CITATION: Danforth (London) Ltd. v. London (City), 2018 ONSC 4203
COURT FILE NO.: 422/17
DATE: 20180705

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DANFORTH (LONDON) LTD.	)	
Plaintiff	)	*F. Scott Turton*, for the plaintiff/responding party
– and –	)	
THE CORPORATION OF THE CITY OF LONDON	)	*Geoffrey P. Belch and Danilo Popadic*, for the defendant/moving party
Defendant	)	
	)	**HEARD:** April 9, 2018

GRACE J.

A. Overview

[1] Danforth (London) Ltd. ("Danforth") acquired a vacant parcel of land in the downtown core of London, Ontario in the latter part of 2014 for the purposes of development. In early 2015, Danforth communicated its proposal to the municipality through the planner it had retained. Soon afterward a related company made application for an amendment to a City of London zoning by-law. During the process that followed, staff employed by the Corporation of the City of London ("City") asked for allowances that would accommodate a proposed rapid transit ("RT") route that was then under consideration. Unwilling to proceed on that basis, the related company withdrew its application in October, 2015. Danforth's lands continue to be undeveloped.

[2] On May 16, 2017, the City's municipal council passed a resolution approving a plan that contemplates a different path for the proposed RT system. Danforth claims that the development it proposed in 2015 would have proceeded had the City made its routing decision earlier. It alleges the City was negligent or alternatively, failed to act fairly and in good faith insofar as the plaintiff is concerned in the exercise of its discretionary authority relating to planning and transit. Danforth's amended claim seeks $53 million in damages.

[3] In this motion, the City posed four questions and based on the answers it seeks, asks the court to grant summary judgment dismissing the action. In essence, the City maintains that a trial is not required for the court to conclude that Danforth has no claim either in negligence or based on the unfair or bad faith exercise of a discretionary statutory power. For the reasons that follow, I agree that this action does not involve a genuine issue requiring a trial.

B. The Background

[4] Most of the background is well documented and undisputed.

[5] Municipally described as 195 Dundas Street, the land involved in this proceeding is an irregularly shaped .655 hectare parcel (the "Lands"). Dundas Street is at the northern end. The Lands are also bounded by King Street to the south and Clarence Street to the east. The site once accommodated a shopping centre known as the London Mews. That structure was demolished. The Lands have been used as a commercial parking lot since 1999.

[6] Danforth paid $8.45 million for the parcel when it was acquired on October 27, 2014. Ayerswood Development Corp. ("Ayerswood") is a related company. Anthony Graat is a principal of both companies. He has been in the land development business for more than fifty years.

[7] A rapid transit system has been the subject of discussion and study in the City of London for years. Danforth's materials mention reports and studies delivered to the City by third parties in November, 2010, June, 2011, January, 2012 and May, 2013.[1]

[8] In June, 2014, the City retained a planning and design firm, IBI Group ("IBI"), to conduct a Rapid Transit Environmental Assessment.

[9] On January 8, 2015 a local planning firm, Zelinka Priamo Ltd. ("Zelinka"), submitted a written proposal to the City on behalf of Ayerswood. A mixed use development on the Lands was contemplated consisting of three residential towers, one commercial/office building and one level of underground parking. Zelinka recognized that a zoning by-law amendment would be required because the 638 residential units it proposed exceeded the 350 units per hectare allowed at the time.

[10] A pre-application consultation meeting was held on January 27, 2015. Rapid transit was one of the issues the parties discussed. The record of the meeting prepared by City staff contained the following excerpt concerning that subject:

> Transportation has reviewed the pre-application for [the Lands] and has the following comments:
>
> - A transportation impact assessment will be required as part of a complete application. The proponent's traffic engineer to contact us regarding scope & requirements of the [traffic impact assessment] prior to undertaking the study.
>
> - The zoning by-law indicates a road allowance on Clarence St measured 11.6 m from the centre line of the street. This would result in a 1.542 m dedication for this site. Clarence St was identified in the Transportation Master Plan for rapid transit. There is an [environmental assessment] underway to determine the exact route through the downtown and this land may be required for the future [rapid transit]

[1] AECOM was identified as the author of the reports dated November, 2010 and May, 2013. The second report was entitled "A New Mobility Transportation Master Plan for London". Stantec was identified as the author of the June, 2011 Downtown London BRT Routing Options report. The author of the "Transit Priority for Bus Rapid Transit Implementation" report delivered in January, 2012 was not identified.

