The Application of Section 50 of The Planning Act of Ontario to a Commercial Lease

The Planning Act, R.S.O. 1990, Chapter P.13, (hereinafter referred to as the “Act”) was created to control the division of real estate in Ontario.

“Section 50 of the Planning Act, which in earlier Planning Acts was called section 23, 24, 26 29 or 49, is the main instrument of subdivision control in Ontario. Subdivision control means the control by government of the division of land into smaller parcels.”

Failure to comply with the Act would void the transaction.

The Act has application to commercial leases. In certain circumstances, i.e. shopping or strip centres where there is more than one tenant, a lease is a form of property division as the tenant has the exclusive use of the demised premises for a specified period to the exclusion of all others. In the shopping centre situation, as the landlord owns the property abutting the demised premises, [it could be either a common area for the development or another demised premises], the Act would be applicable.

The Act would also apply where the demised premises and the property abutting the demised premises are owned by the same individual, even though the abutting property may not be leased. For example, a tenant may be the sole tenant of a portion of land, [a land lease or a lease of a building], but the landlord also owns abutting property. Unless the demised premises and the abutting property were each separate lots on a registered plan of subdivision, the Act would apply.

There is a basic prohibition against leases that are for a term of twenty-one (21) years or more [§ 50.(3) and § 50.(5) of the Act]. Failure to comply would void the transaction, [see § 50.(21) of the Act]. For the purpose of this opinion, a lease term of twenty-one years less one day is hereinafter referred to as the “Planning Act Limit”.

The term of a lease is calculated by aggregating the initial grant and all renewals or extensions. A lease of ten (10) years, with three (3) five-year options to extend/renew has a term of twenty-five years. It is irrelevant that the tenant may not exercise any or all of its options. Where the original lease without renewal/extension is less than the Planning Act Limit, and subsequently a separate agreement is reached for a renewal that renews the initial term beyond the Planning Act Limit, the lease may not be a prohibited agreement. However, the intent of the parties is germane. The supplementary agreement must be bona fide and not designed to defeat the Act. In my opinion you can not today sign a lease for the Planning Act Limit, then tomorrow sign another agreement for an extension or renewal beyond this limit. This will be discussed below in Spooner v. Arcand 2.

There are certain exceptions to this prohibition [see § 50.(3)(a), - (g) inclusive of the Act]. Practically, for most tenants the exceptions that would be relevant are:

1. § 50.(3)(a): Where the demised premises is described in accordance with and is within a registered plan of subdivision. A registered plan of subdivision permits the division of land into lots or blocks after approval has been granted through the applicable planning process. Upon registration of the plan of subdivision, these lots and parcels may be leased beyond the Planning Act Limit.

The owner may not however subdivide his lot or parcel. This is prohibited by § 50.(5) of the Act which substantially mirrors the language of § 50.(3), save that it applies to a registered plan of subdivision.

2. § 50.(3)(b): Where the landlord does not own the abutting premises, other than where the demised premises is the whole of one or more lots or bocks within one or more registered plans of subdivision. Where the landlord does not own the abutting property, there is no prohibition. However, a term in excess of fifty years may attract Land Transfer Tax.

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1 Sidney H. Troister, Subdivision Control: Section 50 of the Planning Act, Law Society of Upper Canada, 2003), at page 7-1

2 (1993), 13 O.R. (3d) 835 (Ontario Court General Division)
3. § 50.(3)(f): The consent of the applicable authority has been obtained. § 50.(1)(f) of the Act provides the definition of “consent”. By applying to the applicable authority, the landlord could obtain “consent” for a term beyond the Planning Act Limit. A tenant should ensure that any lease with a term in excess of this limit contains a clause that requires the landlord to attempt to obtain such consent.

An exception specific to leases is provided in § 50.(9). This exception was introduced in a 1983 amendment to the Act, and states:

“50.- (9) Nothing in [§ 50.(3) and (5)] prohibits the entering into of an agreement that has the effect of granting the use of or right in a part of a building or structure for any period of years.”

Though leases can be a form of subdivision of property, due to the planning process required to develop and approve the building or shopping plaza, there is no prohibition. The building or shopping centre is;

“in theory, … akin to the plan of subdivision; the building has received prior approval and once built, its use is fixed and its further subdivision to rented units is irrelevant to the municipalities planning concerns and is in fact within its expectation.”

