CITATION: Fortin v. Sudbury (City), 2020 ONSC 5300
COURT FILE NO.: CV-19-8313-00
DATE: 2020/09/04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
TOM FORTIN Applicant	*G. Petch and S. Fleming*, for the Applicant
– and –	
CITY OF GREATER SUDBURY Respondent	*T. Halinski, C. V. Raphael and D. Muise,* for the Respondent
– and –	
GATEWAY CASINOS & ENTERTAINMENT LIMITED Intervenor	*R. B. Swan, A. Jeanrie and I. W. Thompson*, for the Intervenor
	HEARD: June 29 and 30, 2020

REASONS FOR DECISION

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Ellies R.S.J.

OVERVIEW

[1] The applicant, Tom Fortin, applies under s. 273 of the *Municipal Act, 2001* to quash four by-laws adopted by the City of Greater Sudbury ("the City") under the *Planning Act*, R.S.O. 1990, c. P.13. The by-laws permit the development of an arena/event centre and a casino outside of Sudbury's downtown area, at a location now known as the "Kingsway Entertainment District" (the "KED").

[2] The applicant contends that the by-laws were passed following a flawed process, by a biased City Council, in bad faith.

[3] These reasons explain why the applicant has failed to persuade me that any of these things are true. To the contrary, I am satisfied that the decision as to where the arena/event centre would be located was made after a careful study of the potential effects of locating it there, as part of a robust democratic process in which the members of City Council were legally entitled to hold a view on behalf of their constituents. Council did not suffer disqualifying bias in the *Planning Act* process that followed Council's decision simply because the City entered into agreements to develop the KED after that decision was made or because Council ultimately approved the City's *Planning Act* applications. The by-laws were passed following a process that complied with both the letter and the spirit of the *Planning Act*, a process in which the applicant and other members of the public were given ample opportunity to persuade the Planning Committee and Council not to pass them. The fact that their efforts failed does not render the by-laws illegal.

FACTS

[4] The events leading up to this application involve the histories of two separate facilities whose paths converged at a Council meeting held on June 27, 2017. It was at that meeting that Council determined that a new arena/event centre to be built by the City should be located on the same site as a new casino to be built by the intervenor, Gateway Casinos & Entertainment Limited ("Gateway"). The site is at the east end of the City, outside of the downtown area, in an area known as "The Kingsway". The site is owned by 1916596 Ontario Ltd. ("191"), a company controlled by Dario Zulich, the owner of Sudbury's Ontario Hockey League team, the Sudbury Wolves.

[5] As the parties did in their materials, I will begin with the history of the casino.

The Casino

[6] Prior to 2012, gaming in the City had been conducted at a racetrack called "Sudbury Downs", located in the former town of Rayside Balfour. On March 12, 2012, the Ontario Lottery and Gaming Corporation ("OLG") set out a plan to modernize and privatize the operations of certain lottery and gaming facilities in Ontario (the "Modernization Plan"). As part of the Modernization Plan, OLG identified "Gaming Zones" within the province, in which a single gaming facility could be located. Gaming Zones, in turn, were organized

into "Gaming Bundles", each of which could be bid upon by private sector organizations. One of those Gaming Bundles was the "Northern Gaming Bundle", which included Gaming Zones in Sudbury, Sault Ste. Marie, North Bay, Thunder Bay, and Kenora.

[7] After the release of OLG's Modernization Plan in March 2012, Council unanimously passed a resolution at a meeting held on May 15, 2012 that the City would continue to support gaming and would continue to be a willing host for gaming as it evolved (the "Willing Host" resolution).

[8] A few days later, OLG began a process by which it would determine who would be eligible to bid on the establishment of a casino with 600 slots and table games in Sudbury. As part of that process, the City was required to provide OLG with information on a possible site for the casino. City staff contacted 14 interested parties, who predominantly favoured one of four sites for the new casino: Four Corners, Kingsway East, Downtown Sudbury, and the existing Sudbury Downs location. In order to consider all of these sites, the City asked OLG to extend the boundaries of the Sudbury Gaming Zone to include the Kingsway area, which includes what ultimately became the KED.

[9] On June 1, 2012, a new regulation concerning gaming came into effect. Ontario Regulation 81/12 made under the *Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, c. 12 requires that, before OLG can authorize a gaming site, it must ensure that a municipality has sought "public input into the establishment of the proposed gaming site and...passes a resolution supporting the establishment of the gaming site in the municipality" (: s. 2.(2), para. 3.).

[10] On August 14, 2012, Council passed a resolution directing City staff to initiate an open house information session to seek public input into the four locations identified by staff as possible sites for the casino. In the resolution, Council welcomed the results of OLG's modernization initiative, committed to working with the successful proponent, and encouraged gaming proponents to "maximize benefits to the community by identifying and developing opportunities for ancillary and complementary amenities as part of their proposal".

[11] As part of the City's efforts to attract and educate gaming proponents, City staff prepared an investment document entitled "City of Greater Sudbury Casino Opportunity", in which proponents were provided with information about the City, in general, and about the four potential casino sites, in particular.

[12] As directed by Council, City staff also held an open house on October 10, 2012. The event was widely advertised in advance and citizens were asked to complete an on-line survey in which they answered questions relating mainly to the design of the new casino. However, the survey included a question asking whether the casino should be located in an urban or a rural setting and one asking respondents to note "anything else that [they] would like to share regarding the future of gaming in Greater Sudbury". The survey was completed by 466 respondents.

[13] An analysis of the survey results prepared by City staff was presented to Council on February 26, 2013. It showed that a majority of those who responded preferred to locate the casino where gambling was already permitted, namely at Sudbury Downs. Based on

the responses obtained regarding possible complementary amenities, Council unanimously passed a resolution requiring gaming proponents "to maximize economic opportunities to the community by working with local groups to develop ancillary and complementary amenities" including, but not limited to "a hotel, a convention or multi-use centre, a performing arts centre and/or an Ontario Hockey League-ready arena". The resolution also reaffirmed Council's commitment to developing the casino at one of the four sites referred to above.

[14] It is important to note that neither this resolution nor the Willing Host resolution are the subject of these proceedings. There is no evidence that either has ever been challenged. Further, in the years since the Willing Host resolution was passed, no councillor has ever put forward a motion to change the City's official position.

[15] In January 2015, OLG wrote to the City to confirm that the requirements of O. Reg. 81/12 had been satisfied. In November 2015, OLG issued a Request for Proposals from the proponents it had selected through a pre-qualification process. On December 13, 2016, OLG announced that Gateway had been chosen as the Northern Gaming Bundle service provider. On May 30, 2017, Gateway took over operations of the slots at the former Sudbury Downs (now "Gateway Casinos Sudbury"). On June 13, 2017, Gateway announced that it had signed a letter of intent with 191 to relocate the Sudbury Downs to the KED.

[16] That was the state of affairs as they related to the casino as the question of the location of the arena/event centre was about to be determined by Council at a meeting scheduled for June 27, 2017.

The Arena/Event Centre

[17] In April 2010, the City began to consider whether to renovate existing arenas or to construct new ones. The arenas under consideration included the Sudbury Community Arena, home to the Sudbury Wolves, which is located in downtown Sudbury. To assist in Council's decision-making, the City retained a third-party consultant, Coldwell Banker Richard Ellis ("CBRE"), to prepare a report on the alternatives available to Council. The CBRE report, presented to Council on March 31, 2015, showed that the cost of renovating the Sudbury Community Arena, which had been built in 1951, was significant.

[18] In the years leading up to the CBRE report, the City sought to develop a plan to revitalize the downtown area. In 2012, the Greater Sudbury Development Corporation (the "GSDC"), the City's economic development arm, completed the "Downtown Sudbury Master Plan and Action Strategy" (the "DTMP"). The DTMP set out a vision for Sudbury's downtown area and identified over 50 projects that would fulfill that vision.

[19] Shortly after the CBRE report was delivered, the City began to solicit input from the public and from private stakeholders for "large projects" that would serve to revitalize areas of the city, including the downtown area. A public input session was held on November 27, 2015, in which 16 such projects were presented to Council. One of those projects included a 6,000 seat sports and entertainment complex located in the Kingsway area, presented by the True North Strong Group, a group of which Zulich was a member. Following the session, City staff undertook an analysis and prepared a report entitled

"Summary and Analysis Report on Large Projects at Public Input Meeting of November 27, 2015" (the "Large Projects Report").

[20] On April 26, 2016, Council endorsed four of the large projects: a convention and performance centre, a combined art gallery and library, a multi-use arts and cultural centre ("Place des Arts"), and an arena/event centre. At that same meeting, Council recognized the possibility of additional, complementary, uses to the large projects (such as a hotel) and the possibility of the City partnering with the builders of the new casino to develop these projects.

[21] There appears to have been no question that three of the large projects approved by Council were to be located in the downtown area. The exception was the arena/event centre. With respect to the location of that large project, Council resolved to hire a consultant to advise it. On July 12, 2016, PricewaterhouseCoopers Real Estate Inc. ("PWC") was retained for that purpose.

[22] On February 21, 2017, PWC delivered the first of two reports to Council. In the February report, PWC recommended the creation of a "Site Evaluation Matrix" to assist in selecting a site for the arena/event centre. PWC provided a draft matrix in its report, which listed eight main criteria:

- vision
- complementary benefits
- ease of development
- access
- parking
- cost impact
- economic impact; and
- city-building

[23] PWC recommended that "[p]rior to embarking on any locational assessment [the] City agree to the individual weights assigned to each respective criteria and sub-criteria."