- Drop off/pick-up areas for moving vehicles etc. will need to be addressed as part of the application.

[11] Three public information meetings were held in 2015 concerning the proposed rapid transit system. The first was conducted on February 4. A notice was published in advance inviting participation. In part members of the community were advised that:

> The Rapid Transit Corridors Study will be conducted in accordance with the requirements of the Municipal Class Environmental Assessment Process…The first stage of the study will prepare a Master Plan for Rapid Transit…The second stage will involve the completion of a Schedule 'C' [environmental assessment] for the preferred initial corridor or corridors.

[12] Ayerswood submitted an application for a zoning by-law amendment on April 30, 2015. Aspects of the initial proposal had changed. Notably, the height of the residential buildings had increased. The applicant sought an amendment of the zoning by-law to allow a greater unit density per hectare and an increase in the permitted building height.

[13] Additional information was requested by a member of the City's planning department in a May 19, 2015 e-mail. The City regarded Ayerswood's application as incomplete until provided.

[14] The second public information meeting concerning rapid transit was held on May 28, 2015. The City "presented the preliminary recommended RT network which included options through the downtown shown as under consideration by IBI Group".[2]

[15] The following day Zelinka provided the City with the information its planning department had requested. On June 15, 2015, the City advised Zelinka by letter that the developer's application had been accepted as complete and that the file had been assigned to its employee John Fleming.[3]

[16] Notice of Ayerswood's application was published in a local newspaper on June 25, 2015. Particulars of the proposed development were set forth as was an explanation of the

[2] This excerpt is drawn from para. 23 of the affidavit of Edward Soldo, the City's Director of Roads and Transportation, sworn January 12, 2018.
[3] The application was regarded as complete on June 11, 2015.

nature of the zoning amendments being sought. The public was invited to comment on the application and was advised that the "appropriateness of the requested Zoning By-Law amendment will be considered at a future meeting of the Planning & Environment Committee". Once scheduled, notice of that meeting was also promised.

[17] On June 29, 2015, Mr. Fleming requested IBI's input concerning Ayerswood's application. After asking several questions concerning what he described as the "King/Clarence Development Proposal", Mr. Fleming wrote:

> As you know, [the location of the Lands] is the hub of it all for our RT system, and the time is now with respect to this application and our ability to do something supportive of a great RT station at this primary hub.

[18] IBI delivered a memorandum to the City on July 3, 2015. IBI indicated that the intersection of King and Clarence Street had been identified for further study and explained:

> The [environmental assessment] commenced in fall 2014 and has progressed to the point where preliminary preferred routings have been identified.
>
> …
>
> The King and Clarence station is a priority for assessment given it will be the signature downtown station, and it is also located adjacent to a proposed new development on the north-west corner of King and Clarence.

[19] The potential importance of the Lands to the development of rapid transit in London caused City staff to increase the requested street dedication from 1.542 metres along Clarence Street to 5 metres along both Clarence and King Streets.[4]

[20] Discussions between the City and developer occurred thereafter. It is fair to say that the latter found the demands of the City's planning department unacceptable.

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[4] In his affidavit sworn December 13, 2017, Anthony Graat deposed that the request was made during a July 14, 2015 meeting. The date was July 30, 2017 [*sic*] according to para. 12 of Sonia Wise's January 10, 2018 affidavit. July 30, 2015 appears to be the correct date.

[21] The issue was unresolved when, on September 15, 2015, Zelinka advised that it would not be attending a meeting that had been scheduled for the following day with the Urban Design Peer Review Panel ("UDPRP"). Its e-mail explained:

> With the discussions regarding road dedication ongoing between ourselves and the City…we would like to put presenting to the UDPRP on hold until a resolution is reached and revised drawings prepared.

[22] Later that afternoon, the planner confirmed that the application for a zoning by-law amendment was on hold and that the statutory[5] 120 day period for its consideration by the City council would be suspended.

[23] In fact, the process did not proceed any further. The following month Ayerswood's planner withdrew the application and asked the City to close its file. In its October 23, 2015 letter Zelinka outlined the reasons for the developer's decision:

> The City's transit initiative…materially affects the viability of our client's project as presented. The prospect of a gratis taking at the scale proposed and the resulting impacts on the density and design of our client's project, together with continued staff pursuit of challenging urban design elements that would require major changes to our design and density on their own, has led our clients to determine that proceeding with the project at this time is no longer viable. As you know, efforts to pursue an interim solution to permit initial phases not directly impacted by the proposed taking were met with staff resistance as well.
>
> Ayerswood…has high-density projects in other jurisdictions which will now become the focus of their short-term investment plans.