Litigation has arisen over the meaning of what constitutes ‘part of a building or structure’. The decision in *Favot v. Children's Aid Soc. For Dists. Of Sudbury and Manitoulin* which preceded the introduction of [§ 50.(9)] assisted in its subsequent interpretation. In *Favot*, the landlord constructed a two storey building and exterior parking on a parcel of land. The 1967 lease indicated that the demised premises constituted the entire parcel owned by the landlord though the parties acted as if the tenant only leased the top two floors, with use of a basement vault and parking. The landlord used or leased the balance of the building. Even though the demised premises was only one of several premises leased in the building, as the building had been constructed in accordance with all required approvals, the court held that the lease did not contravene the then portion of the Act which was similar to today’s § 50.(3).

*Favot* was used in the decision in *Westway Plaza Inc. v. TD Bank*. In *Westway*, pursuant to a 1972 lease, the TD Bank leased an end unit in a strip plaza for a term of twenty-one (21) years, plus a renewal for ten (10) years. In 1979 with the consent of the landlord, the TD Bank built a second storey at the back of the leased premises. There was no common interior mall connecting the TD Bank premises with the balance of the premises in the plaza. The applicant Westway Plaza Inc. purchased the shopping plaza and had requested and received a lease acknowledgement from the TD Bank. In 1985 the applicant tried to terminate the lease by arguing that as the TD Bank lease was:

“not a lease of one portion of the building as it is self-contained and that one should consider this portion rather than the whole of the commercial property”

this offended the abutting land prohibition contained in § 50.(3) of the Act. Therefore, the lease was void, as its term was beyond the Planning Act Limit. TD argued that although the premises were self-contained, they should be considered part of the entire development.

Mr. Justice Hollingworth sited *Favot* and the comments of Mr. Justice O'Leary in the unreported decision in *Cardiniere Atlantic Improvements & Shipping Co. S. A. v. Royal trust Co.*, Ontario H. C., August 15, 1977:

“where he [Justice O’Leary] stressed that the purpose of the significant provisions of the Planning Act:

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3 S. O. 1983, c 1
5 9, (1986) 41 R. P. R 9 (Ontario H. C.)
6 Sidney H. Troister, in *The Law of Subdivision Control in Ontario*, 2d ed. (Toronto: Carswell, 1994), at page 220, states that the; “leased premises appear to be a free standing building in the strip plaza”. However, I have been advised by a relative of a principal of the applicant and at that time and currently, the TD Bank is an end unit of the plaza and attached to the building, though there was no interior mall access to the adjoining tenant.
7 supra, Mr. Justice Hollingworth at page 12
8 supra, Mr. Justice Hollingworth at page 12
“[was] ... to ensure orderly land development on appropriately sized parcels”.

He further to took extreme exception with this application and stated, at page 13:

“... it is appalling that a landlord would interfere on the acknowledgment of the terms of
the lease and who, after buying a property with a valid and subsisting lease, turns around
and says that the lease is illegal. This is a case which offends the sensibilities of the
Court.”

He then relied upon § 49.(9) of Act [now § 50.(9)], and held that the leased premises were part of a
building or structure. He further relied upon the principle of estoppel.

In Re Sears Canada Limited and Scarborough Town Centre Holdings Inc. et al. Sears had taken an
assignment of five leases, with terms in excess of fifty years. Each lease was in a large shopping centre
and included a right to an exclusive exterior selling area and use of the parking lot. The initial tenant for
each lease was required to construct and maintain the premises, though each premises was part of the
shopping mall and had direct access to the balance of the centre through a common interior mall. Mr.
Justice Macfarland held that § 50.(9) was applicable. He reasoned that the shopping centre itself had to
endure an extensive approval process before being permitted to be constructed, and that to the public the
leased premises were part of the entire development, with access thereto from a common mall. Further,
the outdoor selling area and parking rights were only ancillary to the primary lease provisions.

What is the application of the Act where the tenant leases a free standing pad in a commercial
development. As at this writing I have not located any case which deals specifically with this situation. In
Sears there was common mall access with exclusive rights to exterior premises. In Westway there was no
interior mall, but the premises were an end cap. Both premises, however, were part of the building of the
shopping centre and consequently; “a part of a building or structure” as required by § 50.(9) of the Act.

