

CITATION:IN8 (The Capitol) Developments Inc. v Building Kingston’s Future, 2020 ONSC  
6151  
DIVISIONAL COURT FILE NO.: DC-18-2442  
DATE: 20201014

ONTARIO

SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

Aston, Penny and Kristjanson JJ.

BETWEEN: )  
)  
IN8 (THE CAPITOL) DEVELOPMENTS ) *Tara M. Sweeney and Phillip M. Osterhout*  
INC. ) for the Appellant  
Appellant )  
(Applicant before the Tribunal) )  
)  
– and – )  
)  
BUILDING KINGSTON’S FUTURE INC. )  
and FRONTENAC HERITAGE )  
FOUNDATION )  
Respondents )  
(Appellants before the Tribunal) )  
)  
)  
) *Roberto D. Aburto and Carolina Campos for*  
) the Respondents  
)  
)  
) HEARD at Ottawa, Ontario, February 26,  
) 2020

**Kristjanson, J.**

**Overview**

[1] The appellant developer IN8 (The Capitol) Developments Inc. (“IN8”), appeals from a decision of the Local Planning Appeal Tribunal issued on November 9, 2018 by Member D. Lanthier (“Tribunal”): *Burfoot v Kingston (City)*, 2018 CanLII 107780 (ON LPAT). IN8 applied to the City of Kingston to re-zone its property so it could develop the site of a former movie theatre into a high-rise mixed-use development, replacing a 3-storey building with a 16-storey building.

The City approved a site-specific zoning by-law amendment which allowed the development to proceed. The amending by-law was appealed to the Tribunal. The Tribunal allowed the appeal, thereby repealing the site-specific zoning by-law amendment and preventing the development. For the reasons below, I dismiss the appeal.

### **Background**

[2] The Tribunal found that the Downtown and Harbour area of Kingston is a “remarkable urban artefact” and “one of Canada’s most well-preserved heritage areas.” The development property is in downtown Kingston, on a lot with frontage on Princess Street to the south and Queen Street to the North. The property is in the Central Business District land use designation under the Official Plan, within the Downtown and Harbour Special Policy Area. The property straddles two Heritage Character Areas identified in the Official Plan, the Lower Princess Street Heritage Character Area and the St. Lawrence Ward Heritage Character Area. Heritage Character Areas are areas recognized in the Official Plan as having a specific heritage character to which additional policies apply.

[3] There is an existing 3-storey building on the property, a former movie theatre on Princess Street. In 2015, IN8 applied to the City of Kingston for a site-specific zoning amendment by-law to allow for the property’s redevelopment, including the construction of a 21-storey mixed-use building. The City did not accept the original proposal. IN8 revised the height of the proposed development, from 21-storeys to 16-storeys. The City passed zoning amendment by-law 2016-184 (“Amending By-law”) in September 2016, to amend the City of Kingston’s Comprehensive Zoning By-law 96-259 for the Downtown and Harbour Area (“Downtown Zoning By-law”), thus permitting the development to proceed. For reasons relating to an undisclosed conflict the municipal council reconsidered the decision, which led to a tie vote. As a result, the Amending By-law was approved.

[4] Four appeals of the Amending By-law were brought before what was then the Ontario Municipal Board and is now the Local Planning Appeal Tribunal (“the Tribunal”). Three of the four appeals were filed by individuals. These appeals were consolidated and continued by the corporate respondent Building Kingston’s Future Inc., which is the respondent in this appeal together with the Frontenac Heritage Foundation.

[5] During an 11-day hearing, the Tribunal heard the evidence of 12 witnesses including ten expert witnesses, as well as submissions by 25 participants. The City took no position at the hearing. The Tribunal’s decision is 68 pages long, with a 16-page appendix setting out “particularly relevant” planning instruments, including portions of the City’s Official Plan.

