CITATION: *Frontenac Heritage Foundation v. Homestead Land Holdings Ltd.*, 2022 ONSC 3613
COURT FILE NO.: CV-21-88060
DATE: 17/06/2022

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:	
FRONTENAC HERITAGE FOUNDATION Appellant/Moving Party	Roberto Aburto, Carolina Campos, and David Donnelly for the Moving Party
– and –	
HOMESTEAD LAND HOLDINGS LTD. and CTIY OF KINGSTON Respondents	Timothy Hill, Eileen Costello, and Philip Osterhout for Respondent Homestead Land Holdings Ltd. No one for the City of Kingston
	HEARD: February 25, 2022

DECISION ON MOTION FOR LEAVE TO APPEAL

Justice Sally Gomery

[1] Frontenac Heritage Foundation seeks leave to appeal a decision of the Ontario Land Tribunal on December 3, 2019, granting amendments to a zoning by-law and Kingston's Official Plan. These amendments allow Homestead Land Holdings Limited to take steps to build two high-rise buildings in downtown Kingston. The proposed construction sites are in an area designated for intensification, but within the Kingston's historic Downtown and Harbour Area and in proximity to heritage buildings and designated heritage areas.

[2] Frontenac contends that, in its decision authorizing the amendments, the Tribunal made legal errors on issues that merit consideration by the Divisional Court. Homestead says leave to

appeal should not be granted. The City was active in the Tribunal hearing but takes no position on this motion.

[3] For the reasons that follow, I conclude that the Tribunal did not make any extricable error of law in its decision. Frontenac's motion for leave to appeal is accordingly denied.

Background to the Tribunal's decision

[4] Homestead's proposed development involves erecting two high rise buildings, one residential and the other mixed use, on lots on opposite sides of Queen Street. These lots are in a sector described in Kingston's Official Plan as the Downtown and Harbour Area. The first building would take up the southern half of a block designated on the Plan as Block 3. The second building would take up the entirety of Block 5. The sites are within the North Block Special Policy Area, a four and a half block area targeted for intensification and development in the Plan, and Blocks 3 and 5 are each specifically designated as a Major Development Site.

[5] The Downtown and Harbour Area includes Heritage Conservation Districts such as Market Square, which are subject to stringent limitations on development, and Heritage Character Areas, which enjoy a lesser degree of protection. Neither Block 3 nor Block 5 is adjacent to Market Square or any other Heritage Conservation District. Block 5 is adjacent to the Lower Princess Street Heritage Character Area, and both sites are in the vicinity of other such areas.

[6] The proposed buildings would be erected on brownfield lots, currently used for paid surface parking. Other buildings in the North Block include an indoor stadium, a grocery store, a liquor store, a gym, and two other surface parking lots. The North Block also contains buildings designated as heritage properties. None of the existing buildings are high-rises.

Procedural history

[7] Homestead first submitted its applications for site-specific amendments to Zoning By-Law No. 96-59 (the "Zoning By-Law") in November 2015. It proposed to build a 17-storey tower on a 4-storey podium on Block 3 and a 14-storey tower on a 7-storey podium on Block 5. The proposed redevelopment excited considerable public reaction. Amongst those opposed to the plan

were members of Frontenac, a not-for-profit organization created in 1972 to promote the preservation of Kingston's heritage.

[8] In response to comments received from the public and the City and its consultants, Homestead submitted a revised design proposal in May 2017. When the City failed to make a decision on the applications within the timeline required in the *Planning Act*, RSO 1990, c. P.13, Homestead appealed to the Tribunal.[1]

[9] While the appeals were ongoing, Homestead continued to discuss its plans with the City and their respective consultants. This resulted in a third proposal. This proposal reduced the buildings' floorplates; adjusted their heights so that one building was a total of 19 storeys and the other 23 storeys; added commercial uses on each building's ground floor; reserved space for a municipal art gallery in one building; and modified the design and detailing of the podia façade.

[10] In 2018, Homestead and the City entered into minutes of settlement, further to which Homestead committed to additional design elements and the City dropped its opposition to the proposed development. The minutes foresaw amending the Official Plan to add a new site-specific policy at s. 3.17.66, allowing a maximum height limit for Blocks 3 and 5 consistent with Homestead's proposal. The Zoning By-Law would likewise be amended.

