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DEVELOPER WINS CASE AGAINST A MONTREAL BOROUGH AFTER IT REFUSES TO ISSUE A CONSTRUCTION PERMIT IN THE CONTEXT OF A SITE PLANNING AND ARCHITECTURAL INTEGRATION PROGRAM (SPAIP)

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The Superior Court of Quebec [1] recently rendered a decision about the exercise of a borough council's discretion in connection with the analysis of an application for a construction permit in a neighbourhood that is subject to the site planning and architectural integration program process ("**SPAIP**", or "PIIA" in French). The Court allowed the aggrieved developer's claim, finding that the borough made its decision to refuse to issue the permit based on irrelevant considerations and that it unreasonably erred in its analysis of the project.

One important lesson developers can learn from this decision is that, while it is in their interest, in an SPAIP context, to welcome a city's suggestions concerning the project, the city cannot impose an "ideal" project on a developer, and must be sensible in its expectations.

For several years, the *Act Respecting Land Use Planning and Development* has given municipalities (or in the case of Montreal, boroughs) the power to "subordinate the issu[ance] of a building or subdivision permit or a certificate of authorization or occupancy to the approval of plans relating to the site and architecture of the constructions or the development of the land and related work.[2] To do so, the municipality must adopt a by-law which must, among other things, "determine objectives regarding site planning and the architecture of constructions or the development of the land, and set out criteria permitting to assess whether the objectives have been achieved."[3]

Relying on this power, the Plateau Mont-Royal borough adopted the *Règlement sur les plans d'implantation et d'intégration architecturale* (By-Law 2005-18, hereinafter "the **By-Law**") in 2005.

The permit application in issue was filed in the fall of 2019. The real estate project involved was a multi-storey residential building consisting of lofts. The project, which was wholly compliant with the applicable zoning by-law, required no variances, be it in relation to the floor space ratio, the implementation rate, the setback distances or the number of floors. Moreover, to design the project, the developer used an architect familiar with

the area.

According to the By-Law, the project first needed to be considered by the borough's Direction du développement du territoire et des études techniques ("**DDTET**"), then by the Comité consultatif d'urbanisme ("**CCU**"), and subsequently the borough council for a decision by way of resolution. The CCU (urban planning advisory committee) consists of 13 members, including three elected members as well as planning, architecture and urban development professionals.

After an initial analysis of the permit application, the DDTET notified the CCU in January 2020 that its opinion was unfavourable. The DDTET stated that four elements in particular needed to be revised in order for the project to be acceptable, notably with respect to architecture, materials and site history.

The CCU agreed with the DDTET's analysis and also issued an unfavourable opinion, essentially for the same reasons.

The developer then undertook a dialogue with the borough, which lasted several months. The Court noted that the developer listened to the borough's suggestions and modified its project to take several of them into account. For example, based on the findings of a historical study commissioned at its expense, the developer had the architect design a new facade evocative of the situation that had prevailed beforehand.

These discussions led the Court to find: [TRANSLATION] "Based on the discussions as a whole, [the developer]and his consultant felt the borough was aiming for a certain ideal. He was even invited to sell. In other words, the expectations of the developer, which had submitted a project fully compliant with zoning and was concerned about building and integrating harmoniously from an architectural point of view in a very architecturally diverse area, counted for very little. The priority was to achieve a certain kind of project, which was idealized and yet not well-defined. In short, the city was prepared to wait for the right project. The city encouraged the developer to "get its architect to work on it" while imposing a certain vision of what was required."

The developer submitted an amended project in October 2020. In December 2020, the DDTET once again issued an unfavourable opinion, to which the CCU concurred. In March 2021, the borough council refused to issue a permit. Its decision reads:

> WHEREAS, in its sittings of January 14 and December 1, 2020, the urban planning advisory committee (CCU) issued an unfavourable recommendation concerning the proposal, in accordance with the *Règlement sur les plans d'implantation et d'intégration architecturale* (2005-18);
>
> WHEREAS the proposal fails to comply with several objectives and criteria in By-Law 2005-18, specifically intervention fact sheet no. 1 regarding extensions and new constructions, notably criteria 1, 4, 12, 20, 21, 23,

> 24, 28, 30 and 32, as specified in the decision summary, and, as a result, the proposed building, in its architectural design and its relationship with the existing architectural environment, lacks finesse and does not fit in harmoniously with the adjacent buildings or draw inspiration from their tone;
>
> WHEREAS the proposed building, in its architectural design and relationship with the existing architectural environment, does not fit in harmoniously with the adjacent buildings or draw inspiration from their tone;
>
> AND CONSIDERING the compliance attestation issued by the director and his team at the Direction du développement du territoire et des études techniques (DDTET).
>
> It is [...] resolved :
>
> To refuse the drawings [...] subject to the application for permit number [...].
>
> UNANIMOUSLY ADOPTED

Let us now review the Court's main findings.