[6] In its decision, the Tribunal identified the core issue as the height of the proposed development given the location of the property: in other words, how high is too high? The Tribunal analyzed the planning context of the development, focusing on (a) policies for height, massing, scale and built form; (b) policies governing heritage, history and compatibility, and (c) policies relating to intensification and growth. The Tribunal accepted that no witness really challenged the proposition that intensification should occur, and that development was encouraged under the growth policies of the Official Plan. The central question was how many floors, and at what height.

[7] The Tribunal found that the City's Official Plan and related by-laws prioritized heritage considerations in the area of the proposed development. The Tribunal found that the Official Plan and implementing documents including Downtown Zoning By-law "have clearly elevated policies relating to the preservation of the unique heritage and character of the City's Downtown to the forefront" and have "notable significance in assessing development in the Downtown." The Tribunal recognized the challenge of balancing heritage preservation policies with the promotion of intensification and revitalization of the downtown.

[8] The Tribunal agreed with IN8 that the site could accommodate a higher density mixed-use development. But the Tribunal found that the height of the building, essentially 10- storeys above the six-storey as of right limit and 12 to 14-storeys above the average range of building height in the heritage neighbourhood, would fundamentally change the image of the Downtown and Harbour area. The Tribunal found that the development was not compatible with the massing of surrounding buildings; did not respect the quality of the existing area; represented a visual intrusion that disrupted the streetscape and an identified cultural heritage resource; and constituted overdevelopment that caused adverse impact. The Tribunal found that the proposed development and the Amending By-law did not conform to the policies of the Official Plan, were inconsistent with Provincial Policy Statements that were supportive and directive as to cultural heritage resources and landscapes, and did not represent good planning in the public interest.

[9] The Tribunal allowed the appeals against the Amending By-law, which had the effect of repealing the Amending By-law and preventing the proposed development.

### **Statutory Scheme**

[10] The Tribunal held a hearing to determine whether the Amending By-law met the test under section 34 of the *Planning Act*, which requires that a zoning by-law amendment conform to a municipal official plan.

[11] The *Planning Act* forms the statutory basis for Ontario's land use planning regime. The Minister of Municipal Affairs, alone or with other Ministers, may issue provincial policy statements under s. 3 of the *Planning Act* which provide policy direction on matters related to land use planning and development. Provincial direction through the *Planning Act* and Provincial policy statements sit at the top tier of the planning hierarchy.

[12] Official plans passed by municipal councils, or approved by the Tribunal, are the second tier of the planning hierarchy. Under section 16(1) of the *Planning Act*, an Official Plan is to contain "goals, objectives and policies established primarily to manage and direct physical change and the effects on the social, economic, built and natural environment", among other policies. The goal of an official plan is to set out a framework of "goals, objectives and policies" to shape planning decisions and govern a municipality's land use planning generally: *Toronto (City) v. Goldlist Properties Inc.*, 2003 CanLII 50084 (ON CA) at para. 49.

[13] Zoning by-laws are the third tier of the planning hierarchy. Zoning by-laws may be passed by a municipal council to restrict the use of land and the erecting, locating or using of buildings in defined areas within the municipality. Zoning by-laws under s. 34 of the *Planning Act* may also regulate the construction, spacing, character and use of building or structures. Under s. 24(1) of

the *Planning Act*, where an official plan is in effect, zoning by-laws must conform to the official plan. Once a zoning by-law comes into force, it is deemed to conform to the official plan (s. 24(4)). As stated by this Court in *Aon Inc. v. Peterborough (City)*, [1999] O.J. No. 1225, 1 M.P.L.R. (3d) 225 (Div. Ct.) at para. 18, it is a zoning by-law which converts the official plan into a body of law regulating the use of land.

### **JURISDICTION AND STANDARD OF REVIEW:**

[14] Section 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1 provides that an appeal lies from the Tribunal to the Divisional Court, with leave of the Divisional Court, on a question of law. As a result, the appellant must establish that its appeal involves a question of law. When the issue is a question of law, the statutory right of appeal is engaged.