[24] At the time of withdrawal the third public meeting concerning RT had not yet been held.

C. The Action and Subsequent Events

[25] This action was commenced on February 22, 2017. Danforth sought $53 million in damages on two bases: (i) negligence; and (ii) a failure to act fairly and in good faith in the exercise of a discretionary authority regarding planning and transit.

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[5] *Planning Act*, R.S.O. 1990, c. P.13, s. 34(11).

[26] At that time Danforth alleged that:

> The…proposal for a transit hub at King and Clarence Streets is just that – a proposal. There is no funding in place for a transit plan that will cost hundreds of millions of dollars. The ability to construct the new transit lines is beyond the financial capability of the City and is dependent on funding from (at least) the Province, for which funding there is no Provincial government commitment. Thus, the City is exercising its discretionary planning powers to render the plaintiff's property virtually unusable for the purposes embodied in the Official Plan and is doing so on the basis of a transit plan that is unfunded and may never be built. To exercise a discretionary power on this basis breaches the standard of care the City owes to the plaintiff. It also is a failure to treat the plaintiff fairly and to exercise a discretionary power fairly and in good faith.

[27] Two subsequent events caused Danforth to seek leave to amend its statement of claim. First, a fourth public meeting was held on February 23, 2017.[6] According to Mr. Graat the City then learned that the public opposed utilization of King Street for both eastbound and westbound RT. Second, on May 16, 2017 City Council passed a resolution that approved a modified downtown route known as the King Street/Queens Avenue couplet. That alternative contemplates the use of King Street for eastbound RT only. Queens Avenue would be used for westbound RT. Rapid transit will not run along Clarence Street. According to the revised plan, buses would use the south side of King Street rather than the north side where the Lands are located. The approved route decreases the importance of the intersection of King and Clarence Streets. As a result, the City no longer intends to use that junction as a rapid transit hub.

[28] Those developments caused Danforth to obtain leave to amend its statement of claim. In paragraphs 19 and 29 of the amended pleading the plaintiff alleges:

> Had the City made those 16 May 2017 routing decisions by July 2015, then there would have been no insistence on the 5 metre dedications, the plaintiff would have proceeded with its [zoning by-law application] and the construction of the plaintiff's project at King and Clarence would have proceeded.

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[6] Earlier I mentioned those held on February 4 and May 28, 2015. The second meeting also continued on May 30, 2015. A third meeting was held on December 2, 2015.

> …
>
> The City's insistence on the five metre dedications from the plaintiff was based on a [bus rapid transit] route that none of the expert consultants recommended and that failed to consider the interests of the property owners and businesses in the affected stretch of King Street…The City's insistence on the King/Clarence dedicated [bus rapid transit] lanes and hub was not based on a careful and good faith exercise of its discretionary statutory powers regarding transit routing, but rather was an ill-advised, arbitrary decision taken without any, or…adequate, regard for the…plaintiff…As such, the City failed to act fairly, failed to exercise its discretionary power in good faith, acted negligently, and cannot protect itself from liability for its failings by relying on section 450 of the *Municipal Act, 2001*.[7]

D. The City's Motion for Summary Judgment

[29] While rule 21 of the *Rules of Civil Procedure* was also mentioned in the City's notice of motion, rule 20(2) (a) is the only one it relies upon. That subrule provides:

> The court shall grant summary judgment if,
>
> (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence…

[30] The City argues that there is no genuine issue requiring a trial. It submits that Danforth's claim in negligence should not move forward because no duty of care was owed. Furthermore, the moving party maintains that Danforth cannot complain about the exercise of a discretionary power because Ayerswood withdrew its application for a zoning by-law amendment before any decision was made by City council.