The Court began by noting that the power of municipalities to adopt a by-law concerning SPAIPs enables them to implement a system by which they can exercise ***qualitative*** oversight over a real estate project (as opposed to a purely quantitative or mathematical analysis). In the Court's opinion, this power is discretionary. In exercising that discretion, the borough council, [TRANSLATION] "in applying the factors it must take into consideration, exercises the responsibility to ascertain and differentiate between what is legitimately part of the mandate conferred to it and what falls outside that mandate." Even if it is in good faith, it cannot base its decisions on irrelevant considerations that fall outside its mandate.

The Court then distinguished between the power of the borough council and the power exercised by a sole individual. The council's power must be exercised collectively. Consequently, it was the Court's role to [TRANSLATION] "examine the process in a more comprehensive way" and thereby [TRANSLATION] "consider whether the decision-making process as a whole was tainted by the defect alleged." In other words, [TRANSLATION] "it must assess which factors were determinative in the decision." "If the factors are not pertinent, the decision will be found unreasonable, even if it was discretionary."

The Court held that the borough council's decision to refuse to issue the permit for which the developer had applied was unreasonable for two categories of reasons: [TRANSLATION] "Firstly, the decision is tainted by an intent to impose a certain ideal on the developer, which went beyond the factors that are supposed to be taken into account. Secondly, the decision contains certain unreasonable errors which were clearly determinative in the refusal to grant a permit."

With respect to the first category of reasons, the Court found that the By-Law does not permit the borough to demand a project [TRANSLATION] "of excellent quality" or perhaps even the [TRANSLATION] "best project", notably [TRANSLATION] "with respect to scale, implementation, physical characteristics and height, in keeping with the immediate surroundings." The Court acknowledged that a project that complies in every respect with density rules and other urban planning requirements is not guaranteed a favourable outcome in the SPAIP analysis, but added that, in applying that qualitative framework, one cannot ultimately impose certain additional constraints to it. In particular, having considered the evidence, the Court found that the decision was made [TRANSLATION] "based on an impression that the project "was not contributing to the advancement of the surroundings" and was "not consistent with the orientations, plans and policies" – considerations that went beyond the vocation of the SPAIP framework.

Noteworthy among the factors supporting this finding are that the borough invited the developer to draw inspiration from other buildings on the street even though those buildings were subject to different zoning, and that the DDTET openly declared that it was prepared to wait years for a project on the site that would garner municipal approval. To sum up, the Court found that

[TRANSLATION] "the city had ideas, which became suggestions, which became expectations, and which ultimately were criteria based on which [the permit] was denied."

As for the second category of reasons, the Court found that the decision was tainted by palpable errors of assessment. Among other things, the city criticized certain aspects of the revised project which the developer actually proposed with the aim of meeting the city's requirements. For example, the borough criticized the developer for not having made provision for [TRANSLATION] "appropriable outdoor spaces accessible from a living space." And yet, the proposed solution – one balcony for each unit, combined with a rooftop terrace that includes vegetation – was rejected by the borough despite being the most realistic solution under the circumstances. Indeed, a green space for each dwelling unit would simply not be realistic. The Court made the following comments regarding this example:

[TRANSLATION] "Even when a decision-making power is discretionary, one cannot demand the impossible" and "a manifest defect in logic must be sanctioned."

The Court sums up its reasoning as follows: [TRANSLATION] "This is not a mere debate over good taste in which it is not the Court's role to intervene. The Court finds that the borough council, relying on the opinions of the DDTET and the CCU, simply did not acknowledge the developer's efforts to reflect the historical tone of the three original lots and to harmonize the facade materials with the environment."

This decision should provide some measure of reassurance for developers whose projects are subject to a SPAIP. Specifically, the Court provides them some guidance that should help them better interpret comments

and opinions made by municipal government representatives, and take appropriate action based on those comments and opinions.

[1] *3470 Parc inc.* c. *Ville de Montréal* (arrondissement du Plateau-Mont-Royal) 2022 QCCS 3775.

[2] *Act Respecting Land Use Planning and Development*, CQLR, c. A-19.1, s. 145.15

[3] *Act Respecting Land Use Planning and Development*, CQLR, c. A-19.1, s. 145.16.

by Martin Thiboutot

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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