site Plan Approval Process

[24] An MZO derives from the Minister of Municipal Affairs and Housing's exercise of statutory powers under s. 47 of the *Planning Act,* R.S.O. 1990, c. P.13 to authorize specific zoning, site plan and subdivision control. The *Act* regulates the use of land, building and structures in Ontario. Under s. 47(4) of the *Act*, an MZO is deemed to be a by-law as passed by City Council. MZOs are not subject to appeals to the OLT (s. 47(1)(a) of the *Act*).

[25] It is possible for a MZO to be amended by way of "minor variance" under s. 47(2) and by way of a formal amendment under s. 47(8) of the *Act*.

[26] The City of Toronto has Site Plan Control Approval authority over properties (s. 114, *City of Toronto Act,* 2006, S.O. 2006, c. 11 Sched. A). While the authority is vested in City Council, the approval process is typically delegated to staff. A site plan agreement must be approved be

[10] Schedule E to the APS provides that there will be a partial discharge relative to those condominium units in a phase of the project, on the date of registration of the condominium and provided that any amounts due and payable under the Security Mortgage has been paid by Vandyk as of the date of registration of the subject condominium.

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buildings can be built, and site plan control is still required for the development of lands subject to an MZO.

[27] The MZO supersedes the LPAT Decision. It became the "Authority" that has jurisdiction over the Property under the APS.

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[28] The MZO addresses two sets of "blocks" of lands. As stated, Block 2 was dealt with in a global way and consists of 39 Newcastle and the Metrolinx Lands. The MZO specifically states at s. 1(2) that, for purposes of the Order, these lands "shall be considered as a single lot, and despite any severance, partition or division of the lands, the provisions of this Order apply to the whole of the Block 2 lands as if no severance, partition or division occurred".

[29] The MZO, in addition to the zoning requirements set out in subsection (1), provided that the maximum residential gross floor area for the Block 2 developments is 92,000 square metres and the maximum non-residential gross floor area is 3,200 square metres, with a plan of 4 towers to be constructed on the combined Vandyk Property and Metrolinx Lands, setting out the maximum heights but not the density for each of the respective towers.

[30] The MZO treats the Vandyk and Metrolinx property developments as one "site" for purposes of its zoning approval. This makes sense in light of the fact that Vandyk and Metrolinx were seeking a rezoning for a joint transit-oriented development plan built around the Mimico GO Station. However, the MZO does not allocate the aggregate density approved as between the respective properties. Herein lies the dilemma.

ISSUES

[31] The issues to be determined are:

(a) Has Bonus Density Been Achieved Under the APS by virtue of the MZO? Related to this issue, does Density (as defined in the APS) include density achieved for lands other than 39 Newcastle, and is CIC currently entitled to any Bonus Density payments under the APS?

(b) Should the Security Mortgage be Discharged?

(c) Should this Application be Converted into a Trial?

ANALYSIS

Issues 1: Has the Bonus Density Been Achieved Under the APS?

[32] Vandyk takes the position that the court should infer that density was implicitly allocated as between the four towers and two sets of lands, based on the SvN Architectural Plans submitted by it in support of the TOD plan to the Minister. These plans are consistent with the general density projections made by Vandyk around and following the APS and submitted for the LPAT appeal.

The plans submitted to the Minister show that three towers with a total gross area of 68,385 square metres is being proposed to be built on 39 Newcastle.[11]

[33] CIC, however, submits that the SvN Architectural Plans have not been attached or incorporated by reference into the MZO and therefore do not form part of the MZO. Accordingly, the density measurements contained in the TOD plan which are allocated specifically to 39 Newcastle cannot be inferred to be the maximum density approved by the Minister. In any event, its view is that the Vandyk and Metrolinx lands have been consolidated by the MZO, and therefore, it gets the benefit of the total aggregate density approved, irrespective of any potential allocation down the road.

[34] Both parties agree that the material clauses in the APS are unambiguous. Therefore, resort to extrinsic evidence to interpret the clauses is not necessary or appropriate.

[35] The court must determine what the objective mutual intentions of the parties were at the time of entry into the APS. The mutual intentions, in turn, are to be derived from the APS itself; in particular, the material clauses, read within the context of the entire APS, based on the plain meaning of the words used by the parties. The surrounding circumstances may be considered for the limited purpose of understanding the mutual intentions of the parties based on what these parties reasonably understood when they entered into the APS (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 47, 57).

[36] The intent of the parties was to adjust the purchase price, upwards or downwards, to reflect the actual worth of the property in terms of its development potential. That development potential was set out in the APS as the total density achievable based on government/tribunal approvals.