Strictly interpreting § 50.(9) of the Act, as a free standing pad is not; “part of a building or structure”,
arguably a lease in excess of the Planning Act Limit would be prohibited. Alternatively, you could argue the
reasoning of Mr. Justice O’Leary in Cardiniere that as the development in which the free standing pad is
located had to undergo an extensive approval process, it would not be contrary to the intent of the Act.
However, as this is unresolved, a tenant must take the position that a free standing pad in a
commercial development is contrary to the Act, and include in its lease document provisions that
would maintain the lease integrity in the event that the term was challenged. It would be prudent for the
tenant to attempt to obtain consent to the lease from the applicable authority pursuant to § 50.(3)(f) of the
Act.

Non Compliance with the Act

Non compliance with § 50 of the Act is fatal to the disposition. To prevent a transaction from being void ab
initio, the transacting documentation must contain an express condition that such agreement is to be
effective only if the provisions of § 50 of the Act are complied with. § 50.(21) of the Act states:

“(21) An agreement, conveyance, mortgage or charge made, or a power of appointment
granted, assigned or exercised in contravention of this section or a predecessor thereof
does not create or convey any interest in land, but this section does not affect an
agreement entered into subject to the express condition contained therein that such
agreement is to be effective only if the provisions of this section are complied with.”

§ 50.(14) of the Act permits a consent to retroactively legitimize a conveyance or interest in land. In Bluestone v. Enroute Restaurants Inc. a previous owner of several abutting parcels of land leased
one of the parcels to Enroute for a term of twenty years, with a ten year right of renewal, in obvious
contravention of § 50.(3). Two individuals personally guaranteed the obligations of Enroute. Subsequent
to the sale of the land Enroute defaulted on its lease and vacated the premises. In its statement of
defence Enroute argued that the lease with a term in excess of the Planning Act Limit, was void. The
applicant after applying to the City of Windsor for its consent to convey the demised parcel from itself to

10 45 O. R. (3d), O. R. 474, (Ontario Court General Division)
11 18 O. R. (3d), O. R. 461, (Ontario C. A.)
itself, [writer’s emphasis] registered the conveyance and consent on title. It was the applicant’s position that the consent and registration had the effect of retroactively legitimizing the previously prohibited lease.

“The appellants argue that the effect of [§ 50.(14) of the Act] is to validate, retroactively, all prior transactions in respect of the land that contravened [the Act]”

As Mr. Justice Catzman stated at page 489:

“No general policy concerns militate against the construction the appellants urge us to put upon [§ 50.(14) of the Act]. The starting point in the present case is an agreement to lease which – apart from Planning Act considerations – is conceded to have been legal and enforceable. Because it contravened the Planning Act, it did not create or convey any interest in land. But a subsequent conveyance with consent can remove retroactively as well as prospectively, the only consequence the Planning Act ever imposed upon the contravening agreement, [being as provided § 50.(21) of the Act, that the agreement or instrument did not create or convey any interest in the land]. That consequence, and that consequence alone, is what [§ 50.(14) of the Act] addresses. Once that consequence is removed, there remains no Planning Act impediment to the legal effect of the agreement; and if the agreement was otherwise legal and enforceable, once the impediment to its enforcement is gone, none remains”.

Term of the Lease

In *Spooner and Arcand* a twenty (20) year lease was executed, with a purchase option. Seven years later the applicant gave notice of its intention to exercise the option and made application for consent pursuant to the Act to the applicable authority. Recognizing that this consent may be refused, the parties agreed to a transfer of additional land to the applicant, as well as to a renewal of the lease for an additional twenty (20) year period. After the consent was refused, the applicant exercised the renewal option, but this was rejected by the respondent on the basis that it contravened the Act, as the lease had a total term of forty (40) years.

The court held that there were two (2) distinct agreements. Although the second lease referenced the first lease and was to commence immediately upon the expiration of the first lease, in the court’s opinion, the second agreement was primarily designed to cause a sale of the property. The renewal contained therein was supplementary if such sale was not possible. The renewal and the initial lease were not from the same transaction. The court found no evidence that the intent of the transaction was to circumvent the Act.

Note the difference between a renewal and an extension as this may impact on any renewal or extension as of and from the twentieth (20th) year. When a tenant exercises its right to renew and that renewal term commences, a new lease is created. *Spooner and Arcand* has established that a bona fide, separate agreement that results in the term going beyond the Planning Act Limit is acceptable. However, in this case the second agreement was a renewal of the initial agreement. A renewal of a lease, is not a continuation of the initial lease, but a separate and distinct agreement. As Harvey Haber, Q.C. noted in *Landlord’s Rights and Remedies in a Commercial Lease*:

“A lease that is renewed for an additional term beyond the original term stops for an “instant” at the end of the original term, prior to the commencement of the renewal term; that is, the renewal creates a new lease.”