[31] The City also maintains that a trial is not required to address Danforth's argument that the withdrawal resulted from City staff's insistence on a road allowance that would have crippled the proposed development. The defendant submits that Ayerswood could have compelled consideration of its application by the municipal council at any time pursuant to the *Planning Act*, R.S.O. 1990, c. P.13, s. 34(11). If dissatisfied with council's

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[7] These paragraphs were repeated almost verbatim in paras. 16 and 27 of the affidavit of Anthony Graat affirmed December 13, 2017.

decision, the applicant could have pursued a statutory right of appeal to the Ontario Municipal Board.[8]

E. The Applicable Legal Principles

[32] The applicable principles are well developed. Summary judgment must be granted if three preconditions are met. As Karakatsanis J. explained in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 at para. 49 ("*Hryniak*"), there will be no genuine issue requiring a trial if:

> …the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[33] Establishing that the motion judge is in a position to make findings of fact and to apply the law with conviction is critical to the moving party's success. If the motion material is sufficient to allow a fair and just determination of the issues raised without a trial, summary judgment should be granted. If not, the motion should, of course, be dismissed: *Fontenelle v. Canada (Attorney General)*, 2018 ONCA 475 at para. 25. I return to *Hryniak.* At para. 50, Karakatsanis J. added:

> When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve the dispute… [T]he standard for fairness is not whether the procedure is exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

F. Analysis and Decision

[34] As mentioned, the City posed four questions in its notice of motion. Danforth argues the court should confine its analysis to them. I disagree. The City's fundamental position in the notice of motion is that Danforth's allegations of negligence and/or misuse of discretionary powers do not constitute genuine issues requiring a trial. Danforth

[8] *Planning Act*, *supra* s. 34(11)

addressed that argument in the factual and legal material it assembled and in the oral submissions its counsel made.

[35] The role of a municipal government is central to the City's argument. Inherent legislative power is enjoyed by Parliament and provincial legislatures but not by municipalities.[9] The decision making power of a local level of government is limited. In *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 ("*Catalyst*"), McLachlin C.J. wrote at para. 11:

> Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. This means that they must act within the legislative constraints the province has imposed on them.

[36] The court is sometimes asked to set aside a by-law passed by a municipality on one of two grounds: first, on the basis of an allegation that the requirements of procedural fairness have not been met and second, on the ground that a decision or by-law does not comply "with the rationale and purview of the statutory scheme under which it is adopted."[10] When required to conduct a review of the second type, the court's approach is deferential. A by-law enacted in good faith[11] will be upheld if it falls within a range of reasonable outcomes. As the Chief Justice explained in *Catalyst* at paras. 19, 20 and 25:

> Municipal councillors passing by-laws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. By-laws are not quasi-judicial decisions. Rather, they involve an array of social, economic and other non-legal considerations…In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
>
> The decided cases support the view…that historically, courts have refused to overturn municipal by-laws unless they were found to be "aberrant", "overwhelming", or if no "reasonable body" could have adopted them.

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[9] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 at para. 15.
[10] *Ibid.* at para. 15.
[11] *Grosvenor v. East Luther Grand Valley (Township)* (2007), 84 O.R. (3d) 346 (C.A.) at para. 41; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304 at paras. 23 and 24.

> …
>
> Reasonableness limits municipal councils in the sense that the substance of their by-laws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a by-law.

[37] Sometimes those affected by a municipality's decision do not seek to set it aside. Rather the person alleged to have been aggrieved asks the court to award damages. This is such a case.

[38] *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957 ("*Welbridge*") was too. In *Welbridge* a developer sued the municipality in negligence following the revocation of a building permit the City of Winnipeg had issued. The municipality had failed to comply with its own procedures concerning notice prior to enacting an amending zoning by-law. When the amending by-law was declared invalid by the court, the foundation for the issuance of the building permit disappeared.

[39] Welbridge Holdings Ltd. submitted that the City of Winnipeg owed it a duty of care to satisfy its internal procedural requirements. The action was dismissed. Writing on behalf of the court, Laskin J. said at p. 967:

> A rezoning application merely invokes the defendant's legislative authority and does not bring the applicant in respect of his particular interest into any private nexus with the defendant, whose concern is a public one in respect of the matter brought before it. The applicant in such case can reasonably expect honesty from the defendant but not a wider duty.

[40] The procedural requirements had been characterized as "quasi-judicial" in the proceeding that resulted in the successful challenge of the amended zoning by-law. However, that did not advance the plaintiff's case in *Welbridge* because those prerequisites "were relevant…to the legislative exercise in which the [municipality] was engaged."[12]

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[12] *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, [1971] S.C.R. 957 at p. 969.