[37] At the time of entry into the APS, CIC had already engaged in an appeal of the City's zoning decision with a view to having the property re-zoned to a higher valued mixed-use designation. The appeal was before the LPA as at the date of the APS and then assumed by Vandyk. This is a relevant surrounding circumstance that is referenced in the APS at clause 3.2(1) and (2). Specifically, that clause provides that if, as a result of the decision of the LPAT following the hearing scheduled for August 2019, 39 Newcastle is approved for Density which is less than the Base Density or more than the Base Density, then the purchase price will be adjusted according to the formula set out in the APS.

[38] The LPAT released its decision but attached certain conditions to be fulfilled before it would release its Final Order. Before the conditions were fulfilled, Vandyk opted to apply for the

[11] Using the GFA definition in the APS, which includes certain land/building uses not reflected in the MZO, the total GFA for 39 Newcastle was approximately 72,149 square metres or 776,605 square feet based on the TOD Plan and SvN Architectural Plans.

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MZO jointly with Metrolinx for a zoning order to facilitate development of both lands as a transit-oriented development, as a result of receiving encouragement from the City of Toronto to do so.

[39] The issue really is what is the triggering event for the calculation of density for purposes of determining whether an adjustment in the purchase price is required. The key provision is clause 3.2(2) which provides that the adjustment can take place based on the Decision of the LPAT or *at any time after it is rendered up to the Outside Date*. The Outside Date has not yet occurred.

[40] The Density Overpayment clause (Article 3.2.(1)) references that the calculation of an overpayment, if the approved Density is *less* than the Base Density, is from the Closing Date of the APS to the date the approved Density is "final" with all applicable appeal periods having expired. Similarly, the Bonus Density calculation (clause 3.2(3)) references the additional payment date as being calculated in relation to when the Bonus Density is achieved "in final form" with all applicable appeal periods having expired.

[41] However, the joint application to the Minister for a MZO, in place of the LPAT decision and order, was not foreseen at the time the parties entered into the APS nor was the possibility that an MZO based on a joint TOD would be issued approving an aggregate density on the basis of 39 Newcastle and other lands, not owned or controlled by Vandyk, combined without allocation. The MZO superceded the LPAT decision. Nothing in the APS prevented Vandyk from going this route, and indeed, CIC congratulated Vandyk upon obtaining the MZO (believing that this triggered a Bonus Density calculation and payment).

[42] CIC argues that, because the MZO consolidated the two sets of lands into one site, the Density under the APS must include the aggregate amount of density approved for both 39 Newcastle (with its three towers) and the Metrolinx lands (with its single tower). This argument makes no commercial sense.

[43] CIC relies on *Disera v. Liberty Development Corporation*, 2008 ONCA 34. However, the facts in *Disera* differ from the current proceeding. In *Disera*, the purchaser agreed to pay additional consideration if it was successful in a zoning application and was approved to build more than the 1,000 units that the purchase price was based on. The court held that the obligation to pay the additional consideration under a price adjustment clause was triggered when the applicable authority (in that case the City of Vaughan) passed a by-law amending the zoning designation to higher density and approved the building of 1,598 units on the subject land. The hold that had been put in place before actual development on the ground could take place, pending approval of site plans prior to the issuance of building permits, was characterized as an implementation issue that did not interfere with the fact that the maximum number of units and associated density had been approved. In other words, approval occurred notwithstanding the fact

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that the final order had not been granted, much like the LPAT Decision. Accordingly, the price adjustment clause was triggered and the bonus payment due.

[44] Unlike *Disera*, in the case at bar the LPAT decision was effectively overridden by the MZO and thus is not the "final" approval of density within the meaning of the APS.

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[45] This is also not a situation like *Vanzanten v. Brownstone Adera Projects*, 2013 BCSC 428, another development property case in which the price adjustment clause was in issue. In that case, the property that was the subject of the sale was about 1.1 acres and was zoned for one acre of residential use. The price adjustment clause provided that if the approved density exceeded 30 units per acre on the property additional sums would be due to the vendor. The purchaser owned the adjacent properties. The intent of the purchaser was to consolidate the properties and seek re-zoning. This was addressed in the agreement of purchase and sale and anticipated by the parties when they entered into the transaction. The purchaser successfully obtained a permit allowing for redevelopment approving the building of up to 29.5 units per acre, based on the consolidation, which was under the base density. This aggregate approval resulted, however, in the purchaser being able to build 32.7 units on the acre that was the subject of the agreement of purchase and sale due to the layout of the buildings over the consolidated lands. The vendors submitted that this triggered the price adjustment clause requiring a further payment.