[24] On March 7, 2017, Council approved both the site evaluation criteria and the weight assigned to each of them by PWC in its report. However, according to a City staff report dated March 29, 2017, following that meeting:

> ... comments by several councilors (*sic*) indicated an expectation to further review and perhaps adjust elements of [the Site Evaluation Matrix]. Specifically, there was some interest in confirming the scope of each evaluation category and the relative weight all categories had on the overall evaluation result.

[25] Accordingly, at a meeting held on April 11, 2017, Council considered four different options prepared by City staff. Ultimately, Council chose an option that ranked cost, economic impact, and parking of highest importance, with complementary benefits, access, and ease of development of next highest importance, followed by vision and city-building.

[26] PWC completed its second report, entitled "Greater Sudbury Event Centre Site Evaluation", in June 2017. As explained in the report, an "Event Centre Site Evaluation Team" comprised of a group of individuals drawn from the City's Economic Development, Planning, Engineering, and Real Estate departments, together with third parties including architects, PWC, and a special advisor to the City's CAO, reviewed 23 potential sites for the arena/event centre, based on the priorities set by Council. The team eventually narrowed the group of potential sites down to four: a 19.2 acre site on MacIsaac Drive, a 22 acre site on Algonquin Road, a 23.2 acre site on the Kingsway, and a 3.5 acre site downtown, adjacent to the existing Sudbury Community Arena.

[27] Using the matrix decided upon by Council at its April 11 meeting, the report concluded that the downtown site ranked highest overall, followed by the Kingsway site, the MacIsaac Drive site, and the Algonquin Road site, in that order. Notably, in terms of the criteria that were deemed by Council to be of the highest importance, the Kingsway site ranked highest overall. Although the authors of the report ultimately recommended the downtown site, they wrote of the Kingsway site:

> While ranking second, the Kingsway Site scored high and would constitute a viable location.

The Option Agreements

[28] Following the identification of the four potential sites for the arena/event centre, City staff began negotiating agreements giving the City the option to purchase the lands in question. By June 23, 2017, staff had succeeded at negotiating seven option agreements with respect to the four sites (the downtown site required more than one agreement). Each of these agreements was expressly conditional upon the approval of Council and would not be binding unless approved by a by-law. Four of the seven agreements, including the Kingsway site option agreement (the "Kingsway option agreement"), permitted the City to apply to rezone the property to meet the City's intended use.

The June 27, 2017 Council Meeting

[29] The second PWC report was presented to Council at a public meeting held on June 27, 2017. During the presentation, Council members were given an opportunity to ask questions of both PWC and City staff. Following the presentation, many of the Council members made statements in which they explained why they intended to vote a certain way.

[30] Council was then asked to vote on two potential resolutions. The first was a resolution to locate the arena/event centre at the downtown site. That resolution failed because the vote was tied at 6-6.

[31] The second was a resolution to locate the arena/event centre at the Kingsway site. Before the resolution was read, the Mayor proposed that it be amended to require certain guarantees by the True North Strong Group (191) to build additional facilities at the site, including a casino, a resort, a motorsport park, and a conference centre. Following further debate, the motion to amend was defeated 7-4. After the motion was defeated, Council was asked to vote on the second resolution as it had been originally drafted. The

resolution to locate the arena/event centre at the Kingsway site passed by a margin of 10-2.

[32] At the same meeting, Council then passed a resolution authorizing the City to execute the option agreement on the Kingsway site and to provide up to $100 million from various reserve funds to build the arena/event centre. The City exercised the option to purchase the Kingsway site on January 14, 2019.

Collaboration on Development of the KED

[33] Following the selection of the Kingsway site, discussions began between Gateway, 191, and the City regarding development of the site. On August 22, 2017, Council resolved to invest in the creation of a Site Design Strategy in collaboration with Gateway and 191, to take advantage of the economies available in developing several facilities at the same time. Council authorized City staff to retain a firm of architects, Cumulus Architects Inc. ("Cumulus"), to develop the strategy.

[34] Both before and after the August 22 meeting, the City entered into agreements with 191 and with Gateway relating to the development of the KED. The first was a "Servicing, Contribution and Road Transfer Agreement" (a "servicing agreement"), which was appended to the Kingsway option agreement dated June 8, 2017. This agreement provided that the City would be responsible for up to $1,000,000 for roads and servicing.

[35] Later, the City entered into three further cost contribution agreements: one in January 2018, another in May 2018, and another in January 2019. Like the Kingsway option agreement, all of these agreements were subject to approvals being obtained under the *Planning Act*, and all of them could be terminated if the City determined that it would not be proceeding with the arena/event centre.

Public Consultation on the Design of the KED

[36] At the same time as it was collaborating with Gateway and 191 regarding development of the KED, the City began a process of public consultation to obtain the views of Sudbury citizens on how the finished product should look. This process occurred in two phases.

[37] In the first, two "walk-through" open-house sessions were held in September 2017. Displays had been set up and representatives of Gateway, 191, and Cumulus were present to explain the project, record comments, and answer questions. The first phase also involved an online survey. Between September 20 and October 4, 2017, the survey garnered 227 individual responses.

[38] City staff presented a Draft Site Design at a public meeting of Council on November 1, 2017, which included information on the public input obtained to that point.

[39] In the second phase of consultation, 18 open houses were held over five days in November 2017 to present the Draft Site Design. Another online survey was also available, with respect to which approximately 500 citizens responded. Using the feedback obtained in this second phase, a Final Site Design was prepared and presented to Council at a public meeting held on November 22, 2017. Council passed a resolution that evening to approve the Final Site Design as presented.

The *Planning Act* Approvals

[40] At its August 22, 2017 meeting, Council also authorized City staff to submit a rezoning application, with the consent of 191, to allow a "public arena" as a permitted use at the Kingsway site. A third party, Dillon Consulting Limited ("Dillon"), was retained to provide land use planning advice and to submit applications on behalf of the City, Gateway, and 191 to permit the uses contemplated by each, including overflow parking, at the KED. In due course, Dillon submitted applications:

(a) for an official plan amendment and zoning by-law amendment to permit the development of a place of amusement in the form of a casino on certain of the KED lands (the "casino application") on behalf of Gateway;

(b) for a zoning by-law amendment to permit the development of a "community recreation centre" in the form of a public arena (the "arena application") on behalf of the City on certain of the KED lands (a private arena was already a permitted use); and

(c) for a zoning by-law amendment to permit a "parking lot" as a principal use on certain of the KED lands (the "parking lot application") on behalf of 191.

[41] No application was necessary to permit the planned construction by 191 of a hotel on the site because 191 had successfully applied to rezone the Kingsway site in September 2014 to accommodate, among other things, a hotel.

[42] In accordance with the *Planning Act*, the applications were submitted to the City's Planning Services department. As required by that Act, the City declared the casino and arena applications complete in December 2017 and the parking lot application complete in January 2018. The City published Notices of Complete Applications in two local newspapers. The Notices invited anyone wishing to comment on the application to write to Planning Services. A notice published in December 2017 advised that further information was available through Planning Services and provided contact information for anyone wishing it.

[43] In addition to providing the public with an opportunity to comment in writing, the City provided two other opportunities for citizens to provide input in person during the planning approval process. Since 2007, the City has followed a two-stage public meeting process for larger *Planning Act* applications such as those involved in this case. The first is a "pre-hearing", designed to provide information to stakeholders and members of the public and to obtain information from them.

[44] The pre-hearing with respect to these applications was held on January 22, 2018. During that meeting, the Planning Committee heard from a considerable number of people, many of whom opposed the rezoning and official plan amendments being sought. The Minutes show that no one who wanted to say something was denied that opportunity.

[45] After hearing from members of the public, the committee resolved that the submissions be received by the committee (meaning "accepted"), that City staff complete their review of the applications, and that a further public meeting be scheduled when that review was complete.

[46] The second public hearing before the Planning Committee took place on March 26, 2018. That hearing was restricted to the casino application. Prior to the hearing, the applicant had retained his own planning experts, urbanMetrics. urbanMetrics prepared a report dated March 12, 2018, which was received by the Planning Department after their reports were completed, but before the March 26 meeting. The report was provided to the Planning Committee before the meeting convened. Not surprisingly, given the applicant's position on this application, the report concluded:

> In our opinion, the proposed Kingsway Entertainment District would be contrary to a number of key municipal and Provincial policies, including the Official Plan, the Downtown Master Plan, the Economic Development Strategy and the Growth Plan for Northern Ontario.
>
> Our analysis also concludes that the Kingsway Entertainment District is not a project that would make economic sense for the City of Greater Sudbury in that the benefits it would produce would be overshadowed by its economic and financial costs.

[47] As happened at the January 22 pre-hearing, a significant number of people spoke out against the proposed rezoning application. The applicant was one of those people. The minutes of the meeting make it clear that, for many of the speakers, the central issue was whether Sudbury should have a casino at all, and not whether it should be located at the Kingsway site. However, not all of the speakers were opposed to the rezoning. Members of the City's Planning Department, members of other City departments, and even Council members not forming part of the Planning Committee made submissions to the Planning Committee in favour of the application.