[11] Frontenac continued to oppose Homestead's proposed development. The Tribunal heard Homestead's appeals in February 2019 and dismissed them a few months later. This decision was rescinded in December 2019 following a request for review by Frontenac under s. 35 of the *LPAT Act.* In her decision rescinding the August 2019 decision, the then Associate Chair of the Tribunal found that the Tribunal had misinterpreted the Official Plan, resulting in internally inconsistent findings with respect to the developments' compatibility with it.

---

[1] When Homestead filed its appeals in 2017, the appeal tribunal was the Local Planning Appeal Tribunal constituted under the *Local Planning Appeal Tribunal Act, 2017*, SO 2017, c. 23, Sched. 1 (the "*LPAT Act*"). The *LPAT Act* was later repealed and replaced with the *Ontario Land Tribunal Act, 2021*, SO 2021, c. 4, sched. 6, and the Local Planning Appeal Tribunal was replaced by the Ontario Land Tribunal. None of these changes has any bearing on the issues on this motion. For simplicity's sake I will refer to both the predecessor tribunal and the current tribunal as the Tribunal.

[12] The Tribunal held a *de novo* hearing of Homestead's appeals in Spring 2021. The hearing lasted ten days. A total of 12 witnesses testified: five were called by Frontenac, four by the City, and three by Homestead. All but one had expertise in either heritage planning, urban design, land use planning, or architecture. The Tribunal also received written statements from 16 participants. The evidentiary record was thousands of pages long.

[13] On November 4, 2021, the Tribunal allowed Homestead's appeals for the reasons set out in its decision (the "Decision").

The Tribunal's Decision

[14] In its Decision, the Tribunal framed its consideration of the proposed redevelopment in terms of the need to balance heritage and intensification. To protect and preserve its rich heritage, the City has designated certain areas in the downtown core as Heritage Conservation Districts or Heritage Character Areas. The City has targeted other areas in the same downtown core for growth and intensification, to respond to housing and employment needs, and to contribute to a vital and robust community.

[15] The Tribunal noted that Block 3 and Block 5 are specifically targeted for redevelopment in the City's Official Plan. According to unchallenged expert evidence submitted to the Tribunal, the economic conditions in Kingston's downtown are fragile and Homestead's proposed development is an important component in the City's plans for its economic recovery

[16] After reviewing the history of Homestead's proposed development, the Tribunal turned to what it viewed as the central issue on the application: whether the proposed development was compatible with the City's objective of preserving Kingston's heritage while supporting its growth. Section 2.7 of the City's Official Plan defines "compatible" as "capable of co-existing in harmony, not having an undue physical or functional adverse impact on development in the area, and not posing an unacceptable risk to environmental or human health". The Tribunal stated that the mechanism to assess the compatibility of Homestead's plan was a review of the potential adverse effects it could cause, based on a list of specific potential adverse impacts at s. 2.7.3. In the Tribunal's view, the principal potential impacts, in this particular case, were (1) visual intrusion and height; (2) shadowing and height; and (3) environmental degradation and climate change.

[17] The Tribunal assessed the visual intrusion of the proposed buildings by first considering the height restrictions on new buildings in the Official Plan. It found that the City's Official Plan does not impose a blanket height limit in Blocks 3 and 5. It instead provides that a proposal for buildings that exceed this height must be supported by an urban design study that demonstrates the compatibility of a proposed development with the "surrounding built form context". Homestead had undertaken such a design, which was peer reviewed by the City and resulted in modifications to its original proposal. Taking into account these modifications, and further detailed work contemplated in the minutes of settlement with the City, the Tribunal concluded that the proposed development was compatible with its surroundings.

[18] The Tribunal next considered other aspects of visual intrusion. Frontenac's witnesses maintained that the buildings would have an adverse impact because they would be visible from within the Market Square heritage conservation district; they would disturb pedestrian enjoyment along the street; and they would interfere with views of the water.

