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Change of Plans – New Amendments to Ontario's *Planning Act* and their Impact on Commercial Leasing

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Background

Although frequently ignored by leasing professionals (and even some lawyers!), the *Planning Act* prohibits leases in Ontario from having a term longer than 21 years (including potential extensions/renewals) unless such a lease falls within one of the specifically-stated exemptions. If a lease has a term (including extensions/renewals) of 21 years or more and does not fall within any of the stated exceptions in Section 50 of the *Planning Act*, the lease may be in contravention of Section 50 and could potentially be void unless consent is obtained pursuant to Section 53.

Put into context, this issue pops up most commonly in shopping centre leases for pad locations or on standalone, single-tenanted sites. In these situations, where the lease term is longer than 21 years, it is incumbent on the landlord and tenant to apportion responsibility for obtaining *Planning Act* consent, and then follow through and actually obtain the consent; otherwise, the lease could be void from the start (*not* just after 21 years) unless remedial action is taken (or the common "saving provision" is included – that unless/until consent is obtained the term of the lease is for 21 years less a day).

The most common exception dealt with by leasing practitioners is found in Section 50(9), which provides that the restrictions contained in Sections 50(3) and (5) do not restrict parties from entering into leases for longer than 21 years where the premises leased thereby are "part of a building or structure". This is why premises leased in enclosed shopping malls or the main building of strip plazas are most commonly exempt from *Planning Act* controls.

However, as is well-established practice, many tenants of such centres *also* lease exterior space outside of their premises – including patios, outdoor selling areas and garden centres, or even exclusive parking areas. Under the previous legislation, while these tenants did *not* require *Planning Act* consent for the "main" lease of the interior space (so long as it was for part of a building), they *did* require consent for the exterior areas, where the lease term exceeded 21 years. Ultimately, this incongruity created a system of uncertainty, an administrative headache for landlords and tenants alike, and forced the parties to incur additional costs in order to obtain *Planning Act* consent.

Bill 276 – Supporting Recovery and Competitiveness Act, 2021

On June 3, 2021, Bill 276 (the *Supporting Recovery and Competitiveness Act, 2021*) was given Royal Assent, although it will only come into force on a day to be proclaimed by the Lieutenant Governor.

According to Bill 276's sponsor, Associate Minister of Small Business and Red Tape Reduction Prabmeet Singh Sarkaria, the intent of the legislation is to "modernize regulations and ease unnecessary burdens" and to "remove regulatory roadblocks".[1] In fact, proposals to amend and simplify the *Planning Act* have actually been gathering dust for more than 20 years, so a modernization of

certain provisions is long overdue.[2]

As noted above, the most common exemption from needing to obtain *Planning Act* consent to a lease over 21 years was Section 50(9). For ease of reference prior to Bill 276 being passed, Section 50(9) read:

(9) Nothing in subsections (3) and (5) prohibits the entering into of an agreement that has the effect of granting the use of or right in a part of a building or structure for any period of years.

Once Bill 276 comes into force, Section 50(9) will read:

(9) Nothing in subsections (3) and (5) prohibits the entering into of an agreement that has the effect of granting the use of or right in a part of a building or structure, including the use of or right in lands, which use or right is ancillary to the use of or right in the part of the building or structure, for any period of years.

Moreover, a new subsection, 50(9.1) has been added to the *Planning Act*, which reads:

(9.1) For greater certainty, subsection (9) applies to an agreement that has the effect of granting the use of or right in a part of a building or structure, including the use of or right in lands, which use or right is ancillary to the use of or right in the part of the building or structure, for the lifetime of an individual.

Taken together then, these amendments effectively state that where a lease for part of a building (which would have been exempt beforehand) *also* contains a lease for exterior areas (which would *not* have been exempt beforehand), no consent is required for such exterior areas, regardless of the length of the term, so long as the use of such area(s) is "ancillary" to the use of the interior, exempt, premises.

Practically speaking then, this means that where a tenant leases space in a shopping centre for longer then 21 years, and its lease also includes exterior space such as a patio or garden centre or other outdoor selling area, the parties will no longer be required to seek *Planning Act* consent for the *exterior areas leased* as long as they are "ancillary" to the tenant's use of the interior, exempt, premises.

Remaining Questions

Although not earth-shattering in its impact, Bill 276 does provide a welcome simplification of the rules regarding *Planning Act* consent for premises with indoor/outdoor components, though it does leave one very large question unanswered: what is the meaning of "ancillary"?

If the necessity to obtain *Planning Act* consent to the exterior component of the leased premises is predicated on the exterior area being "ancillary" to the use of the interior area, where is the line drawn and how is this determined? For instance, is it based solely on square footage – i.e. does the exterior area have to be no more than X% of the total square footage (indoor and outdoor)? What about a business like a car dealership or a small hardware store that has a garden centre outside? In those scenarios, the outdoor premises are often much larger than the interior space. Would these outdoor areas be considered "ancillary" to the use of the interior space despite being (potentially) larger in size? One would think so based on common sense. But what about a small restaurant or bar that has a larger patio outside? Would it still be considered "ancillary" if the patio was not only larger than the interior space, but also accounted for a larger portion of sales?

Another question concerns the potential for retroactive applicability. Does the new legislation "save" existing "ancillary" leases of outdoor space which would have previously required separate *Planning Act* consent, or does it only apply to new leases on a go-forward basis? No information has been offered by the Government on this point.

All this to say that the Government has not provided any meaningful guidance on when exterior areas are truly "ancillary" to interior space, and consequently whether *Planning Act* consent is required. Ultimately, it seems likely that in the majority of cases, it will be relatively clear whether an exterior area is "ancillary" to the use of the interior premises, and in such cases the new legislation provides a welcome respite from the administrative headaches (and associated costs) involved in obtaining *Planning Act* consent. Where there is some uncertainty about whether exterior premises are truly "ancillary", it still behooves landlords and tenants to proceed cautiously as the potential risk of failing to obtain *Planning Act* consent where it is necessary could render the lease for such premises void.

Should you have any questions about the foregoing or would like to discuss how we can help you with your commercial leasing needs, please reach out to Robert Eisenberg at reisenberg@weirfoulds.com.

[1] Legislative Assembly of Ontario, *Hansard Transcript*, April 15, 2021 (https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2021-04-15/hansard#P589_116018).

[2] Legislative Assembly of Ontario, *Hansard Transcript*, April 19, 2021 (https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2021-04-19/hansard#para880).

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