[41] That is not to say that a municipality will always be immune from civil liability. The protection applies to certain categories of behaviour but not all of them. Writing for the majority of the Supreme Court of Canada in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, Cory J. noted:

> The functions of government and government agencies have multiplied enormously in this century. Often government agencies were and continue to be best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many fields. They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. The increasing complexities of life involve agencies of government in almost every aspect of daily life. Over the passage of time the increased government activities gave rise to incidents that would have led to tortious liability if they had occurred between private citizens…However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability…On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy". Thus the dilemma giving rise to the continuing judicial struggle to differentiate between "policy" and "operation"…

[42] Factors relevant to the characterization of a municipality's decision were articulated in *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at 441:

> True policy decisions involve social, political and economic factors…The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy…

[43] Similarly, in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, McLachlin C.J. concluded:

> …that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.

[44] A 2001 decision of the Supreme Court of Canada establishes the framework for the analysis and illustrates its application. The facts of *Cooper v. Hobart*, [2001] 3 S.C.R. 537 ("*Cooper*") can be briefly summarized.

[45] Eron Mortgage Corporation ("Eron") was a mortgage broker. It carried on business in British Columbia. That province's Registrar of Mortgage Brokers, Robert Hobart, suspended Eron's licence and froze the company's assets. It was alleged that Eron had used some of the $222 million received from investors for unauthorized purposes. Investors stood to lose $180 million based on the estimated value of Eron's assets. One of the investors, Mary Francis Cooper, sued Mr. Hobart. She maintained losses suffered by investors would have been reduced, or even eliminated, had Eron's licence been suspended earlier. Ms. Cooper alleged that the statutory regulator was negligent for failing to take that step.

[46] In determining whether Hobart owed investors a private law duty of care, the Supreme Court of Canada applied the two-stage process contemplated by *Anns v. Merton London Borough Council*, [1978] A.C. 728 ("*Anns*"). Writing for a unanimous court, McLachlin C.J. and Major J. outlined the required approach at para. 30:

> …the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

[47] Answering the first question necessitates consideration of two things: reasonable foreseeability and proximity. A *prima facie* duty of care exists if the relationship between the claimant and the alleged wrongdoer is sufficiently close and direct. As the Court explained in *Cooper* at para. 34:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are the factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine

> whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[48] The second stage of the *Anns* analysis is concerned "with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."[13] That is the point at which the distinction between policy and operational decisions is to be made. I return to *Cooper*. At para. 38 the Court said:

> It is at this second stage…that the distinction between government policy and execution of policy fails to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy.

[49] The plaintiff's case in *Cooper* failed at the first stage. In finding that the statutory regulator did not owe investors a duty of care the Supreme Court of Canada made these observations at paras. 50 and 51:

> Even though to some degree the provisions of the *Act* serve to protect the interests of investors, the overall scheme of the *Act* mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.
>
> …The statute cannot be construed to impose a duty of care on the Registrar specific to investments with mortgage brokers. Such a duty would no doubt come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole.

[50] That brings me to this case. In its amended pleading Danforth alleges that the City could and should have made its RT routing decision in 2015, rather than 2017. Had it done so, Danforth maintains, the developer would have obtained the zoning by-law amendment it sought and developed the Lands.

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[13] *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 37.

[51] The estimated cost of the BRT option approved by the City council is about $500 million.[14] Its features include 22.5 km of dedicated median transit lanes running throughout the municipality, 36 rapid transit stations and 28 articulated buses. The project is a mammoth one that affects the entire population. As evidenced by the process it adopted, the City's decision involved many factors. Bus rapid transit and its routes were, in my view, a "core policy" decision that were based on a wide range of public policy considerations: among them social, environmental, economic, geographical, political and technical. The relationship between Danforth on the one hand and the City on the other was not sufficiently close to justify the imposition of a duty of care. That conclusion flows clearly from the evidentiary record.

[52] Even had I concluded otherwise, Danforth's action would have foundered at the second stage of the *Ann's* test. A decision to allow or refuse an application for a zoning by-law amendment is not operational: *Birch Builders Ltd. v. Esquimalt (Township)*, [1992] B.C.J. No. 814 (C.A.).[15] Danforth sought to distinguish this case by focusing on the City's actions in relation to BRT. At para. 16 of its factum the developer argued:

> The plaintiff does not quarrel that under the *Municipal Act* the City is given jurisdiction to make policy decisions regarding planning and transportation. Liability in the case at bar is based on the operational conduct relating to that policy. Put another way, the failure to consult with parties directly affected, was the operational misconduct. The routing decision, which is the policy decision, was not made until council's decision in May 2017. That ultimate policy decision is not complained of by the plaintiff. Rather it was the manner in which the City acted leading up to that policy decision that damaged the plaintiff – a damage that was foreseeable.