[19] The Tribunal acknowledged that the towers would be visible from Market Square. It concluded, however, that they would be neither close enough nor tall enough to have an adverse impact on it. It also found that the proposed buildings would not cross, or impede, any view of Kingston Harbour protected under the Official Plan.

[20] In terms of the pedestrian experience, the Tribunal found that a development based on Homestead's revised design would enhance visual interest on the street and contribute to its animation, due to the redesigned podia, commercial uses on the ground floor of each building, and the inclusion of space for a municipal art gallery in one of them. The Tribunal acknowledged that a passer-by would have to crane their neck to look up to the towers and that this was not conducive to enjoying the streetscape. In the end, though, it was not persuaded that this by itself resulted in an adverse impact, noting that: "Simply being able to see something, or simply knowing that it is there, does not constitute an adverse impact that warrants further modifications or mitigation".

[21] Next, the Tribunal considered whether the buildings would result an adverse impact by shadowing the surrounding area. Homestead had submitted a shadow study with its original proposal, and updated shadow modelling was reviewed by the City before it entered into the

minutes of settlement. The Tribunal found that the shadows cast by the buildings would be comparable to those cast by existing buildings, and that their shadowing effect had been reduced through modifications to the tower placement and reduced floorplate size. It concluded that there were no adverse impacts from shadowing on nearby Heritage Character Areas that would require further mitigation.

[22] The Tribunal's analysis of compatibility under s. 2.7 of the Official Plan ended with its consideration of the development's potential environmental impacts. It found that Homestead would remediate and redevelop two brownfield sites; there are no natural features on the sites or on adjacent lands; and a Record of Site Condition will be required before the City issues a building permit. The amount of parking required meets the City's standard and the new residents in the buildings will have ready access to public transit.

[23] Having found no adverse impacts under s. 2.7, the Tribunal briefly considered an alternative proposal for a shorter building. It noted that its job was not to decide on the merits of alternative proposals, but to assess the applicant's proposal.

[24] The Tribunal considered two cases relied on by Heritage: *Burfoot v. Kingston (City of)*, 2018 CanLII 107780 and *Aurora (Town of) v. Sikura*, [2011] OJ No. 6007, 2011 ONSC 7642.

[25] In *Burfoot*, the Tribunal allowed an uncontested appeal from the City's decision to amend a by-law to permit a proposed development in another area of downtown Kingston. The Tribunal concluded that *Burfoot* was distinguishable. The proposed building site in that case was not designated a Major Development Site and fell within two designated Heritage Character Areas. The appeal also did not involve a proposed amendment to the Official Plan, as is the case here.

[26] The Tribunal also distinguished *Aurora*, a case in which it disallowed a municipality's amendment of its official plan. The Tribunal pointed out that the nature of the decision in *Aurora* was different than that in this case.

[27] Frontenac had argued that the Tribunal should not defer to the minutes of settlement between Homestead and the City and should instead focus on the City's initial failure to make a decision on the proposed development. The Tribunal rejected this argument, reasoning that it was

appropriate to give weight to the City's decision in settling the case given the history of the proposed development and the extensive materials and evidence before it with respect to the parties' negotiations.

[28] The Tribunal considered other statutory requirements that governed its decision.

- It held that the proposed development met matters of provincial interest under s. 2 of the *Planning Act*, such as the conservation of features of significant cultural and historical value (s. 2(d)); the orderly development of safe and healthy communities (s. 2(h)); the provision of a full range of housing (s. 2(j)); the provision of employment opportunities (s. 2(k)); the protection of a municipality's financial well-being (s. 2(l)); the appropriate location for growth and development (s. 2(p)); the promotion of development that supports public transit and is oriented to pedestrians (s. 2(q)); the promotion of well-designed built form (s. 2(r)); and the adaptation to a changing climate (s. 2(s)).

- It reiterated that, in assessing the development, it had considered City Council's decision to enter into the minutes of settlement carefully and fully, as required under s. 2.1 of the *Planning Act*;

- It found that the proposed development was consistent with the 2020 Provincial Policy Statement. The Statement mandates that cities identify areas for intensification, and the City of Kingston had done so by identifying North Block as an area for growth and development and Blocks 3 and 5 as Major Development Sites. Frontenac had argued that the parking in the proposed development was inconsistent with the thrust of the Statement, which emphasizes the need for active transportation and transit-supportive development. The Tribunal repeated that the parking to be provided for both the residential and commercial uses on the site conformed to the City's parking standard.