[46] However, the court found that the agreement of purchase and sale made it clear that the price adjustment was to be calculated on the basis of the allowed zoning density for the consolidated lot as a whole (at para. 24), and not specific to the one-acre property sold by the vendors. The only reason why the subject lot could support 32.7 units was because of the consolidation – if the 1.1 acre lot was a standalone development property, the base density would not have been exceeded. Accordingly, no additional payment was required.

[47] In this case, there is no reference in the APS to a joint project with Metrolinx, much less a consolidation of Vandyk's Property with Metrolinx's Lands. Furthermore, the adjacent lands are not even owned by Vandyk, but rather by a separate arms-length entity. These events were not contemplated at the time of entry into the APS based on the wording of the APS itself but does reflect the fluid nature of property development transactions. In addition, while 39 Newcastle's land value may increase as a result of the TOD (and there was no evidence led on this point), value has been defined by the APS as related to the maximum density approved for 39 Newcastle "only".[12] To accept CIC's interpretation would not only provide it with an unanticipated windfall but also alter the premise upon which the purchase price was determined. The APS does not permit this interpretation based on the density and price adjustment clauses, when read in the context of the APS as a whole, and taking into account the surrounding circumstances that both parties acknowledge existed at the time of entry into the APS. Aside from being commercially

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[12] Article 1.1(1)(l).

unreasonable, to adopt CIC's interpretation would require the reading out of the APS of the word "only" following Property in the definition of "Density".

[48] Furthermore, the MZO states that "For purposes of this Order" the Block 2 lands are to be considered as a single lot. The MZO also states that it applies to the whole of the Block "despite any severance, partition or division of lands". The MZO does not purport to alter the definition of the Property in the APS. As stated, there is no basis for this interpretation within the APS itself which precisely defines the Property relative to the density calculation to be 39 Newcastle, and no other property.

[49] Accordingly, the Bonus Density is to be calculated only on the basis of the allowable Density achieved by the applicable Authority with respect to the property municipally known as 39 Newcastle St. and not any adjacent properties owned by third parties.

[50] In my view, it is the MZO which has caused uncertainty with respect to the application of the Bonus Density clause by its failure to apportion the density approved as amongst the four towers and/or 39 Newcastle and the Metrolinx Lands. A determination with respect to whether Bonus Density has been achieved or not is therefore premature as the applicable Authority has not made that determination or rendered a final approval of the maximum achievable Density for 39 Newcastle.

[51] Mr. Stagl, a planning consultant who has been assisting Vandyk with the zoning process from the outset of this project, and who was tendered as an expert on land use planning related to development approvals, agreed in his affidavit that the MZO did not include a Zoning Schedule or plan that outlined these requisite details to determine density, though he maintained that the TOD Plan was before the Minister when the MZO was released and could be implied to have informed the Minister's decision.

[52] Extrinsic evidence showing the background against which legislation was enacted should only be used with caution in interpretation of legislation, such as in interpreting an "obscure provision", and cannot be given statutory force (*Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 318; *Delisle v. Canada (Deputy Attorney General)*, [1992] 2 S.C.R. 989, at para. 17; *Ahamed v. Canada*, 2020 FCA 213, at para. 22). I do not accept Mr. Stagl's proposition that the TOD plan should be referred to in order to imply an allocation as between 39 Newcastle and the Metrolinx Lands in the MZO.

[53] In any event, the MZO is not ambiguous and clearly sets out what has been approved in terms of the density, as well as the basis. Therefore, resort to extrinsic evidence is not necessary in order to construe the regulation (*Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 35 O.R. (3d) 418, at para. 21).

[54] As the MZO superceded the LPAT Decision, the LPAT Decision is no longer operative and LPAT is not the "applicable Authority" with jurisdiction to approve the density for 39 Newcastle, nor is its "Decision" the appropriate trigger under the Bonus Density clause. A

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harmonious reading of clauses 1.1(1)(d) (Authority), 1.1(1) (Density), and 3.2(2) and (3) (Bonus Density) results in an interpretation that the Bonus Density calculation will not be achieved until approval by the applicable Authority of the density for 39 Newcastle "only" is "rendered" and this may be done at any time "up to the Outside Date".