[15] Leave to appeal the Tribunal's decision to the Divisional Court was granted by Order of Justice Riopelle on the following question:

- (a) Did the Tribunal err in its interpretation and application of the Official Plan and its policies by:
  - (i) prioritizing one Official Plan policy (heritage) over others (intensification and revitalization);
  - (ii) its application of the provisions of the Zoning By-law that was being amended and other studies and guidelines referred to in the Official Plan;
  - (iii) concluding that the Official Plan policies impose height, density and angular plane limitations on the Site even though the Official Plan does not make this explicit; and
  - (iv) concluding that the Development was not in the public interest.

[16] The leave judge must be satisfied that these are questions of law to grant leave, but his determinations are not binding on this panel. Having heard full argument on the merits of this appeal, I find that not all these issues raise questions of law.

[17] Aspects of the issues encompass some questions of law. That said, other aspects deal with the application of law to the facts and are questions of mixed fact and law not properly before this panel on appeal. On this statutory appeal restricted to questions of law, the questions of law must be extricable. When issues are raised about the application of a legal test, questions must go to the defining elements of the legal test, and not merely to how a tribunal finds facts, assesses the evidence, or balances relevant factors when applying the legal test.

[18] The statutory provision, which restricts appeals to questions of law is significant, in that statutory limitations on the scope of appellate review are absolute. When no question of law is raised, this disposes of the court's jurisdiction to review those questions on an appeal, as contrasted to a judicial review: see *Vavilov* at para. 52.

[19] Since the *Local Planning and Tribunal Act, 2017* contains an express appeal provision which limits appeals to questions of law, the appellate standard of correctness applies to questions of law and questions of mixed fact and law involving extricable legal errors: *Vavilov*, 2019 SCC 65 at para. 37.

**Issue #1: Did the Tribunal err in its interpretation and application of the Official Plan and its policies by prioritizing one Official Plan policy (heritage) over others (intensification and revitalization)**

[20] The appellant argues that the Tribunal erred in law in concluding that the heritage policies of the Official Plan are to be given priority over the intensification and urban growth strategies of the Official Plan. The appellant argues that by ignoring possible ways of resolving the conflict between heritage and intensification, the Tribunal has improperly entrenched the primacy of heritage considerations rather than intensification and growth. Thus, the appellant argues, the interpretation of the Official Plan is legally incorrect.

[21] The Court of Appeal has held that proper interpretation of an official plan is a question of law: *Niagara River Coalition v. Niagara-on-the-Lake (Town)*, 2010 ONCA 173 at para. 43. But this does not mean that all issues about how an official plan applies or how to resolve conflicts between provisions of an official plan are questions of law. In *Niagara River Coalition*, parties sought to quash a by-law by application to a Superior Court judge under the *Municipal Act*. The application judge quashed the by-law in part because it licensed a use not permitted under the official plan. Before the Court of Appeal, a key issue was whether the application judge erred in admitting evidence to assist in interpreting the scope of an official plan designation. The Court of Appeal found that 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”, to be determined based on the documents comprising the official plan (paras.43 and 45). The Court of Appeal also held that issues 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.

[22] Looking at the full decision in context, the Tribunal did not interpret the Official Plan to determine that heritage policies are to be prioritized over intensification and growth policies as a matter of law. Rather, the Tribunal engaged in a much broader and more nuanced inquiry. The Tribunal scrutinized many Official Plan policies relating to growth, development, density, intensification, land use compatibility and cultural heritage. The Tribunal also considered Provincial Policy Statements (“PPS”) about heritage as well as intensification and development since provincial policies also informed the analysis, finding at para. 81

The Tribunal has considered the PPS in regards to such heritage policies. The Tribunal has also turned its mind to the PPS policies relating to intensification and development, as such provincial policies also inform the analysis. Given the unique character of Kingston’s Downtown, Policy s. 2.6 of the PPS dealing with Cultural Heritage and Archaeology, and in particular s. 2.6.1, is of importance in that it requires that significant built heritage resources and significant cultural heritage landscapes shall be conserved. Development will not be permitted if it has not been

demonstrated that heritage attributes of protected heritage property will be conserved. The City's OP is consistent with the Provincial Policies, and has been drafted to address the unique heritage characteristics and resources in much detail.