[48] The final hearing before the Planning Committee was held two days later, on March 28, 2018. That hearing dealt with the arena/event centre application. As with the other meetings, many people spoke out against the application, although the minutes reflect that the issues raised by opponents to the application were somewhat more concrete than the social issues raised at the March 26 meeting regarding the casino application. Like the March 26 meeting, staff members from other City departments were present to address concerns that had been raised at the pre-hearing. Unlike the March 26 meeting, however, at this meeting the applicant had two professionals present. The first was the author of the urbanMetrics report, Rowan Faludi. The other was the applicant's lawyer in this application. Again, not surprisingly, both spoke out against the application.

[49] Notwithstanding the opposition expressed by people who attended the January 22 hearing, City staff ultimately recommended in two reports dated March 14, 2018 that the applications before the Planning Committee be approved. In the opinion of Planning Department staff, the Official Plan amendment and rezoning applications were consistent with the Provincial Policy Statement, in conformity with both the Northern Ontario Growth Plan and the relevant sections of the City of Greater Sudbury Official Plan, and represented "good planning … in the public interest."

[50] At the conclusion of both the March 26 and March 28 meetings, the Planning Committee approved the applications.

[51] At a Council meeting held on April 10, 2018, Council adopted the recommendation of the Planning Committee and passed the four by-laws that are the subject of this application (the "KED by-laws"):

(a) By-law 2018-60P approving Official Plan Amendment No. 92 (permitting the development of a place of amusement in the form of a casino on the KED lands);

(b) Zoning By-law 2018-61Z, as amended by By-law 2018-70Z (permitting a casino on KED lands);

(c) Zoning By-law 2018-63Z, as amended by By-law 2018-72Z (permitting a public arena on the KED lands); and

(d) Zoning By-law 2018-62Z, as amended by By-law 2018-71Z (permitting a "parking lot" as a principal use on the KED lands).

[52] The mayor and 11 councillors voted in favour of the casino application, while the mayor and 8 councillors voted in favour of the arena/event centre application.

Challenges to the By-Laws

[53] In May 2018, 12 appeals were commenced relating to the KED by-laws under the *Planning Act* by several appellants, including the applicant.

[54] The present application was commenced on April 8, 2019. The *Planning Act* appeals remained to be heard before the Local Planning Appeal Tribunal ("LPAT") at the time that this application was argued.

ISSUES

[55] This application is brought under s. 273 of the *Municipal Act, 2001*, which reads:

> 273 (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

[56] As I will explain, courts have quashed by-laws as being illegal under s. 273 for a number of different reasons. In addition to quashing by-laws that are enacted beyond the scope of a municipality's statutory authority, courts have quashed by-laws where a municipality has failed to follow statutorily-mandated or common law procedural requirements, where Council has demonstrated bias, and where Council has demonstrated bad faith. The applicant attacks the KED by-laws on all three of these legal grounds.

[57] The applicant alleges that Council and City staff committed a host of improprieties leading up to and following the passage of the KED by-laws. These include:

(1) failing to disclose important documents;

(2) misleading the public;

(3) failing to comply with statutory and common law procedural requirements;

(4) limiting the public's ability to make meaningful representations at public meetings

(5) aligning with Gateway and 191 in the *Planning Act* applications; and

(6) using threats and intimidation to silence opponents of the arena/event centre and casino projects.

[58] Counsel for the applicant submits, correctly, that many of the improprieties alleged, if proven, could result in the by-laws being quashed on more than one legal basis. Procedural defects can be evidence that a by-law was passed in bad faith, for example. In the analysis that follows I propose to address all of these allegations in the context of a discussion about each of the three legal grounds upon which the by-laws have been challenged. Although many of the factual allegations made by the applicant could be addressed under each of the three grounds, where possible, I will address them only once.

[59] I will begin the next section with a general discussion of the law under s. 273. Before I do that, however, I must address one other legal issue on which the parties are unable to agree, namely, the appropriate standard of review to be applied in an application under s. 273.

ANALYSIS

Standard of Review

[60] One of the most important cases governing the scope of judicial review of municipal decision-making is the Supreme Court of Canada's decision in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. In *Shell Canada*, the Supreme Court was asked to review two resolutions passed by Vancouver city council in which council resolved that the city would not do business with Shell Canada while Shell continued to trade with the apartheid regime of South Africa. Two questions were before the Supreme Court. One was whether the city had the power to pass such resolutions. The other was the scope of a court's power to review them.

[61] The majority, whose decision was delivered by Sopinka J., struck down the resolutions as being beyond the city's jurisdiction. In many ways, however, the decision in *Shell Canada* is more important for what was said by McLachlin J. (as she then was) in dissent than what was said by the majority. McLachlin J. argued in favour of a more deferential approach to the review of municipal acts. Beginning at p. 243, she reminded the court of its decision in *R. v. Greenbaum*:

> This Court has pronounced, on at least one occasion, in favour of a generous approach to the construction of municipal powers.
>
> ...
>
> In *R. v. Greenbaum*, 1993 CanLII 166 (SCC), [1993] 1 S.C.R. 674, in a passage cited on this appeal by Sopinka J., Iacobucci J., speaking for the Court, commented (at p. 687) that:

> Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.
>
> However, the same reasons (at p. 688) advocated a "benevolent construction" of the provincial enabling legislation…
>
> The weight of current commentary tends to be critical of the narrow, pro-interventionist approach to the review of municipal powers, supporting instead a more generous, deferential approach: [citations omitted]. Such criticism is not unfounded. Rather than confining themselves to rectification of clear excesses of authority, courts under the guise of vague doctrinal terms such as "irrelevant considerations", "improper purpose", "reasonableness", or "bad faith", have not infrequently arrogated to themselves a wide and sweeping power to substitute their views for those of the elected representatives of municipalities.
>
> …
>
> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

[62] McLachlin J.'s dissent in *Shell Canada* on the approach to judicial review of municipal acts was adopted by a majority of the Supreme Court in *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342. The court in *Rascal Trucking* held that the standard of review of municipal decisions involving legal questions such as the scope of the municipality's authority was correctness (at para. 29). However, with respect to the review of decisions made *within* the scope of a municipality's authority, the court held that the standard of review was deference. On behalf of a unanimous court, Major J. wrote (at para. 35):

> In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with

> the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.

[63] However, on behalf of the applicant, counsel submits that the appropriate standard of review under s. 273 is correctness. He argues that the deferential standard referred to in *Shell Canada* and *Rascal Trucking* has been overtaken by the more recent decision of the Supreme Court of Canada in *London (City) v. RSJ Holdings*, 2007 SCC 29, [2007] 2 S.C.R. 588. He relies on the following passage from the latter decision, in which Charron J., on behalf of the court, commented on the decision in *Shell Canada* (at para. 38):

> In light of the particular statutory provision that occupies us — the open meeting requirement — I would add the following comment on the principle of deference. The dissent of McLachlin J. (as she then was) in *Shell Canada* is often cited as a broad statement of the deference that courts owe to municipal governments. In large part, this deference is founded upon the democratic character of municipal decisions. Indeed, McLachlin J. recognized that deference to municipal decisions "adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them" (p. 245). Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.

[64] In my view, the decision in *RSJ Holdings* does not stand for the proposition that correctness is the standard to apply in every case in which a municipal by-law or resolution is being attacked. *RSJ Holdings* was a case in which the attack on the by-law was based on statutory non-compliance, raising a legal question akin to the question of jurisdiction, which the court was at least as well-equipped to decide as was the municipality. In *RSJ Holdings*, the question before the Supreme Court was whether an interim control by-law passed under the *Planning Act* in secrecy during two closed meetings of council should be quashed under s. 273. Section 239 of the *Municipal Act, 2001* requires that meetings be open to the public unless one of the statutory exemptions applies. One of those exemptions permitted closed meetings where they were allowed

under another statute. The municipality argued that council was entitled to meet secretly because an interim control by-law could be passed under the *Planning Act* without prior notice and without holding a public meeting.

[65] The Supreme Court disagreed. In delivering the court's decision, Charron J. made it clear that the question before the court was a purely legal one. She wrote (at para. 37):

> [T]he City argues that the overarching principle which should govern the court on a s. 273 review of a municipal by-law is one of deference. While this approach may be appropriate on a review of the merits of a municipal decision, in my view, the City's argument is misguided here. Municipalities are creatures of statute and can only act within the powers conferred on them by the provincial legislature: *Shell Canada Products Ltd. v. Vancouver* (City), 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, at p. 273. On the question of "illegality" which is central to a s. 273 review, municipalities do not possess any greater institutional expertise than the courts — "[t]he test on jurisdiction and questions of law is correctness": *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29.

[66] However, as McLachlin J. pointed out in *Shell Canada*, and as we shall see, courts have quashed municipal by-laws for many reasons going beyond those relating only to jurisdiction. As Charron J. explained, this power to quash a by-law under s. 273 that is not *ultra vires* is a discretionary one (at para. 39):

> The power to quash a by-law for illegality contained in s. 273(1) of the *Municipal Act, 2001* is discretionary. Of course, in exercising its discretion, the court cannot act in an arbitrary manner. The discretion must be exercised judicially and in accordance with established principles of law. Hence, when there is a total absence of jurisdiction, a court acting judicially will quash the by-law. In other cases, a number of factors may inform the court's exercise of discretion including, the nature of the by-law in question, the seriousness of the illegality committed, its consequences, delay, and mootness.

