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Planning Act Consent and Long-Term Commercial Leases

June 8, 2026

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Long-term commercial leases are a cornerstone of modern real estate development and retail stability, but they also carry a series of statutory risks that can undermine even sophisticated transactions. In Ontario, the *Planning Act,* RSO 1990 c P13 (the "*Planning Act*") imposes subdivision control rules that reach beyond traditional conveyances and, in defined circumstances, apply with equal force to commercial leases. Certain long-term leases and lease-like interests may therefore be rendered legally ineffective if they are not carefully structured.

The subdivision control regime under the *Planning Act* is commonly associated with severances and land transfers. Less well-appreciated is its application to agreements that grant a use of or right in land for extended periods. Section 50(3) of the *Planning Act* prohibits any person from entering into an agreement that grants a use of or right in land for a period of twenty-one years or more, whether directly or through renewal rights, unless a statutory exception applies.

Where this prohibition is engaged, the consequences are severe. Section 50(21) provides that an agreement entered into in contravention of section 50(3) "does not create or convey any interest in land." A lease that offends the subsection is therefore void *ab initio*. Voidness has far-reaching practical implications in the leasing context. A tenant may have no enforceable leasehold interest. The landlord may be unable to rely on negotiated covenants. Lenders may lose the ability to treat the lease as valid security. Even routine commercial outcomes, such as rent recovery or enforcement of exclusivity provisions, may be unavailable. These consequences arise automatically unless the lease falls within an exception or is protected by an effective statutory saving mechanism.

Although section 50(3) contains numerous specific exceptions, one regularly arises in commercial leasing practice where a long-term lease does not otherwise fall within an available exception. Under section 50(3)(f), a lease may extend beyond twenty-one years where consent is granted by the relevant municipal authority or the Minister. Section 53 authorizes an owner, chargee, or purchaser of land to apply for such consent, which may be granted where a plan of subdivision is not necessary for the proper and orderly development of the municipality.

The timing of consent is critical. Where a lease grants a term exceeding twenty-one years at the time it is entered into and does not include a saving mechanism, it risks contravening the *Planning Act* from the outset. In *Bluestone v Enroute Restaurants Inc.,* 1994 CanLII 814 (ON CA) ("*Bluestone*"), the Ontario Court of Appeal confirmed that the consent contemplated by section 53 must relate to a contemporaneous dealing and cannot revive an agreement that was already void at inception. In that case, a lease granted an interest exceeding the statutory threshold without a saving clause and was held to be legally ineffective from the outset by operation of section 50(21).

The Court of Appeal in *Bluestone* nevertheless emphasized that the *Planning Act* itself provides a curative mechanism capable of removing the statutory impediment created by a subdivision control contravention. Section 50(14) mitigates the harshness of the subdivision control regime by providing that, once consent is properly granted and a certificate is issued, any prior contravention "does not and shall be deemed never to have had the effect" of preventing the creation of the interest in land. In *Bluestone,* after the

lease was found to contravene section 50(3), the landlords obtained *Planning Act* consent to a conveyance of the leased lands and completed a registered conveyance stamped with that consent. By operation of section 50(14), that conveyance retroactively removed the statutory consequence imposed by section 50(21), with the result that the previously void lease was now enforceable according to its terms.

An important lesson coming from *Bluestone* is that the risk of initial invalidity could have been avoided through careful drafting. In modern commercial lease drafting, a common approach is to include a *Planning Act* saving clause deeming the lease term to be twenty‑one years less one day unless and until the required consent is obtained. Structured in this way, the lease operates as a valid dealing from the outset, and any consent obtained is contemporaneous, avoiding the voidness issue addressed in *Bluestone*.