[29] In reviewing the proposed amendments to the City's Official Plan, the Tribunal held that there were two important policies to be considered in addition to the compatibility criteria it had already analyzed.

[30] The first was policy 9.1.3, which provides that, if section 2 of the Plan is to be amended, the amendment must be considered only in the context of a comprehensive review of the Plan. The Tribunal deemed this policy irrelevant as no such amendment was before it in this case. The Foundation had called an expert witness on planning, who expressed the view that an amendment to s. 2 of the Plan would be required for the Homestead development, because the compatibility requirements in s. 2.7.3 could not be met. The Tribunal rejected this argument, having already found that the criteria in s. 2.7.3 were satisfied.

[31] The second policy considered by the Tribunal was policy 9.3.2, which sets out general criteria to be met for any proposed amendment to the Official Plan. The Tribunal held that these criteria were met, based on its earlier findings, as well as findings that the proposed development supported the City's efforts to protect the economic viability of the downtown core, met the City's interest regarding financial implications of costs and revenues, and would not lead to instability; supported and enhanced existing and planned infrastructure; and was reasonable, appropriate, and did not constitute an undesirable precedent.

[32] Based on all of the foregoing analysis, the Tribunal granted Homestead's appeals from the City's failure to approve its application for redevelopment and modified the City's Official Plan and the Zoning By-Law as proposed in the minutes of settlement between Homestead and the City.

The test for granting leave

[33] Section 24(1) of *Ontario Land Tribunal Act* provides that an order of the Tribunal may be appealed to the Divisional Court, with leave of that court on motion, "but only on a question of law". The scope for an appeal in s. 24(1) is essentially the same as that provided in s. 37(1) of the predecessor statute, the *LPAT Act*. The test for leave was most recently set out by the Divisional Court at para. 31 of *CAMPP Windsor Essex Residents Association v. Windsor (City)*, 2020 ONSC 4612 (Div. Ct.). I adopt that test but would add that the question of law at issue must, to use the Supreme Court of Canada's terminology in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, be "extricable", that is, separate and distinct from any mixed question of fact and law.

[34] The party seeking leave must accordingly persuade the motion judge that:

(1) the proposed appeal raises one or more extricable questions of law; and

(2) if so, there is good reason to doubt the correctness of the Tribunal's decision with respect to the question(s) of law raised; and

(3) if so, the question or questions of law are of sufficient "general or public importance" to merit the attention of the Divisional Court.

[35] If the moving party fails to meet the first part of the test, the analysis ends there. If the moving party establishes that the Tribunal's decision contains one or more extricable errors of law, the court must consider the other two legs of the test.

(1) Does the proposed appeal raise one or more questions of law?

[36] In its written and oral argument on the motion, Frontenac contended that the Tribunal had made two errors of law in the Decision: (1) It failed to read and interpret the Official Plan as a whole; and (2) it incorrectly interpreted s. 9.3.2 of the Plan.

Did the Tribunal fail to read and interpret the Official Plan as a whole?

[37] Pursuant to s. 34(1) of the *Planning Act*, municipal councils may pass zoning by-laws to restrict how land may be used and to prohibit the "erecting, locating, or using of buildings or structures for or except for such purpose as may be set out in the by-law". Such by-laws must conform to matters of public interest set out in the Act (s. 2); provincial policy statements (s. 3(5)), and the municipality's official plan (s. 24(1)). An official plan is not a law, however. Rather, it is the zoning by-law which "must implement or convert the Official Plan into a body of law regulating the use of land and it does so only to the extent that it actually sets forth in its provisions, interpreted in their ordinary sense in light of the policy framework of the official plan and the context of the by-law as a whole": *Aon Inc. v. Peterborough (City of)*, [1999] O.J. No. 1225 (Ont. Gen. Div.), at para. 18.