[67] Thus, there are differing standards of review depending on whether the question is one of *vires* or not: *Wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)*,2015 ONSC 4164 (Div. Ct.), at paras. 20-21. I believe that what can be safely gleaned from the decision in *RSJ Holdings* is that the degree of deference to be shown to municipal acts will depend on the extent to which the illegality in question involves a question of law and the extent to which it affects the democratic legitimacy of its decision.

[68] In the case before me, the KED by-laws are not being attacked on a purely jurisdictional basis. Rather, they are being attacked for other reasons, including bias and bad faith. These are not purely questions of law and, therefore, depending on the effect of the impugned conduct on the democratic process, the acts of the City and Council may attract deference.

[69] In any event, as I will explain, I am not satisfied that the applicant has made out a factual basis for most of his claims, making the standard of review an irrelevant issue with respect to those claims.

Onus of Proof

[70] While the standard of review may differ depending on the nature of the attack being made, the onus of proof under s. 273 remains constant. The onus is on the person challenging the by-law to prove illegality: *Ottawa (City) v. Boyd Builders Ltd.*, [1965] S.C.R. 408, at p. 413.

"Illegality" Under Section 273 of the *Municipal Act, 2001*

[71] As Charron J. made clear in *RSJ Holdings* when discussing s. 273 (at para. 35):

> "Illegality" is not defined under the statute. In its ordinary meaning, it is a broad generic term that encompasses any non-compliance with the law.

[72] As McLachlin J. pointed out in *Shell Canada* (at p. 244), by-laws need not have been passed outside of a municipality's statutory authority to be declared illegal. Courts have quashed by-laws, or considered doing so, where:

(a) there has been statutory procedural non-compliance: *RSJ Holdings*;

(b) there has been procedural unfairness: see *Re. McGill and City of Brantford* (1980), 28 O.R. (2d) 721 (Ont. Div. Ct.);

(c) a party's reasonable expectation of being heard has not been met: see *West Nipissing Police Services Board v. Municipality of West Nipissing*, 2018 ONSC 6454 (Div. Ct.);

(d) a by-law has been passed for an improper purpose: *Shell Canada*; see also *Barrick Gold Corporation v. Ontario* (2000), 51 O.R. (3d) 194 (C.A.); *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55; *Wpd Sumac*; *Xentel DM Inc. v. Windsor (City)*, 2004 CarswellOnt 3608 (S.C.);

(e) council has suffered from disqualifying bias: *Old St. Boniface Residents v. Winnipeg*, [1990] 3 S.C.R. 1170.; and

(f) the by-law was passed "in bad faith": see Re. H. G. Winton Ltd. and Borough of North York (1978), 20 O.R. (2d) 737 (Div. Ct.); Luxor Entertainment Corp. v. North York (1996), 27 O.R. (2d) 259 (Gen. Div.); Equity Waste Management of Canada v. Halton Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.).

[73] The applicant argues that the KED by-laws should be quashed for all of these reasons.

[74] I will begin with his allegations of statutory non-compliance.

Statutory Non-compliance/Procedural Unfairness

[75] As the decision in *RSJ Holdings* demonstrates, the failure of a municipality to follow the procedures required by a statute will usually result in a by-law being quashed for illegality because the power conferred upon a municipality is purely statutory.

[76] The applicant argues that the City and Council failed to comply with the provisions of both the *Ontario Lottery and Gaming Corporation Act, 1999* and the *Planning Act*.

Non-compliance Under the Ontario Lottery and Gaming Corporation Act, 1999

[77] The applicant makes two allegations of statutory non-compliance under the *Ontario Lottery and Gaming Corporation Act, 1999*.

Resolution v. Referendum

[78] First, the applicant argues that the Willing Host resolution passed in May 2012 was not enough under the *Ontario Lottery and Gaming Corporation Act, 1999*. He submits that, at the time it was adopted, the law required a referendum, not a mere resolution. He is right about that. Before it was replaced with O. Reg. 81/12 on June 1, 2012, the regulation governing the establishment of a casino in a municipality was O. Reg. 347/00. That regulation required that the municipality hold a referendum on the question of whether a casino should be established and prescribed the question that citizens were required to answer in that regard, which the applicant refers to in his materials as the "Fundamental Question".

[79] However, at the time that the casino was actually being established in Sudbury, a referendum was no longer required. All that was required was a resolution. Ontario Reg. 81/12 did not specify when the resolution had to be passed. There was no statutory requirement that the resolution be passed after June 1, 2012. The fact that it was passed a few weeks before that date is of no legal consequence, in my view.

Public Consultation on the "Fundamental Question"

[80] Second, the applicant argues that O. Reg. 81/12 required that the City consult the public on the Fundamental Question of *whether* there should be a casino before it consulted the public on *where* the casino should be located. He is wrong about that. There is nothing in the regulation that could reasonably be interpreted as imposing this requirement. The relevant parts of the regulation read:

> 2. (1) Subject to subsections (2) and (3), the Corporation [OLG] may authorize the establishment of a gaming site on an electronic channel or, at premises approved by the Corporation, in a municipality or on a reserve.
>
> (2) The Corporation shall not authorize the establishment of a gaming site until after the Corporation takes the steps and requires that the conditions are met as follows:
>
> ...
>
> 3. In the case of a proposed gaming site to be established at premises in a municipality or on a reserve,
>
> i. the municipal council or the council of the band, as the case may be, seeks public input into the establishment *of the proposed gaming site* and gives the Corporation, in writing, a description of the

> steps it took to do so and a summary of the public input it received, and
>
> ii. the municipal council or the council of the band, as the case may be, passes a resolution supporting the establishment *of the gaming site* in the municipality or on the band's reserve and gives a copy of the resolution to the Corporation. [Emphasis added.]

[81] I agree with the City's interpretation of the regulation, namely, that it requires the City to seek public input into the proposed *location* of the casino, not on whether there should be one. This view is obviously shared by the OLG, who wrote to the City on January 14, 2015 to confirm that the requirements of O. Reg. 81/12 had been met.

[82] I also agree with the City's submission that the applicant's allegations of statutory non-compliance under the *Ontario Lottery and Gaming Corporation Act, 1999* amount to nothing more than a stale attack on the Willing Host resolution. Section 273 of the *Municipal Act, 2001* applies both to by-laws and to resolutions: s. 273(2). An application to quash under that section must be brought within one year of the passage of the resolution: s. 273(5). The applicant is too late to attack the resolution now.

Non-compliance Under the Planning Act

[83] The applicant also makes two allegations of statutory non-compliance under the *Planning Act*.

Failure to Study

[84] The applicant relies in two ways on a submission that the City failed to study the effects of locating the arena/event centre at the Kingsway site. First, he submits that the City failed to comply with the *Planning Act* by failing to study the social and economic effects of its decision. I will deal fully with that submission here.

[85] The applicant also submits that the fact that Council passed the KED by-laws without a proper study is evidence of bad faith. I will return very briefly to this submission when I address the topic of bad faith.

[86] In support of his position on this application, the applicant has filed a lengthy affidavit sworn by Rowan Faludi, the author of the urbanMetrics report. Faludi deposes that both he and another expert retained by the applicant believe that the failure of the City to perform an "economic impact analysis" of the effect of establishing an entertainment district outside of the downtown area of Sudbury "is not consistent with" the 2014 Provincial Planning Statement, does not "conform with" and "conflicts with" the Growth Plan for Northern Ontario, and "is not in conformity with" the City's Official Plan.

[87] These are all matters of opinion. As I set out above, the City's professional planning staff were of the opposite opinion. Although Faludi has highlighted various provisions referring to the importance of social and economic considerations under the *Planning Act*, I have not been referred to any provision in that Act specifically requiring a social or economic "impact analysis". While it might be said that, if Faludi is correct, the City

failed to comply with the *Planning Act* in a certain sense, that is not the sense in which by-laws should be quashed for illegality. Those are merits-based issues for the LPAT to decide. As it relates to the issues I have to decide, the City's interpretation must be shown deference. For this reason, the applicant has failed to satisfy me that there was any breach of the provisions of the *Planning Act* that rendered Council's decision illegal under s. 273.

[88] However, the applicant also submits that a municipality must comply both with the letter of the law, and with its spirit: *Barrick Gold Corporation*. I have concluded that the City and Council did both. The City did study and Council did consider the social and economic impact of locating the arena/event centre at the Kingsway site.

[89] Contrary to the submissions made on behalf of the applicant, PWC did study the economic impact that locating the arena/event centre would have on the downtown. As Faludi admits, PWC evaluated economic and social benefits of a proposed sports and entertainment centre as part of its scope of review. "Economic impacts" was one of the eight factors comprising the matrix used by PWC in making its recommendations. Indeed, as Faludi sets out in his affidavit, in concluding that the downtown was the recommended site, PWC wrote that "it scored highest in terms of economic development". The fact that Council chose the second most highly recommended site does not mean that the downtown location was not sufficiently studied.

[90] The impact of locating the arena/event centre outside of the downtown area was studied even before PWC became involved. On April 6, 2016 the Greater Sudbury Development Corporation submitted a report to Council in which it made what Faludi described as "preliminary comments on the positive benefits" of two proposals to locate the facility outside of the downtown.