The Ontario Court of Appeal's recent decision in *McDonald's Restaurants of Canada Ltd. v North Elgin Centre Inc.,* 2026 ONCA 129 ("*McDonald's*") illustrates the practical operation of this provision. In that case, a ground lease for a freestanding restaurant created the potential for a forty-year term through renewal options. The lease included a saving clause deeming the term to be twenty-one years less one day pending consent and imposed a contractual obligation on the landlord to diligently pursue that consent. When the landlord later attempted to frustrate the tenant's renewal rights by relying on delays in the consent process, the Court rejected that position. The saving clause prevented voidness, municipal delay could not strip the tenant of its negotiated rights, and section 50(14) would operate to cure the contravention retroactively once consent was granted. The Court also emphasized the landlord's obligation to act in good faith and not to use the *Planning Act* as a tool to defeat the commercial bargain.

Renewal options are aggregated with the initial term when assessing whether section 50(3) is engaged. Ontario courts have, however, distinguished renewal rights from subsequent leases that are separate and independently negotiated. In *Spooner v Arcand,* 1993 CanLII 8455 (ON SC) ("*Spooner*"), the Court was faced with an unusual factual matrix in which a twenty‑year lease entered into in 1973 was followed, seven years later, by a separate agreement that contemplated the grant of a further twenty‑year lease only if a proposed severance associated with the tenant's exercise of an option to purchase were refused. The second agreement was negotiated years after the original lease, arose in a different commercial context, and was directed primarily at facilitating a potential conveyance of the lands rather than extending the existing tenancy.

On these facts, the Court found that the two agreements did not form part of a single integrated transaction and were not designed to circumvent subdivision control. The second leasehold interest was not embedded in the original bargain, was not exercisable as of right at the outset of the first lease, and depended on contingencies external to the leasing arrangement itself. Importantly, the Court emphasized the absence of any scheme or intention to evade the *Planning Act*, noting that the parties had negotiated at arm's length and that the later agreement reflected a fresh and independent negotiation separated in time. In those circumstances, the aggregate duration of the two leases was not treated as a single grant of a long‑term interest in land, and the transaction was therefore not caught by the prohibitory language of section 50(3).

Spooner is best understood as a fact‑specific exception rather than a general rule. Unlike *Bluestone*, where a single agreement granted a leasehold interest exceeding twenty‑one years at inception, and unlike *McDonald's*, where renewal rights were expressly contemplated as part of a unified long‑term leasing structure, *Spooner* involved two distinct agreements that did not collectively affect a division of land within the meaning of the statute. The case illustrates that courts will look to substance, timing, and intent in determining whether multiple occupancies amount to a single prohibited long‑term grant, but it should not be read as permitting parties to structure sequential leases as a routine means of avoiding subdivision control.

Subdivision control is directed primarily at the division of bare land. That policy focus is reflected in section 50(9), which provides that the twenty-one-year restriction does not apply to an agreement granting a right in a part of a building. As a result, the typical inline retail lease within an enclosed shopping centre or multi-tenant building is not subject to the limitations of section 50(3), even if its term exceeds twenty-one years. Courts have consistently adopted a physical analysis in applying this exemption. A freestanding building, such as a bank branch, pad restaurant, or gas bar, is not treated as a lease of part of a building, regardless of operational

integration with a broader centre.

Recent legislative amendments have expanded the scope of the exemption by clarifying that the use of or right in lands ancillary to the use of a part of a building may also fall within section 50(9). In practical terms, a tenant leasing interior space for more than twenty-one years may also lease certain outdoor areas, such as patios or garden centres, without separate consent, provided the outdoor use is genuinely ancillary to the interior premises. The boundaries of this concept remain fact-sensitive and warrant careful consideration in drafting.

The severity of these statutory consequences underscores the importance of careful drafting. Long-term leases should be approached with explicit attention to subdivision control. Saving clauses should be included where appropriate, responsibility for obtaining consent should be clearly allocated, renewal options should be assessed with care, and ancillary rights should be reviewed to ensure they do not independently create long-term interests in land.

Long-term leases remain essential to commercial real estate development, including in retail and mixed-use contexts. Their statutory treatment, however, is complex. By understanding the operation of the *Planning Act*'s subdivision control framework and the available saving mechanisms, practitioners can structure long-term leases to avoid unintended voidness or loss of rights.

I regularly advise landlords and tenants in matters related to long-term commercial leases and welcome the opportunity to discuss how the considerations above may apply to your specific lease situation.

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