[38] In an appeal of a site-specific zoning by-law amendment, the Tribunal must assess whether the proposal conforms with the official plan, is consistent with provincial policy, and represents good planning such that it is in the public interest: *Hendry v. Amaranth (Township of)*, 2008

Carswell Ont 428, 58 OMBR 417, at para. 18; and *CRAFT Acquisitions Corporation v. Toronto (City of)*, PL180211, May 12, 2021, at paras. 23-34.

[39] Frontenac argues that, in assessing the conformity of the proposed amendments to the Zoning By-Law and Kingston's Official Plan, the Tribunal focussed exclusively on the compatibility provisions at ss. 2.7 and 3.18.22 of the Plan, instead of balancing the competing broader objectives of the Plan and interpreting it as a whole. Relying on *Avenue Road Eglinton Community Association v. Toronto (City of)*, 2017 CarswellOnt 17388 (OMB), at para. 45, and *South Side Construction v. Ingersoll (Town of)*, 2018 ONSC 6561, at para. 18, it says an official plan must be interpreted holistically and harmoniously with the scheme and object of the plan as a whole, and that sections of the plan should not be considered in isolation. Frontenac contends that the Tribunal ignored these interpretive principles by considering only the potential adverse impacts of the proposed development in isolation.

[40] Homestead does not disagree that the Tribunal is required to read the Official Plan as a whole and balance its stated goals. It contends, however, that the Tribunal did not focus unduly on any part of the Plan and that it appropriately weighed competing objectives. Homestead argues that the possibility of an alternative assessment of the appropriate balance between heritage protection and development does not give rise to an extricable error of law but rather an issue of mixed fact and law.

[41] Frontenac's argument begins with the Court of Appeal's decision in *Niagara River Coalition v. Niagara-on-the-Lake (Town of)*, 2010 ONCA 173. It contends that this decision establishes that "the proper interpretation of an official plan is a question of law".

[42] *Niagara* involved an application to quash a by-law permitting an agreement between the Town of Niagara-on-the-Lake and a jet boat tour operator. The by-law, the successor to two previous similar by-laws, permitted the tour operator to use a town dock to operate a business along the Niagara River. The application judge disallowed the by-law on the basis that the jet boat operation was not an "Existing Non-Complying Use" under the Town's official plan. The Court of Appeal allowed the Town's appeal from this decision.

[43] The context for the Court's statement to this effect is, however, important. The Court found that the application judge had erred in relying on expert opinion evidence to interpret the meaning of an existing non-complying use, because the proper interpretation of an official plan "is not a factual matter to be decided based on opinion evidence from planners, but rather a question of law"; *Niagara*, at para. 43. On a proper interpretation of the official plan, without regard to inadmissible expert evidence, the Court found that the impugned by-law did not fall afoul of the plan.

[44] *Niagara* accordingly does not stand for the blanket proposition that every aspect of a tribunal's interpretation of an official plan gives rise to a question of law. The application judge's reading of the official plan in *Niagara* was a legal error because he relied on extrinsic evidence rather than the language and scheme of the plan itself.

[45] This was clarified by the Divisional Court in its 2020 decision in *IN8 (The Capital) Developments Inc. v. Building Kingston's Future*, 2020 ONSC 6151 (Div.Ct.). In *IN8*, the Local Planning Area Tribunal repealed a site-specific zoning by-law amendment that would have permitted the construction of a 21-storey mixed use building in Kingston's Downtown and Harbour Area that straddled two designated Heritage Character Areas. On appeal, the would-be developer argued that the Tribunal had focussed entirely on heritage considerations and failed to give due weight to the objective of densification and development set out in the Official Plan. The Divisional Court held that the Tribunal's balancing of these competing objectives did not give rise to an issue of law but rather an issue of mixed law and fact.

[46] At para. 21 of *IN8*, the Divisional Court noted that, in *Niagara*, the Court of Appeal identified the application judge's reliance on extrinsic as an error of law, but had also held that:

> [I]ssues about compatibility of uses – evaluating the evidence in the context of the context of the official plan - are questions falling within the competence of the Board; in other words, it was not a question of law. In most cases the question of conformity to an official plan is a planning decision based on fact and policy, when the court would rarely intervene.