[91] As I mentioned earlier, PWC was only one member of a task force formed to evaluate the potential sites for the arena/event centre. City staff from numerous departments were also involved. In addition to PWC's report, a report dated June 15, 2017 was submitted to Council by the City's General Manager. That report clearly addressed the economic and social impacts of locating the arena/event centre at the Kingsway site versus the downtown site. As Faludi notes, the General Manager advised that the downtown site would provide immediate and long-term financial benefits to the downtown area and was "best aligned with the stated long-term vision for the City". The General Manager also highlighted the uncertainty that other amenities would be built at the Kingsway site and that other cities that had built event centres outside of their downtown areas did not realize the anticipated economic benefits from surrounding developments.

[92] It is also clear from the minutes of the June 27, 2017 meeting that Council considered the economic and social impacts associated with locating the arena/event centre at either the downtown or Kingsway site. Practically every member of Council present that night asked questions of PWC or City staff or made comments in the speeches they gave about the economic and/or social benefits of locating the arena/event centre in one place or the other before casting their votes.

[93] Thus, the record before me reveals that the social and economic issues were both studied and considered. The simple fact is that Council opted for the Kingsway site over the downtown site. As Faludi concedes, Council is free to do that.

[94] For these reasons, the applicant has not demonstrated that the City or Council failed to comply with either the letter or the spirit of the *Planning Act* by failing to study or to consider the social and economic impact of its decision to locate the arena/event centre outside of the downtown area.

Denial of Public Input at the June 27, 2017 Meeting

[95] The applicant also submits that Council failed to comply with the *Planning Act* by denying the public the right to be heard on June 27, 2017. Section 61 of that Act provides:

> 61 Where, in passing a by-law under this Act, a council is required by this Act, by the provisions of an official plan or otherwise by law, to afford any person an opportunity to make representation in respect of the subject-matter of the by-law, the council shall afford such person a fair opportunity to make representation but throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function.

[96] Other provisions of the *Planning Act* require that at least one public meeting be held before an Official Plan is prepared or a zoning by-law is passed at which the public is permitted to make representations in respect of the proposed plan or by-law, as the case may be: ss. 17(15) and 34(12).

[97] The applicant submits that Council made a final decision at the June 27 meeting to locate both the arena/event centre and the casino at the Kingsway site and that the meeting failed to comply with the *Planning Act* because the public was not permitted to make representations at that meeting. I will address the submission about statutory non-compliance here. Because the applicant also relies on this submission in support of his argument that the by-laws should be quashed for disqualifying bias, I will return to his submission about the arena/event centre when I address the subject of disqualifying bias. I will also discuss the distinction between legislative and judicial functions referred to in s. 61 of the *Planning Act* at that time.

[98] I would start my analysis with this observation: contrary to the submissions made on behalf of the applicant, Council did not decide on June 27, 2017 to locate the casino at the KED. Council never decided on where the casino should be located. What it did was fulfill the requirement of O. Reg 81/12 that the City consult with the public on where the casino should be located. The result of that consultation was to narrow the potential sites to four, one of which was the Kingsway site. The decision as to which of those four sites would ultimately be used was left to the successful proponent and to the *Planning Act* process, which I will address in more detail below.

[99] While Council did make a decision about the location of the arena/event centre on June 27, 2017, it was not one to which the procedural provisions of the *Planning Act* applied. The applicant's submission that *Planning Act* procedural provisions applied to the June 27 meeting fundamentally misinterprets the purpose of that meeting. At the risk of over-simplifying, the June 27 meeting was held for the purpose of deciding where the

arena/event centre *should* go, not where it *would* go. That would eventually be decided at the meeting held on April 10, 2018.

[100] In any event, there is no evidence that the applicant ever sought to make representations at the June 27 meeting. All of the meetings at which the applicant alleges he was denied the right to be heard were governed by a procedural by-law. The by-law required that notice be given of Council's agenda by posting it on the City's website. A notice for the June 27 meeting was posted on June 19. The notice advised that "site selection for the arena/events centre" would be discussed and provided a link to the agenda for the meeting. That link, in turn, provided links to both the PWC June report and the General Manager's June 15 report. The by-law provided that individuals wishing to make presentations could apply to the City clerk to be designated as a "community delegation" in advance of the meeting, in which case the delegation could make a presentation to Council, provided the subject of the presentation was on Council's agenda.

[101] The applicant does not allege that the procedural by-law was in any way breached. The fact is that the applicant never asked to make a presentation at the Council meeting of June 27, 2017. According to the City, no one did.

Procedural Unfairness

[102] A by-law may be quashed for procedural shortcomings even where there has been no statutory breach leading up to its passage. In certain circumstances, a person may be entitled to a higher level of procedural fairness than that called for by a statute or by-law. The facts in *Pedwell v. Pelham (Town)*, 2003 CanLII 1701 (Ont. C.A.) provide a good example of circumstances in which that may happen. In *Pedwell*, the municipality enacted an interim control by-law to prevent a developer from taking advantage of a provision in the *Planning Act* that allowed him to avoid having to file a plan of subdivision and obtain approval of the plan by the municipality. The Court of Appeal refused to interfere with the trial judge's finding that the municipality ought to have given the respondent notice of its intention to pass the interim control by-law even though such notice was not required under the *Planning Act*, because the municipality was already engaged with the respondents over the issue.

[103] As cases like *Pedwell* demonstrate, statutory decision makers must observe the rules of natural justice: see also *Old St. Boniface*, at p. 1190. The rules of natural justice require that the City ensure procedural fairness in its decision making by providing adequate notice, appropriate disclosure, and a meaningful right to be heard: *Re. McGill*, at p. 728. The applicant submits that he and other members of the public were denied all three of these aspects of procedural fairness during the process leading up to passage of the KED by-laws.

[104] I will begin with the allegations of non-disclosure and misleading.

Non-disclosure

[105] The applicant submits that the City failed to disclose the existence of "crucial" documents "which would have drastically affected public perception and representations in respect of" the arena/event centre. By this, he means the option agreements, in general, and the Kingsway option agreement, in particular. I will address the applicant's submissions

about non-disclosure of all of the option agreements in this part of my reasons. I will address the applicant's submissions about the Kingsway option agreement when I address his allegations of disqualifying bias and bad faith.

[106] The applicant submits that the public should have been informed that City staff had been instructed to enter into option agreements with respect to the four potential sites for the arena/event centre before the June 27, 2017 meeting. I cannot see why. The only effect of the option agreements was to provide Council with the ability to choose any of the four sites identified by the Event Centre Evaluation Team. I fail to see how disclosing them to the public could have drastically affected public perception or public input into the location of the arena/event centre.

[107] The applicant submits that the option agreements were not even disclosed to Council members. However, it is clear from the transcript of the June 27, 2017 meeting that the members of Council were not only aware of the agreements but were also familiar with their terms. This is not surprising, given that the basic terms of the agreements were noted by PWC in their June report, which was attached to the City staff report to Council of June 15, 2017 and made available to the public on June 19, 2017.

Misleading Statements

[108] The applicant contends that City staff misled Council and members of the public once during the March 26 Planning Committee meeting and twice during the Council meeting at which the KED by-laws were passed on April 10, 2018.

[109] During the March 26 meeting, the Director of Planning Services was asked by the chair of the committee why the socio-economic impacts of gambling fell outside of the land-use issues the committee was to consider. The applicant submits that the Director misled the committee and the public when he responded that they had already been considered at the time the Willing Host resolution was passed. The evidence does not support this submission.

[110] I have not been taken to any evidence showing what was discussed at the Council meeting leading to the passage of the Willing Host resolution. The only evidence I have are the minutes of the meeting and they do not purport to be a *verbatim* record of the discussions that were held during that meeting.

[111] The applicant submits that the Director also misled Council and the public at the April 10, 2018 meeting. He alleges that, when asked why a Preliminary Planning Report prepared by City staff dated December 18, 2017 failed to mention that the DTMP and other strategic planning documents had recommended locating the arena/event centre downtown, the Director of Planning Services falsely advised that they had not been approved in Sudbury's Official Plan and were, therefore, irrelevant.

[112] Whether these documents were relevant is an issue for the LPAT to determine. As this statement relates to the issues I have to decide, I am not persuaded that the statement was false. The applicant's own expert's evidence is that neither the DTMP nor the 2015 Economic Development Strategy were incorporated into the Official Plan at the time.

Denial of the Right to be Heard

[113] The applicant submits that he was denied the right to be heard on three occasions leading up to the passage of the KED by-laws. First, submits that he had been assured by members of Council that he would be given a chance to make representations before Council on the Fundamental Question and that he was not given that chance. Second, he submits that he was not permitted to make representations during the November 22, 2017 meeting at which Council approved the Final Site Design strategy for the KED. Third, he submits that, although the public was permitted to make representations before the Planning Committee during the meetings it held in January and March 2018, the Committee "drastically" limited the scope of those submissions, making the meetings "a sham".

[114] I will start with the applicant's expectation that he would be given a chance to make representations about whether there should be a casino in Sudbury.

(a) The Applicant's Expectations

[115] Counsel for the applicant submits that the applicant and other members of the public were assured by the Mayor, the Director of Economic Development, and a Council member that they would have an opportunity to make submissions on the Fundamental Question before Council considered any particular site for the casino.