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[55] This interpretation reflects the mutual objective intentions of the parties that the ultimate purchase price of 39 Newcastle will be driven by the density approved for development of that property in isolation. It reflects the structure and wording of the APS, which is a product of negotiation by two sophisticated parties represented by counsel throughout. The APS provides for the date of valuation being the final approval of the Density for 39 Newcastle by the applicable Authority, the mechanism by which the calculation is to be made, and the timing of any additional payment for the Bonus Density. It reflects the fluid nature of the land development process which can be somewhat unpredictable and uncertain, makes business sense in the context of the APS, and produces a commercially reasonable result which accords with the unambiguous provisions of this agreement (*First Elgin Mills Developments Inc. v. Romandale Farms Limited*, 2014 ONCA 573, 324 O.A.C. 153, at paras. 31 – 34, 39, 53).

[56] Accepting CIC's interpretation would mean that it receives a Bonus Density payment based, at least in part, on density attributable to the Metrolinx Lands. This has no bearing on the development value of 39 Newcastle and is not reflective of the parties' objective mutual intentions as reflected by the APS's own definition of Density.

[57] In other words, the Bonus Density trigger event has not yet happened as it requires approval with respect to the density ultimately approved for the 39 Newcastle property alone, as made clear by s. 1.1(1)(l), which defines "Density" "as approved by the applicable Authority, with respect to the Property only". This event will happen prior to the occurrence of the Outside Date. Therefore, the request for a declaration that the Bonus Density has, or has not, been achieved is premature.

[58] However, the evidence demonstrates that there will be an opportunity for a determination of the maximum density achievable in the near future. Both parties' land use planning experts (Paul Stagl and David McKay) agreed that the MZO did not exempt the TOD Plan and development from the City of Toronto's Site Plan control which requires Vandyk to submit a Site Plan Approval application with the density measurements. Those density measurements will then be approved, modified or rejected by the City which will then become the "applicable Authority" under the APS.

[59] As explained by David McKay (tendered as an expert in land use planning by CIC), one of the conditions for approval of site plans as set out in subsection 114(11) of the *City of Toronto Act, 2006* is the execution of a site plan agreement which will include the plans or drawings of the site plan. If Vandyk is not satisfied with the City's decision then it may appeal to the Ontario Land Tribunal. This process is consistent with Article 3.2(2) which provides for the event that Vandyk achieves Bonus Density either as a result of the LPAT Decision "or at any time after [the Decision] is rendered up to the Outside Date". The APS does not address the other methods by which Vandyk

might achieve Bonus Density other than the LPAT Decision, but the APS has explicitly allowed for this possibility.

[60] Since the Bonus Density provision can be triggered at any time from the date of the Decision up to the Outside Date which is the earlier of ten years from the Closing Date (March 31, 2029) or the date of registration of the condominium with respect to the last tower to be constructed on 39 Newcastle, this solution is also consistent with the terms of the APS itself and will meet the business efficacy of this situation. It also reflects the objective mutual intentions of the parties that CIC is entitled to a prescribed Bonus Density up to the Outside Date reflecting the mutual understanding that the "value" and therefore purchase price of 39 Newcastle is ultimately determined by the density approved as by the appropriate authority with jurisdiction.

[61] Accordingly, Bonus Density has not been achieved by virtue of the MZO. Furthermore, the Density is only to be calculated with respect to 39 Newcastle and accordingly, CIC is not entitled to a Bonus Density as a result of the MZO as this is determination is premature.

[62] This finding is without prejudice to CIC's right to claim Bonus Density should that measure, as defined by the APS, be achieved up to the Outside Date by final approval by the "applicable Authority with respect to the Property only" under Article 1.1(1)(i) and the formula and timeline set out in the "Adjusted Consideration" clause in Article 3.2(2) and (3) of the APS.

Issue 2: Should the Security Mortgage be Discharged?

[63] A mortgagor's entitlement to a discharge of a mortgage is determined from the wording of the governing contract which, in this case, is the APS (*First National Financial GP Corp. v. Golden*, 2022 ONCA 621, at para. 32).

[64] Vandyk submits that the APS provides for an early discharge of the Security Mortgage in the event that Bonus Density is not achieved. It relies on s. 3.2.(4) of the APS which states, in part, that the Security Mortgage "shall mature and expire on the Outside Date unless there are amounts owing by the Purchaser" under the Bonus Density provision. It states that if there are no amounts owing by the Purchaser, then the Security Mortgage can be discharged early.

[65] It supports its interpretation by reliance on s. 3.2(3) which obliges Bonus Density payments to be made within 60 days after the Bonus Density is achieved and submits this reflects a common intention by the parties to permit a discharge before the Outside Date.

[66] This is not a commercially reasonable interpretation of s. 3.2.(4) of the APS. The words "unless there are amounts owing" relate to the scenario in which the Bonus Density payments are outstanding as at the Outside Date as made clear by the reference to s. 3.2(2). This interpretation is in harmony with the purpose of the Security Mortgage which is to secure unpaid Bonus Density payments.