[47] The Divisional Court went on to find at para. 24 that:

> Official plans often set out competing objectives, and the various policy goals set out in an official plan must be balanced in the context of a specific proposal. The relevant extracts of the City of Kingston Official Plan contained in the appeal book are 256 pages long, with general policies as well as special policies applicable to special policy areas and secondary plans. The Tribunal properly identified the relevant Provincial Policy Statements and Official Plan policies. The decision about balancing the competing policy objectives – for example, the compatibility of development and heritage with those relating to growth and intensification– are questions of mixed fact and law and discretion, not questions of law subject to the correctness standard.

[48] On this basis, the Court rejected the developer's argument that the tribunal's gave rise to an error of law attracting the court's jurisdiction under s. 37 of the *LPAT Act* (at para. 25 of *IN8*)

> Read as a whole, the decision makes clear that the Tribunal identified and considered the applicable provincial and municipal policies; it did not err in law in interpreting the policies. The Tribunal then balanced the permissive nature of intensification policy with the restrictive confines of heritage policy and the importance of the heritage character in this part of downtown Kingston in arriving at its decision. This was a reasonable decision open to the Tribunal on the facts, and in the context of the law and policies applicable to the development. There was no error of law in the Tribunal's interpretation of the Official Plan.

[49] I reach the same conclusion in this case.

[50] It is true that the Tribunal devoted part of its analysis (four of sixteen pages) to its consideration of whether Homestead's proposed development gave rise to potential adverse impacts set out at s. 2.7.3 of the Official Plan. This is understandable because Frontenac's objections to the development centered on its height. This analysis was not, however, a substitute for a full balancing of the Plan's broader objectives or a proper interpretation of the Plan as a whole. On the contrary, a careful reading of the entire Decision indicates that the Tribunal was, throughout its assessment, fully alive to the need to consider the Plan's overall objectives, including the need to preserve Kingston's distinct heritage.

[51] As mentioned earlier, the Tribunal's entire analysis was framed by its recognition of the need to balance heritage and intensification. The premise for its Decision is summarized at paragraphs 25 and 26 of its Decision:

> Communities are not static; they evolve. The conservation of cultural heritage resources brings the past into the present and helps shape the physical expression of a community. Growth and intensification respond to the community's current needs and planned function for the future; they also help shape the physical expression of a community.
>
> In planning for both heritage and for growth, the challenge is to find the right balance to achieve both elements of a community's ambition. The compatibility provisions in the OP, the applications of which have informed the proposals now before the Tribunal, are the mechanism used by the City to achieve that balance.

[52] The Tribunal achieved this balancing by referring throughout its reasons to the need to ensure that the proposed development was consistent with both heritage preservation and the other stated goals in the Official Plan and conformed to other statutory and policy criteria.

[53] At the beginning of its Decision, the Tribunal described the steps taken by the City of Kingston to protect and preserve historical areas and buildings and how the goal of preserving heritage co-existed with the goal of development within the downtown core. It noted that "not all identifications of heritage areas and properties have equal protection" and that, by providing a range of protections, the City "has recognized the differences between various cultural resources and responded accordingly".

[54] The Tribunal noted that the proposed development was on sites specifically targeted for development and intensification, within an area of downtown that historically was used for industrial purposes. At the same time, it acknowledged that Blocks 3 and 5 contain some designated heritage properties, and they are in proximity to the Market Square and Old Sydenham Heritage Conservation Districts, the Lower Princess Heritage Character Area, and the harbour.

[55] The Tribunal also reviewed the evolution of the Homestead proposals and the revisions made that led the City to sign minutes of settlement. It noted that the development is "intended to contribute to meeting the City's housing supply needs, provide a mix of employment and residential uses, and be transit supportive", as its location "encourages walkability and active transportation". It highlighted how Homestead had revised its plans in response to the comments by the City and its consultants and observed that the minutes of settlement included additional design elements addressing colour and materials for the final design.

[56] All of these findings and analysis preceded the Tribunal's analysis of the potential adverse impacts listed in s. 2.7.3 of the Official Plan. In the course of that analysis, the Tribunal specifically considered the development's compatibility with its surroundings, including the harbour, the Market Square Heritage Conservation District, and other Heritage Conservation Districts and Heritage Character Areas.