[53] As can be seen, Danforth acknowledged that the City's decision concerning the route the BRT is to follow is one of policy rather than operation. Danforth's attempt to characterize the pre-approval process as operational is legally untenable. The course of action the City followed was essential to and an inextricable part of the development of

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[14] According to a memo from Kelly Scherr, Managing Director, Environmental & Engineering Services and City Engineer to the Strategic Priorities and Policy Committee in advance of a May 15, 2017 meeting, City council approved the Full Bus Rapid Transit Network Alternative in May, 2016.

[15] For an example of an operational decision see *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298.

the RT plan the municipality approved.[16] It, too, is a matter of policy, not operation.[17] Consequently, the City did not owe Danforth a private law duty of care.

[54] In reaching that conclusion I have not forgotten *JEC Enterprises Inc. v. Calgary (City)*, 2015 ABQB 555 ("*JEC*"). In *JEC*, the plaintiff sought damages when the municipality failed to give a by-law re-designating its land third and final reading. Although the municipality successfully applied to have portions of the claim struck, the claim in negligence was permitted to proceed to trial. At para. 36 Strekaf J. explained:

> This is a substantial claim. There are disputed facts on relevant matters and a more fulsome record would be needed to determine whether any of the acts underlying JEC's complaints constitute operational acts, as opposed to legislative or policy acts, which could give rise to a duty of care in the circumstances. That issue should not be determined in a piecemeal fashion at this stage of the proceeding but should be left to be determined by the trial judge in light of the evidence adduced at trial.

[55] This case is distinguishable. A significant and comprehensive record was compiled. Cross-examinations were conducted. The parties recognized their obligation on a motion for summary judgment to "lead trump": *Corchis v. KPMG Peat Marwick Thorne*, [2002] O.J. No. 1437 (C.A.) at para. 6; *Ramdial v. Davis (Litigation guardian of)*, 2015 ONCA 726 at para. 28. The court is entitled to assume that the record assembled for the purposes of such a motion contains all of the evidence that would be available at trial: *Sweda v. Egg Farmers of Ontario*, 2014 ONSC 1200 at para. 27, affirmed 2014 ONCA 878.[18]

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[16] *Welbridge Holdings Ltd. v. Winnipeg (Greater)*, *supra* at p. 969.

[17] *1022049 Alberta Ltd. v. Medicine Hat (City)*, [2013] A.J. No. 188 (Q.B.) at para. 14. Section 61 of the *Planning Act*, R.S.O. 1990, c. P.13 is also instructive. It provides:

> 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.

[18] These principles are so well established that they have recently been described as "trite law": *Da Silva v. Gomes*, 2018 ONCA 610 at para. 18.

[56] As contemplated by *Hryniak* the court is confident that it is able to make the necessary findings of fact and to apply the law to the facts as found. I am satisfied Danforth's claim in negligence does not raise a genuine issue requiring a trial. No private law duty of care was owed by the City to Danforth in relation to the BRT project, nor in relation to the application for a zoning by-law amendment.

[57] Further, Danforth's claim fails at this stage of the analysis for another reason. Danforth was only one member of a huge constituency affected by the RT decision. A multitude of interests and considerations were at play. Allowing an action of this kind to proceed could expose the municipality to indeterminate liability. As McLachlin C.J. wrote in *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261 at para. 74:

> Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult and must respect the particular constitutional role of those institutions…Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention.[19]

[58] Danforth grounds its claim on a second cause of action. It also alleged that the City misused discretionary powers it held in respect of planning and transportation. Specifically, the plaintiff claims that the City failed to exercise those powers fairly and in good faith. The developer's pleading recognizes the limited circumstances in which liability can attach. In *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, Deschamps J. said, at para. 23:

> In public law, a municipality may not…be held liable for the exercise of its regulatory power if it acts in good faith or if the exercise of this power cannot be characterized as irrational.

[59] However, that passage must be read with care in the private law context. I return to *Alberta v. Elder Advocates of Alberta Society*, *supra* at para. 78:

> The law does not recognize a stand-alone action for bad faith… [T]he bad faith exercise of discretion by a government authority is properly a ground

[19] To the same effect see *Cooper v. Hobart*, *supra* at para. 52-55.