[116] There is nothing in the evidence to support this submission as it relates to the Mayor and the Director of Economic Development. With respect to the Council member, the applicant deposes that he was assured by a Council member during a one-on-one meeting in June 2013 that the public would have an opportunity to persuade Council "not to approve expanded gambling in the City at any proposed site". He deposes further that, based partly on this assurance, he stopped a campaign he had begun against the casino. He argues that he was never given the opportunity he was promised and that, therefore, he was denied procedural fairness.

[117] To understand why the applicant's unmet expectations might amount to procedural unfairness even where the procedural by-law was not breached, a brief discussion about procedural fairness is necessary.

[118] The exact scope of the common law duty of procedural fairness depends on the context in which a decision is being made. In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court set out five relevant factors to consider in defining the scope of the duty:

(1) the nature of the decision and the decision process followed;

(2) the statutory scheme pursuant to which the body operates;

(3) the importance of the decision to the individual affected;

(4) the legitimate expectations of the person challenging the decision; and

(5) the nature of deference accorded to the administrative body.

[119] The applicant's submission focuses on the fourth factor listed above. As I stated earlier, in certain circumstances, a person may be entitled to additional procedural protection than that provided by a statute or a by-law. One of those circumstances arises where a person

has been promised additional or alternative procedural rights. This is known in law as the doctrine of "legitimate expectations". However, before a party can successfully argue that he had a legitimate expectation that he would be given an enhanced opportunity to participate in a municipal context, he must establish that:

(1) a government official made a representation within the scope of his or her authority about an administrative process that the government will follow;

(2) the representations were clear, unambiguous, and unqualified; and

(3) the representations were procedural in nature and not in conflict with the decision maker's statutory duty: *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.

[120] The representations must be such that, if made in a private law context, they would be certain enough to be capable of enforcement: *West Nipissing Police Services Board*, at para. 52.

[121] The applicant has not established either of the first two prerequisites to relief under the doctrine of legitimate expectations. The representation was far too vague to be enforceable. For one, it was made four years before any of the meetings at which the applicant says he was not given a fair right to be heard. Further, there is no evidence that the Council member in question had any authority to make such a representation.

(b) The November 22, 2017 Meeting

[122] The applicant deposes that he was not permitted to make representations at the Council meeting held on November 22, 2017 at which Council approved the Final Site Design strategy for the KED. He says that he called the City clerk on November 21 to inquire about making a presentation to Council as a community delegation and was told that "Council had a very full schedule and a presentation was not possible for many months." The inference I am asked to draw is that the applicant reasonably assumed he would not be permitted to make a presentation. The evidence does not support that inference.

[123] Following his inquiry, the applicant received an e-mail from the City. The e-mail simply asks that he make a formal written request to the Clerk "describing the purpose of your presentation as well as a description of how your presentation relates to existing or proposed municipal policies or initiatives." There was no reasonable basis for the applicant to conclude from the e-mail that he would be denied the right to make a presentation, provided that it related to the City's policies or initiatives. Even if he was justified in believing that the Clerk would deny him what he wanted, the procedural by-law in force at the time provided that the applicant could request to appear as a community delegation up until the moment the meeting started, provided that two-thirds of the Council members present then voted in favour of hearing from him.

[124] In my view, the reasonable inference to draw is that what the applicant wanted to say on November 22 did not relate to what was to be discussed at the meeting. Indeed, the applicant complains about the fact that, during the November 22 meeting, one of the Councillors stated publicly that neither the location nor the development of the casino was up for debate that night. The Councillor was correct. Neither of these issues were before Council on November 22, 2017. Those decisions had already been made.

[125] For these reasons, the applicant has not satisfied me that he was denied procedural fairness regarding that meeting.

(c) The *Planning Act* Meetings

[126] The applicant makes similar complaints about the January 22, March 28, and April 10, 2018 *Planning Act* meetings. He complains that at the pre-hearing on January 22, the Chair of the Committee advised those in attendance that they were only looking for comments on the rezoning of the arena/event centre, which barred discussion on the location of the arena/event centre near the casino and the social issues related to gambling. He complains that at the hearing on March 28, the Chair again advised that the location of the arena/event centre was not open for discussion because that had already been decided on June 27, 2017. Finally, he complains that Councillors took the position at the meeting on April 10, 2018 that the decision regarding the location of the arena/event centre had been made on June 27, 2017 and that the meeting that night was "strictly and purely a decision on land use questions".

[127] The Councillors were right. The applicant consistently attempted to challenge a decision about expanded gambling that he failed to challenge in a timely way by raising the location of the arena/event centre in the wrong forum. Then, as now, he conflated the purpose of the *Planning Act* meetings. To use the phraseology I used earlier, the January and March meetings were held for the purpose of deciding whether the arena/event centre *could* go where Council wanted it to go, not whether it *should* go there. The meeting on April 10, 2018 was held for the purpose of deciding whether it *would* go there.

[128] In any event, the applicant *was* heard, not only on the location issue, but also on the casino issue, during the *Planning Act* meetings. Notwithstanding the fact that those present at the meeting on January 22 had been told that the committee was only looking for comments on the rezoning for the arena/event centre, the applicant made a presentation that night outlining his opposition to the applications based on the lack of input and public discussion on the casino. In addition, after that meeting, he wrote to the Chair of the Planning Committee asking that the approval process relating to the casino application be suspended pending further City-sponsored input sessions.

[129] Before the next meeting in March, the applicant's lawyer provided the City with the urbanMetrics report, in which Faludi says he advised "of the long term economic impacts on the Downtown" [of locating the arena/event centre at the Kingsway site] and "the economic impact of expanded gambling at the KED on the City's economy as a whole".

[130] The applicant appeared again at the March 26 meeting and gave a presentation, this time highlighting parts of the urbanMetrics report. Both the applicant's lawyer and his expert attended the March 28 meeting, and both were given an opportunity to address the Planning Committee. Clearly, the applicant was provided with the right to be heard at the January and March meetings, even where what he had to say was off topic.

[131] The applicant's submission that he was denied the right to be heard at the April 10 meeting ignores completely the provisions of the *Planning Act* and the procedural by-law in effect at the time. The January and March Planning Committee meetings fulfilled the *Planning Act* requirement that the public be given an opportunity to provide input into the

planning applications. The procedural by-law provided that, where a public hearing has been held by a committee pursuant to a statute, community delegations are not permitted. This is entirely reasonable.

[132] The fact that the Planning Committee approved the applications and that Council adopted the committee's recommendation does not mean that the applicant and his professional advisors were not heard. Faludi himself admits that Council is entitled to make decisions contrary to the recommendations of retained consultants and even of City staff. In this case, the applicant's retained consultants were at odds with City staff. The Committee and members of Council were free to accept the advice of City staff over that of the applicant's consultants without breaching the applicant's right to be heard.

Disqualifying Bias

[133] The applicant alleges that he was denied the right to a fair hearing in another important way.

[134] The right to be heard requires that the decision maker be open to persuasion. The leading case on this aspect of procedural fairness in the municipal context is the decision of the Supreme Court of Canada in *Old St. Boniface. Old St. Boniface* involved a proposed condominium complex which was opposed by a residents' association in the Old St. Boniface area of Winnipeg. To develop the complex, the developer needed to buy land from the city and to have the property rezoned. A member of city council appeared before a committee of council, of which he was not a member, to advocate on behalf of the developer of the complex and to urge the committee to grant the developer an option to purchase the land it needed. That same councillor later sat as a member of another committee that recommended to council that the developer's rezoning application be allowed, which it later was. The issues before the Supreme Court included whether the councillor was disqualified by bias from participating in the rezoning application. The Supreme Court held he was not.

[135] The Supreme Court quoted extensively in its reasons from two decisions written by Henry J. on behalf of the Ontario Divisional Court. As Henry J. explained in *Re. McGill*, municipalities exercise a legislative, rather than an adjudicative, function (at p. 726):

> The members of the Council are elected representatives who, in a democracy, are responsive to the concerns of their constituents, who have given them their mandate. It goes without saying that they are not Judges. The process of governing and legislating is not a judicial process; it is a political function, the ultimate sanction of which lies in the electorate. To put the matter shortly, it would manifestly be impossible for a legislative body, such as a municipal council, to govern on the basis that each decision affecting some citizens adversely had to be made judicially, as if it were a Court. To the contrary, its collective decisions are political, based on the fundamentals of responsible Government, reflecting the needs and mandates of the electorate as a whole.

[136] See also: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 19.

[137] As Henry J. explained in *Re. Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. 20, the legislative function of a municipal council means that council members are *expected* to have views on matters coming before council (at p. 43):

> A municipal council is an elected body having a legislative function within a limited and delegated jurisdiction. Under the democratic process the elected representatives are expected to form views as to matters of public policy affecting the municipality. Indeed, they will have been elected in order to give effect to public views as to important policies to be effected in the community.