[57] The Tribunal's consideration of the compatibility of the proposed development with the preservation of Kingston's heritage did not end there. In assessing whether the proposed development met the goals set out in s. 2 of the *Planning Act*, the Tribunal turned its mind to the need to conserve features of significant cultural and historical value. It also assessed whether the development met the general criteria set out in s. 9.3.2 of the Official Plan, which includes, at sub (c), "the compatibility of the proposal … with adjacent and planned uses, including cultural heritage resources and natural heritage features and areas".

[58] Finally, on the basis of its entire analysis and findings, the Tribunal concluded that the proposed amendments to the Official Plan conformed to the general intent and philosophy of the Plan as a whole.

[59] According to Frontenac, the Tribunal clearly did not read the Official Plan as a whole, or properly define what constitutes "visual intrusion", because it found that the proposed towers were compatible with the surrounding area even though they will be significantly taller than any other building around them. Frontenac states that "on a complete reading of the OP, it is clear that excessive height in the Downtown and Harbour Area constitutes a visual intrusion". It contends that the "predominantly low-rise and human scale of this area forms part of the heritage character of the streetscape", and that this is recognized in the Plan at s. 10A "with the implementation of a maximum height limit of 25.5m downtown, after angular plane setbacks".

[60] There are two problems with this argument.

[61] First, as the Tribunal correctly found, the plain language of s. 10A does not impose an absolute maximum height limit of 25.5 metres for new construction in downtown Kingston. Section 10A.4.6 governs the height of new buildings in various parts of the Area and strictly limits the height of new buildings in the Market Square Heritage District. In the North Block, new

buildings generally cannot be higher than 25.5 metres, but s. 10A.4.7 creates an exception to this rule:

> Notwithstanding the above provision related to height, if a site-specific urban design study, presented to the public, clearly indicates to the satisfaction of the City, that a taller building is compatible with the massing of surrounding buildings, does not create unacceptable amounts of shadowing, and meets the land use compatibility policies of Section 2.7 of this Plan, a greater height within a specified building envelope may be approved.

[62] This exception is reiterated in s. 3.18.22 of the Official Plan, which deals with the North Block.

[63] Second, taken to its logical extreme, Frontenac's interpretation of the imperatives of the Official Plan would preclude the construction of any high-rises in the Downtown and Harbour Area, because any such building would be inconsistent with the heritage character of the streetscape. This would frustrate, or at least substantially limit the potential for intensification and development, also recognized as goals within the Official Plan, in particular with respect to the North Block.

[64] Frontenac contends that I should give weight to the reasons give by the then Associate Chair of the Tribunal for rescinding the Tribunal's first decisions on Homestead's appeal in 2019. The standard for setting aside a decision under s. 35 of the *LPAT Act* is not the standard for granting leave to appeal under s. 35 of the *Ontario Tribunal Act*. In any event, the hearing giving rise to the Decision, now at issue, was a *de novo* hearing resulting decision based on fresh evidence. As a result, the Tribunal's earlier decision, and the reasons for setting it aside, are irrelevant on this motion.

[65] Finally, Frontenac contrasts the length of the Tribunal's analysis in this case with its analysis in *IN8* and finds it lacking. There is no minimum word or page requirement for the Tribunal's Decision, nor is it required to list every policy it considers in reaching a decision. As observed at para. 58 of *CAMPP Windsor Essex*:

> The Tribunal is not required to expound upon "how" it arrived at its conclusion in a "watch me think" fashion. In other words, a detailed description of the Tribunal's

> process in arriving at its decision is unnecessary. When explaining the basis for its decision and its logical link to the decision itself, the Tribunal is not required to: set out every one of the findings or conclusions it reached in arriving at its ultimate decision; expound upon evidence which is uncontroversial; detail its findings on each piece of evidence or controverted fact; or recite well-settled legal principles, where the ultimate result turns on the application of such principles to the facts, as found after a consideration of conflicting evidence.

[66] Frontenac's criticisms of the Decision do not illustrate that the Tribunal failed to read the Official Plan as a whole, or that it failed to consider any relevant part of the Plan. Its decision was based on its appreciation of the evidence and its application of that evidence to Homestead's appeal. The mere fact that it could have reached a different conclusion does not imply that it may have made an extricable error of law.