[67] The wording of s. 3.2(4) is unambiguous when read in the context of the price adjustment scheme set out by the APS, including s. 1.1(u) ("Outside Date"), which provides a maturity date

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for the Security Mortgage as the earlier of ten years from the Closing Date or the date of registration of the condominium with respect to the last tower to be constructed on the Property unless there are outstanding Bonus Density payments. Section 3.2(3) does not relate to the maturity of the Security Mortgage, but rather the date upon which a Bonus Density payment (under s. 3.2(2)) is due.

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[68] Vandyk relied on *Freeborn v. Goodman*, [1969] S.C.R. 923, 6 D.L.R. (3d) 384, by analogy. At issue in *Freeborn* was a vendor's lien and the equitable right of the grantee to have the lien discharged. However, a vendor's lien is with respect to securing the unpaid part of a fixed purchase price. The Security Mortgage however secures future contingent liabilities in the form of the Bonus Density. Furthermore, in *Freeborn*, there were collateral agreements at issue. As well, Vandyk did not plead equitable relief in its Notice of Application.

[69] Notwithstanding the hardship that $25 million Security Mortgage may pose with respect to Vandyk's ongoing financing needs[13], it entered into the APS knowing that this security mortgage would be required, and the terms of the maturity or expiry date of the Security Mortgage was fully set out. Furthermore, s. 3.2(4) provides for some forms of security in which CIC agrees that the Security Mortgage is to be postponed and subordinated.

[70] Vandyk's request for an immediate discharge of the Security Mortgage is dismissed as premature.

Issue 3: Should this application be converted into an action?

[71] CIC brought a motion to convert this Application into an action. Due to the lateness of its motion, Justice Koehnen directed that CIC's motion to convert would be argued by way of its response to this application. Vandyk resists this request.

[72] Under r. 38.10(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, I have the discretion to direct that the application, or any issue within it, proceed to trial.

[73] In light of my findings, it is not appropriate to convert this application into an action since the issues to be determined do not go beyond the interpretation of a contract and regulation (the APS and MZO), and I did not resort to extrinsic evidence to interpret the documents. Furthermore, while competing expert evidence has been adduced, I did not have to resolve an issue of credibility since the expert evidence does not diverge on material issues of opinion needed to resolve the issues in the Application. In addition, the facts that are material to the resolution of the interpretation of the APS and MZO are not in dispute. Finally, in the event that the Bonus Density or price reduction emerges after approval of the maximum allowable density has been made by the

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[13] It should be noted that Vandyk did not adduce evidence supporting this bald allegation, and that CIC has already agreed twice to postpone its Security Mortgage to facilitate financing.

applicable authority, my rulings are without prejudice to resorting to further litigation in the event that they cannot resolve the matter, notwithstanding the guidance hopefully provided in this decision (*Metropolitan Toronto Condominium Corporation No. 965 v. Metropolitan Toronto Condominium Corporation No. 1031*, 2014 ONSC 4458, at paras. 8-13).

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DISPOSITION

[74] The following orders are made:

(a) A declaration shall issue that CIC is not currently entitled to any Bonus Density payments under the APS as Density has not been determined with respect to 39 Newcastle. However, this declaration is without prejudice to CIC seeking payments under the Bonus Density, or Vandyk seeking a set off under the Density Overpayment, provisions of the APS, once the Density for 39 Newcastle is achieved in accordance with the APS.

(b) A declaration shall issue that Density under the APS does not include density achieved for property other than 39 Newcastle.

(c) Vandyk is not entitled to a discharge of the Security Mortgage, as defined by the APS, at this time.

(d) The motion for conversion of this Application into an action is dismissed.

[75] The parties may deliver written submissions as to costs, if they are unable to resolve them. The written submissions will not exceed 5 pages each double spaced. The Applicant's written submissions will be delivered within 15 days from the release of this decision. The Respondent's responding submissions will be delivered within 10 days thereafter. The Applicant may then deliver reply submissions, not to exceed 2 pages, within 5 days thereafter.

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Justice S. Vella

Released: July 4, 2023

CITATION: *2495065 Ontario Inc. v. CIC Management Services Inc.*, 2023 ONSC 3923
COURT FILE NO.: CV-22-00682123-000
DATE: 20230704

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2495065 ONTARIO INC.

Applicant

– and –

CIC MANAGEMENT SERVICES INC.

Respondent

REASONS FOR JUDGMENT

Vella J.

Released: July 4, 2023