[138] Ultimately, the Supreme Court in *Old St. Boniface* adopted Henry J.'s concept of the type of bias that will disqualify a council member in the municipal context. At p. 1197, Sopinka J. wrote on behalf of the majority:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of council who are capable of being persuaded. The legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of council, while they may very well give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[139] Counsel for the applicant submits that even an apprehension of bias on the part of council is enough. This is not correct. This submission directly contradicts the decision in *Old St. Boniface*. As Sopinka J. explained, there is a difference between a degree of prejudgment in a municipal councillor, and a conflict of interest. He wrote (at p. 1198):

> It was error, therefore, for the learned judge to apply the reasonable apprehension of bias test. This test would have been appropriate if it had been found that the Councillor had a personal interest in the development, either pecuniary or by reason of a

> relationship with the developer. In such circumstances, the test is that which applies to all public officials: Would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty? If that duty is to hear and decide, the test is expressed in terms of a reasonable apprehension of bias. As I have stated above, there is nothing arising from the political and legislative nature of a councillor's duties that requires a relaxation of this test. The situation is quite distinct from a prejudgment case. In this case no personal interest exists or was found and it is purely a prejudgment case. Councillor Savoie had not prejudged the case to the extent that he was disqualified on the basis of the principles outlined above.

[140] Like the situation in *Old St. Boniface*, the applicant does not allege that there was a conflict of interest in this case; he alleges that there was prejudgment. He must, therefore, establish that a majority of the members of council had prejudged the issue of the location of the arena/event centre such that they were incapable of being persuaded to change their minds.

[141] I have already dealt with and dismissed the applicant's argument that the *Planning Act* meetings were a sham; an allegation that he relies on to argue that Council suffered from disqualifying bias, as well. However, the applicant also points to other evidence that he says shows disqualifying bias, some of which preceded the June 27 meeting and some of which followed it.

[142] I will deal with that evidence now.

No Questions of the Applicant or His Experts During the Planning Committee Meetings

[143] The applicant submits that the fact that neither he nor his retained professionals were asked any questions at the Planning Committee meetings in January and March is evidence of bias and bad faith. I cannot draw any such inference on the evidence before me.

[144] The minutes of the Planning Committee meetings shows that each of them were long affairs, with many people making presentations. The fact that the committee asked no questions is just as consistent with the need to leave time for other presenters and the fact that the applicant and his experts were still making representations on issues not before the committee as it is with the applicant's submission that the Planning Committee was not listening.

[145] Just as importantly, the applicant has not alleged, nor can I find any evidence, that the committee asked questions of any other presenter, with the exception of City staff, whom I understand were present for that purpose.

Alliance with 191 and Gateway

[146] The applicant relies on the Kingsway option agreement in support of his arguments about procedural unfairness and disqualifying bias. I have already addressed the Kingsway option agreement in the context of the applicant's submissions about procedural fairness. I will address it here in the context of the applicant's submissions on disqualifying bias.

[147] The applicant submits that the servicing agreement attached to the Kingsway option agreement is evidence that the City had already formed an alliance with 191 before the June 27, 2017 meeting was held. He relies on the fact that the servicing agreement says on its face that it was "Last revised May 30, 2017". He deposes that it is reasonable to assume from this that negotiations began as early as April 2017, before Council revised the selection criteria used by PWC to select the site for the arena/event centre. He contrasts this with the only other servicing agreement attached to an option agreement, which had not yet been negotiated at the time of the June 27, 2017 meeting.

[148] This evidence fails as evidence of disqualifying bias and bad faith for two principle reasons. The first is that it is pure speculation to suggest that the agreement was being negotiated prior to April 11, 2017, when Council decided to alter the weight being assigned to each factor in PWC's matrix.

[149] The second is that, until it was approved by Council, there was no agreement, regardless of when it was negotiated. As I have already pointed out, all of the option agreements were conditional upon Council's decision to locate the arena/event centre at the site in question. Therefore, there was no reason for Council to prefer one over the other, regardless of whether one option agreement was more complete than another.

[150] The applicant also relies on the statements made by some Councillors following the June 27, 2017 meeting that the City was "in partnership" with Gateway and 191 in the development of the KED. That was, in effect, true. One of the reasons Council chose the Kingsway site was the possibility that it might benefit from sharing the costs of developing the site with both Gateway and 191. However, I am not persuaded that this partnership lead to disqualifying bias on the part of Council.

[151] All of the agreements that the City entered into with 191 and Gateway were contingent on the City receiving *Planning Act* approvals. As I will discuss below, the evidence reveals that those approvals were not assured.

[152] More importantly, all of the agreements also contained terms that terminated the City's obligations under the agreements if the City determined ultimately that it would not be proceeding with the arena/event centre.

The Terms of the Kingsway Option Agreement

[153] Pursuant to the agreement as it was originally negotiated, 191 was to bear all of the costs of servicing up front and the City was only required to contribute its share, capped at $1 million, later.

[154] The applicant argues that the Kingsway option agreement was always "too good to be true". He highlights that the agreement was subsequently amended to increase the City's contribution to $13 million. As I understand the argument, the applicant is suggesting that there was some kind of "bait and switch" going on. He relies on this as evidence of disqualifying bias and bad faith. I need only address this argument once, in the context of the applicant's submissions about disqualifying bias, to show what it does not support quashing the KED by-laws on either ground. There are at least three problems with this argument.

[155] First, the City never expected to get a free ride when it came to constructing the arena/event centre and no one at the City ever represented to Council or the public that it would. It is true that, as early as August 14, 2012, Council had expressed a hope that gaming facility proponents would identify and develop "opportunities for ancillary and complementary amenities as part of their proposal". However, it would be unreasonable for anyone to believe that the successful proponent was going to build or entirely pay for the event centre if it was built downtown. Both the CBRE report of March 2015 and the City staff's Large Projects Report made it clear that significant investment by the City would be necessary even if the arena/event centre was built downtown.

[156] Second, the City has satisfactorily explained why final amendments to the contribution agreement were necessary. As the City explains, the original cost sharing agreement did not address expenses associated with various common elements of the KED project. This is easy to accept because the Final Site Design strategy was not decided upon until November 22, 2017, months after the original Kingsway option agreement was reached.

[157] Finally, I note that the City has been transparent about the amendments to the original cost-sharing agreement since Council approved the Kingsway location. Since then, details have been available to members of the public on an ongoing basis via the Internet. It is unlikely that the City would be so transparent if the purpose of the original servicing agreement was to enlist public support for the KED under false pretenses.

Deciding Its Own Planning Act Applications

[158] In his affidavit, the applicant expresses concern about the fact that Council decided on its own rezoning and Official Plan amendment applications and seems to suggest that this is evidence of disqualifying bias.

[159] As counsel for the applicant concedes, however, this is a common occurrence. The City is not exempt from the provisions of the *Planning Act*, even though it is empowered to approve applications under that Act. In this case, notwithstanding the usual practice, the City made efforts to ensure that the staff that worked on the development of the arena/event centre reported to a different manager than did the staff that worked on the *Planning Act* applications.

[160] The applicant also submits that Council prejudged the *Planning Act* applications, which is a different, but related, submission. There are a number of facts that undermine this submission.

[161] First, the City began an advertising campaign in January 2018 to promote the Kingsway as the location of the arena/event centre. This hardly seems necessary if the result of the applications was a foregone conclusion.

[162] Second, councillors other than those who sat on the Planning Committee attended the committee meetings to make presentations in favour of and against the site chosen for the arena/event centre. Again, this hardly seems necessary if the game was in the bag.

[163] Third, the votes at Council were not unanimously in favour of the applications, nor were they the same with respect to all of them. I note, in particular, that the Chair of the Planning Committee voted against the arena/event centre application on April 10, 2018,

even though she had voted in favour of it during the committee meeting relating to that application.

[164] I am not persuaded on the evidence that a majority of Council members prejudged the KED by-law applications.

Threats

[165] The applicant deposes that, following the June 27, 2017 meeting, he renewed his campaign against the establishment of a casino and against locating the arena/event centre at the Kingsway site. According to the applicant, he enlisted the support of many local businesses, some of whom were prepared to make their support known to the public, and some of whom were not. Among those who were prepared to allow their support to be disclosed to the public was the Downtown Sudbury Business Improvement Area Board of Management (the "Downtown BIA"). The Downtown BIA is a corporation constituted under s. 204 of the *Municipal Act, 2001* to promote and oversee the development of the downtown area, which was designated as a Business Improvement Area under that Act.

[166] The applicant contends that, as soon as Council became aware of the Downtown BIA's support for his campaign, one councillor in particular became the "leader and voice of Council promoting the KED", who "commenced a highly public, intimidating, and divisive smear campaign not only against the applicant and the [Downtown] BIA but also against local businesses and residents who voiced opposition." Only part of this is borne out by the evidence.

[167] It is true that one councillor did become very vocal against those who opposed the KED. That councillor became the subject of an investigation by the Integrity Commissioner, who found that the councillor repeatedly abused and harassed members of the public, in contravention of the Code of Conduct for Council and Local Boards, as well as the prior Code of Ethics.

[168] However, the applicant has not shown that this councillor represented a majority of Council. While I am prepared to accept that as many as two other councillors also expressed disapproval of what the applicant was doing, that is a far cry from establishing that the councillor in question represented a majority of Council. The evidence is to the contrary. The councillor in question was reprimanded by Council following the Integrity Commissioner's report on his conduct.

Bad Faith

[169] I come now to the third and final legal basis on which the applicant has attacked the KED by-laws under s. 273: bad faith.

[170] As I pointed out earlier, there is no definition of illegality in s. 273 and it has been defined by the courts to include many things, including bad faith: *Grosvenor*, at para. 27.