Did the Tribunal incorrectly interpret s. 9.3.2 of the Official Plan?

[67] Frontenac contends that the Tribunal incorrectly interpreted s. 9.3.2 of the Official Plan, because "it failed to consider independently whether the proposed [amendment to the Plan] conformed to the general intent and philosophy of the OP, particularly the vision and planning principles within the OP". Frontenac argues that the Tribunal gave no consideration to subpara. (a) of s. 9.3.2 and it provided only summary conclusions on the other listed grounds.

[68] I do not accept this argument.

[69] Section 9.3.2 requires that an application to amend the Plan will be evaluated on a number of criteria. Further to subpara. (a), an evaluation must consider "the degree of conformity of the proposed amendment to the general intent and philosophy of this Plan, particularly the vision and planning principles, including sustainability, stability and compatibility outlined in Section 2, and consistency with provincial policy".

[70] The criteria in s. 9.3.2, including that at subpara. (a), were addressed in the body of the Tribunal's Decision. The section of the Decision explicitly addressing the criteria in s. 9.3.2 is admittedly brief. This reflects its placement at its very end of the Decision, after the Tribunal had already assessed the compatibility of the Homestead proposal with the provisions of the Official Plan and found that it met statutory requirements and the requirements of the 2020 Provincial

Policy. The discussion of s. 9.3.2. is short because, as stated in paras. 78 and 82 of the Decision, the Tribunal relied on its earlier analysis and findings.

[71] Frontenac's arguments on this point seek to re-litigate issues that it argued unsuccessfully before the Tribunal. It attempts, for example, to revisit the Tribunal's assessment of the compatibility of a high-rise development within a few blocks of the Market Square with the goal of heritage preservation in the Official Plan. The Tribunal's failure to prefer Frontenac's evidence and arguments to those of Homestead and the City does not give rise to an extricable error of law.

[72] Lastly, Frontenac contends that the Tribunal should have rejected the proposed development because, in *IN8* and *Burfoot*, it held that proposals to build high-rise towers in downtown Kingston were incompatible with the Official Plan's objective of preserving Kingston's unique heritage character. There is no general prohibition, either in the Official Plan or in the Tribunal's previous decisions, on the construction of high rises in downtown Kingston. The Tribunal's decisions in *IN8* and *Burfoot* did not obligate it to reject the proposed development in this case. Each case turns on its own facts. The earlier decisions involved other specific sites in the downtown core and different design proposals.

Disposition

[73] As stated in *2072231 Ontario Limited v. The Corporation of the City of London*, 2020 ONSC 4032, at para. 11, "the Tribunal alone has the task of balancing the factual and policy considerations underlying planning decisions. This court's task is limited to ensuring the Tribunal applies the proper legal principles in the exercise of its exclusive decision-making authority".

[74] On a review of the Tribunal's Decision, I do not find that it failed to give proper regard to Kingston's Official Plan in its entirety, or failed to assess the criteria at s. 9.3.2, or made any other extricable error of law. The Tribunal made a reasonable decision open to it on the evidence and in the context of the law and policies applicable to Homestead's proposed development.

[75] Since Frontenac has not satisfied the first part of the test under s. 24(1) of *Ontario Land Tribunal Act*, I need not consider the second and third part.

[76] The motion for leave to appeal is denied. If the parties are unable to agree on costs, each of them may serve and file costs submissions within the next ten days. The costs submissions may not exceed three pages in length and should attach a draft bill of costs and any other document strictly relevant to the court's consideration of costs.

Justice Sally Gomery

Released: June 17, 2022

CITATION: *Frontenac Heritage Foundation v. Homestead Land Holdings Ltd.*, 2022 ONSC 3613
COURT FILE NO.: CV-21-88060
DATE: 17/06/2022

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FRONTENAC HERITAGE FOUNDATION

Appellant

-and-

HOMESTEAD LAND HOLDINGS LTD. and CTIY OF KINGSTON

Respondents

DECISION ON MOTION FOR LEAVE TO APPEAL

Justice Sally Gomery

Released: June 17, 2022