An extension of the lease creates a continuous tenancy, there is no break from the initial term. Would the decision *Spooner and Arcand* been different if the second agreement was an extension agreement, though bona fide and distinct? Arguably if the lease was extended beyond the Planning Act Limit, it could be contrary to the Act.

12 Bluestone v. Enroute Restaurants Inc, supra, at page 487
13 supra
15 supra
17 supra
To prevent this, any subsequent agreement should be drafted in the form of a renewal not extension. Note however that while a renewal incorporates most of the terms in the initial lease, covenants that are personal to the tenant and that ‘do not run with the land’ are not incorporated into the renewal term, unless specifically stated so in the renewal agreement. A personal covenant would be, for example, an option to purchase the land, or an option to lease additional land. Consequently, when drafting the renewal agreement, ensure that specific provisions contained in the initial agreement are incorporated into the renewal agreement. Do not use generic language such as “and all terms and conditions as contained in the initial lease are incorporated into this agreement in full“. Recite in full those personal provisions that you want to continue, such as an option to purchase.

Conclusion

A. A tenant’s lease should contain the following:

i. Where the term is in excess of the Planning Act Limit, a clause that requires either the tenant or the landlord to attempt to obtain Planning Act consent, as follows:

“Immediately upon the execution of this Lease, the Landlord at its cost, agrees to use its best efforts to obtain from the appropriate municipal authority the consent of that authority to the Term of this Lease, plus all renewals or extensions thereof, and to advise the Tenant forthwith upon request, the status of such application.”

or

“The Landlord hereby agrees to and authorizes that the Tenant may apply to the appropriate municipal authority on behalf of the Landlord for that authority’s consent to the Term of this Lease, plus all renewals or extensions thereof, and the Landlord agrees to execute and return to the Tenant within ten days of receipt, all documents required for such consent to be obtained.”

ii. A clause adopting the provisions of § 50.(21) of the Act, as follows:

“It is a condition of this Lease that the subdivision control provisions of the Planning Act (Ontario), and amendments thereto, be complied with if they apply. If the provisions of the Planning Act do apply, then until any necessary consent to the Lease is obtained, the Term (including any renewal or extension thereof) and the Tenant's rights and entitlement granted by this Lease are deemed to renew or extend for a period not exceeding twenty-one (21) years less one (1) day from the Commencement Date.”

iii. A clause that would excise from the lease any provision that is found unenforceable or illegal, as follows:

“If for any reason whatsoever any term, covenant or condition of this Lease, or the application thereof to any Person or circumstance, is to any extent held or rendered invalid, unenforceable or illegal, then such term, covenant or condition:

(i) is deemed to be independent of the remainder of the Lease and to be severable and divisible therefrom, and its invalidity, unenforceability or illegality does not affect, impair or invalidate the remainder of the Lease or any part thereof; and

(ii) continues to be applicable to and enforceable to the fullest extent permitted by law against any Person and circumstances other than those as to which it has been held or rendered invalid, unenforceable or illegal.

Neither party is obliged to enforce any term, covenant or condition of this Lease against any Person, if, or to the extent by so doing, such party is caused to be in breach of any laws, rules, regulations or enactments from time to time in force.”
B. If the lease has already been executed a tenant may be able to apply for consent to the transaction, which if granted would legitimize the transaction.

C. When drafting a renewal agreement, ensure that any provision contained in the initial agreement that may be considered personal, is recited in full in the renewal agreement.

D. If the landlord does not own abutting property, and the demised premises are the entire parcel there is no prohibition against a lease in excess of the Planning Act Limit. However, note that Land Transfer Tax may apply if the term is in excess of fifty years.

E. If the demised premises are an entire parcel or lot, and are part of a registered plan of subdivision, there is no prohibition against a lease in excess of the Planning Act Limit.

F. If the demised premises are part of a building [i.e. an in line store or end cap] in a commercial development which contains other demised premises, there is no prohibition against a lease in excess of the Planning Act Limit. I still recommend that the lease contain the provisions noted in paragraph A, points i, ii, and iii above.

G. If the demised premises are a free standing pad in a commercial development, the Planning Act Limit would probably apply. Therefore, the tenant must obtain the consent of the applicable authority to any lease in excess of the Planning Act Limit.