[171] Like the term "illegality", there is no definition of "bad faith" in the *Municipal Act, 2001* and that term, too, has been defined by the courts. In *Equity Waste Management*, our Court of Appeal adopted the following definition of bad faith (at p. 340):

> Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the

> exercise of power to serve private purposes at the expense of the public interest.

[172] As Laskin J.A. pointed out on behalf of the court, the onus to prove bad faith is on the challenger, who must show that a majority of the council members acted other than in the public interest (at p. 343). The onus is a heavy one: *Friends of Lansdowne Inc. v. Ottawa*, 2012 ONCA 273, at para. 79.

[173] Consistent with the law as it relates to disqualifying bias, it is entirely proper for councillors to take into account the views of the electorate in making decisions. As Laskin J.A. wrote (at p.343):

> A court should not be quick to find bad faith because members of a municipal council, influenced by their constituents, express strong views against a project.

[174] The same is true, of course, of councillors who express a strong view *in favour* of a project.

[175] Rarely is it possible to find direct evidence of bad faith. Instead, courts have relied on circumstantial evidence ("*indicia*" or "badges") of bad faith, including many of the circumstances that might allow a court to quash a by-law for illegality on the basis of procedural failures or disqualifying bias.

[176] The applicant submits that, in addition to the evidence that I have addressed above, there is other evidence of bad faith on the part of the City and Council in this case.

Changing the PWC Site Selection Matrix

[177] Both the applicant and Faludi suggest in their affidavits that there was something improper about the fact that Council voted to change the weighting in the selection matrix originally proposed by PWC and adopted by Council. They suggest that the weighting was changed to favour the Kingsway site. This suggestion is not supported by the evidence.

[178] There is nothing beyond the bald assertions of the applicant and Faludi that the weighting eventually chosen by Council seemed to favour selection of the Kingsway site over the downtown site. Neither goes on to explain why they hold that opinion.

[179] More importantly, neither opinion is borne out by the result of the application of the new weighting scheme. The downtown site still came out the number one choice.

[180] Even if it could be said that the change favoured the Kingsway site, there is no evidence that the change was made for that purpose. Instead, the evidence suggests that the changes were made to reflect Council's priorities, not to favour one site over the other.

Haste in Passing the KED By-laws

[181] Haste in passing a by-law may be a sign that the by-law was passed in bad faith: *Re. H.G. Winton Ltd.*, at p. 745. The applicant submits that the KED by-laws were passed with unusual haste. He relies on the evidence of Faludi in this respect.

[182] According to the evidence of the City's Director of Planning Services, the *Planning Act* requires that applications to amend Official Plans be processed within 180 days and that rezoning applications be processed within 120 days. Council made its decision on the KED *Planning Act* applications 116 days after the last of the applications was deemed complete. That is only four days before the time limit expired on the rezoning applications and roughly two-thirds of the time permitted to process the Official Plan amendment application. This does not strike me as particularly fast, especially when one considers that the Official Plan amendment application was running in tandem with the rezoning application regarding the casino.

[183] I would point out, as well, that apart from the applicant's allegation that the June 27, 2017 meeting constituted a *Planning Act* meeting, which I have dismissed as unfounded, the KED by-law applications were passed only after the City fulfilled all of the statutory prerequisites, including the Planning Committee meetings in January and March 2018.

[184] While it may be true that some *Planning Act* applications take longer, I cannot agree that the KED by-laws were passed with the kind of haste that would make one suspect bad faith.

Unreasonableness of the KED By-laws

[185] In Ontario, a municipal by-law cannot be attacked on the basis of reasonableness unless it was enacted in bad faith: *Municipal Act, 2001*, s. 272; *Friends of Lansdowne Inc.*, at paras. 13 and 77. However, the unreasonableness of a by-law may nonetheless constitute evidence of bad faith: *Equity Waste Management*, at p. 340.

[186] The applicant submits that the KED by-laws were unreasonable because they were contrary to the plans and policies adopted by the City relating to the downtown area that existed at the time the by-laws were passed.

[187] Like the allegation that the City was required under the *Planning Act* to study in greater detail the social and economic effects of locating the arena/event centre at the Kingsway site, this allegation is largely beyond the scope of the present application. To the extent that the content of the by-laws might provide evidence of bad faith, I cannot agree with the applicant.

[188] There were many reasons why the Kingsway site might be better than the downtown site. These were identified by PWC in its report and in the report of the City's General Manager and considered by Council during the June 27 meeting. They included the fact that option agreements had not been signed before the meeting with all of the property owners whose property was required to build the facility downtown, problems with parking, and the prospect of partnering with the casino developers to share costs. In light of these concerns, I cannot conclude that it was unreasonable not to build the arena/event centre downtown.

[189] This leads me to the allegation that I wish to address last.

Improper Purpose

[190] A by-law passed for a purpose other than that envisaged by the statutory power under which it is enacted may be quashed for bad faith: *Grosvenor*, at paras. 36 and 37.

[191] The applicant alleges that the City acted for an improper purpose in passing the KED by-laws. I have saved this allegation for last because, in a general way, it underlies all of the applicant's allegations and, because it is without foundation, it also undermines them. The applicant submits that, rather than acting in accordance with the "intent and purpose" of the *Planning Act* and the *Municipal Act, 2001*, "[t]he purpose of the City was simply to obtain the approval of the project, speedily and without interference."

[192] I have already demonstrated that the City did not act to avoid interference or in too much haste. However, even if this were true, the applicant has never identified *why* the City would want to do that. No inference of impropriety arises simply because the City wanted to pass by-laws within the statutory time limits. The submission that the City was in a hurry to pass the by-laws is really only a submission that there is circumstantial evidence that the City had an improper purpose. But what is that purpose? The applicant has never pointed to anything that would motivate the City or Council to act in bad faith. This stands in stark contrast to the cases on bad faith to which I have been referred by counsel in this application.

[193] In *H.G. Winton Ltd.*, the municipality passed a rezoning by-law that prevented a religious organization from practicing its faith in a residential area. The by-law was passed without the usual notice, without the usual public hearing, and without any report from the municipality's planning staff. It was the only amendment that had ever been made to the by-law in question and, once passed, the by-law was the only zoning by-law in the municipality that barred a church in a residential area.

[194] In *Markham v. Sandwich South (Township of)*, 1998 CanLII 5312 (ON CA), council enacted a by-law directed specifically at the appellants to collect tipping fees and to do so retroactively (by eight and one-half years) where there was ongoing litigation in which the municipality was trying to do the same thing. The by-law was passed without notice to the appellants and while a motion for summary judgment was outstanding in the litigation between the appellants and the municipality.

[195] In *Grosvenor*, council enacted a by-law designating a 10.5 kilometre railway right-of-way it had purchased as a "highway" to bring it within an exception to provincial legislation that otherwise would have required the municipality to erect a fence on either side of the right-of-way. The by-law was passed without notice to anyone and given first, second, and third reading in one sitting, just before inspections were to take place under the fencing legislation in question.

[196] In *Wpd Sumac Ridge*, council adopted a resolution to prevent wpd from realizing on permits it had been issued by the province to build wind turbines. The municipality had earlier adopted a resolution calling on the provincial government to reject wpd's planned wind energy project, which required that it obtain the municipality's permission to open, upgrade, and use a particular road. The impugned resolution resolved to deny wpd access to the road when it had never expressed any concerns about access during the process leading to wpd being granted a permit, even though it opposed the application.

[197] In all of these cases, the motive on the part of the municipality to act in bad faith was obvious. As the Court of Appeal said in *Equity Waste Management*, there must be some evidence that a majority of Council acted other than in the public interest. There is no

evidence of that in this case. The only evidence I have before me is that there were good reasons to select either the downtown or the Kingsway sites for the arena/event centre. Choosing one over the other could only be improper if the choice was made for reasons other than the public interest. There is no evidence that the decision of Council was based on anything other than those interests. Indeed, the evidence suggests that the opposite is true.

[198] Therefore, the applicant has failed to demonstrate that the City acted in bad faith.

CONCLUSION

[199] The applicant has failed to establish that there was any statutory breach or that he was denied common law procedural fairness in the process leading up to the passage of the KED by-laws. The evidence relied upon by the applicant, whether considered in isolation or in its entirety, is insufficient to support his allegations of disqualifying bias and bad faith.

[200] The applicant has failed to meet his onus. His application to quash the by-laws must be dismissed.

COSTS

[201] Unless agreed upon, the parties may make written submissions on costs, limited to ten type-written pages excluding attachments, as follows:

(a) the City shall deliver its submissions within 30 days;

(b) the applicant shall have 30 days from receipt of the submissions of the City to deliver responding submissions;

(c) the City shall have 10 days from receipt of the applicant's submissions to deliver any necessary reply.

[202] By virtue of Kurke J.'s order of January 24, 2020 granting Gateway intervenor status, Gateway is not entitled to seek its costs.

Ellies R.S.J.

Released: September 4, 2020

CITATION: Fortin v. Sudbury (City), 2020 ONSC 5300
COURT FILE NO.: CV-19-8313-00
DATE: 2020/09/04

BETWEEN:

TOM FORTIN

Applicant

– and –

CITY OF GREATER SUDBURY

Respondent

– and –

GATEWAY CASINOS & ENTERTAINMENT LIMITED

Intervenor

Released: September 4, 2020