> for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable.

[60] In my view, the alternative claim suffers the same fate as the one grounded in negligence. It does not raise a genuine issue requiring a trial. This aspect of Danforth's claim fails at a fundamental level. The plaintiff attributes bad faith and unfairness to a decision that was never made.

[61] The application for a zoning by-law amendment was withdrawn before the outcome was known. As mentioned earlier, the application was regarded as complete on June 11, 2015. The 120 day period contemplated by s. 34(11) of the *Planning Act* expired on or about October 11, 2015. However, the statutory timeframe was suspended when the application was put on hold by Zelinka on September 15, 2015. That continued to be its status when withdrawn the following month. The City's council was never asked to make a determination.

[62] Danforth withdrew the application because it was dissatisfied with the pre-decision process. During the cross-examination of Danforth's officer, Anthony Graat, the following question was asked and answered:

> Q. …What changed between Mr. Kulchyki's email of September 15th and this…direction to the City on October 23rd to formally withdraw the application?
>
> A. It was just bogged down into…so many issues, that it…was just…getting too much for us to spend any more time on it at that time. We were busy maybe doing a few other things. That this is going to be Never Never Land as far as we were concerned.[20]

[63] City staff had not finalized the preparatory work necessary for council's consideration. Danforth anticipated an adverse result. However, no determination had yet been made.

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[20] The excerpt is drawn from page 52, Q. 353.

[64] Even if the earlier request by City staff for a five metre road allowance along Clarence and King Streets could be construed as a "decision" by the City, there is no evidence to support the allegation same was made other than fairly and in good faith. For better or worse it was then contemplated that the intersection would play a pivotal role in the RT project. Adoption by the City council of a different route almost two years later does not cast a dark light on the conduct of City staff and the consultant retained by the municipality in 2015. Additional steps had been taken. More information was in hand. Hindsight is easy to wield. It would be folly to use it to ground otherwise unsupported allegations of bad faith and unfairness.

[65] If Danforth is correct that the City exercised a discretionary power or function, based on the evidence compiled s. 450 of the *Municipal Act, 2001*, S.O. 2001, c. 25 is a full answer. The section provides as follows:

> No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality…made in good faith exercise of the discretion, shall be commenced against…a municipality…

D. Conclusion and Costs

[66] For the reasons given the court is satisfied there is no genuine issue requiring a trial with respect to any portion of Danforth's claim. The City did not owe Danforth a duty of care in relation to either the BRT plan its council approved in May, 2017 or the application for a zoning by-law amendment Ayerswood's planner withdrew in October, 2015.

[67] Furthermore, the withdrawal of the application meant that the City did not exercise a discretionary power or function in relation to the Lands in 2015. Even if the earlier request by City staff for a five metre road dedication constituted a decision, there is no evidence to suggest same was made in bad faith or unfairly. The City is not precluded from relying on the statutory protection the *Municipal Act* affords.

[68] The motion for summary judgment is granted. The action is dismissed.[21]

[69] Each party may serve and file cost submissions of five pages or less. Those of the City are due by the close of business on July 27 and those of Danforth by the close of business on August 17, 2018. If vacation schedules make those timelines impossible, counsel are permitted to vary the timetable by written agreement or during a brief 8 a.m. teleconference to be arranged through the Trial Coordinator in London.

"Justice A.D. Grace"
Grace J.

Released: July 5, 2018

[21] As mentioned, the City posed four questions in para. (c) of its notice of motion. A trial is not needed to answer them. The court's answers are as follows: (i) No, the City did not exercise a discretionary authority or power in relation to the Lands; (ii) No, Danforth does not have a claim in negligence. The City did not owe Danforth a duty of care; (iii) No, Danforth does not have a cause of action based on a failure by the City to act fairly and in good faith towards Danforth in the exercise of the City's discretionary authority regarding planning and transit. I have already concluded the City did not exercise that authority because Ayerswood's application was withdrawn. Further, there is no evidence the City acted other than fairly and in good faith; and (iv) As stated, the City did not owe Danforth a duty of care in relation to the rapid transit initiative or the application for a zoning by-law amendment.

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COURT FILE NO.: 422/17
DATE: 20180705

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DANFORTH (LONDON) LTD.

Plaintiff

– and –

THE CORPORATION OF THE CITY OF LONDON

Defendant

REASONS FOR JUDGMENT

Grace J.

Released: July 5, 2018