[23] The Tribunal found that some residential intensification at the site was consistent with, and conforms, to the residential intensification planning policies in both the Provincial Policy Statement and Growth Plan, and the City's Official Plan. Still, the central challenge was how to balance competing objectives. As the Tribunal set out in para. 76:

[76] The issue of course is how *much* intensification and density is compatible and appropriate, and at what height, mass and scale the Development should be permitted, to accomplish this residential intensification. Over-intensification of the Site through significantly higher density than identified in the City's policy documents plainly stated, and/or contrary to the heritage policies of the [Official Plan] would not conform with the [Official Plan]. What then is the appropriate limit of such increased residential density as it is impacted by height, mass and scale?

[24] 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.

[25] 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.

**Issue #2: Did the Tribunal err in its interpretation and application of the Official Plan and its policies by considering the provisions of the Zoning By-law and the studies and guidelines referred to in the Official Plan**

[26] The appellant submits that the Tribunal's reliance on the Downtown Zoning By-law and the *Downtown and Harbour Architectural Guidelines Study 2007* ("Downtown Guidelines") in interpreting the Official Plan was a legal error in the Tribunal's analysis. The appellant argues that the Tribunal misinterpreted the relationship between official plans and zoning by-laws. In making its determination that heritage policies were paramount, the Tribunal cited the Downtown Zoning By-law. The appellant argues that as Official Plan policies must be implemented through zoning by-laws, it is an error in law to interpret a zoning by-law as restricting an official plan. In this case, however, I find that relevant parts of the Downtown Zoning By-law and the Downtown Guidelines

are incorporated by reference in specific sections of the Official Plan and were properly taken into account by the Tribunal.

[27] The Central Business District provisions of the Official Plan in section 3.4.A.6 state that the Downtown Guidelines and the Downtown Zoning By-law “provide detailed direction for development in the Central Business District,” with more specific provisions in the Downtown and Harbour Special Policy Area Official Plan provisions. The Tribunal considered the Downtown and Harbour Special Policy Area provisions set out in 10A of the Official Plan. Section 10.A.6 of the Official Plan provides that implementation of the Special Policy Area “will be undertaken...with regard to the recommendations of” the Downtown Guidelines. Section 10.A.6.2 of the Official Plan, under the heading “Zoning” provides:

Zoning within the Downtown and Harbour Area will continue to reflect built form provisions as found in the Downtown and Harbour Zoning By-law, to ensure that the form of new *development is compatible* with the built heritage fabric and street-oriented pedestrian function of the Downtown and Harbour area.

[28] The Tribunal considered section 10A.6.2 of the Official Plan. The Tribunal then applied the relevant portions of the Downtown Zoning By-law which were adopted by reference in the Official Plan, in analyzing compatibility issues. There was no error of law in the Tribunal’s approach, given the clear wording of section 10.A.6.2 of the Official Plan.

[29] Contrary to the argument of the appellant, the Official Plan has not adopted the entirety of the Downtown Zoning By-law but has adopted the portions dealing with built form and compatibility. The appellant’s interpretation would render the references to the Downtown Guidelines and Downtown Zoning By-law in sections 10.A.6 and 10.A.6.2 meaningless. An interpretation of these Official Plan sections that renders reference to the Downtown Zoning By-law meaningless is to be avoided.: see *Tabor v. Hospitals of Ontario Pension Plan*, 2009 ONCA 583 (CanLII) at para. 3.

[30] Rather, the Tribunal correctly found that the Official Plan incorporated aspects of the Downtown Zoning By-law. Section 10.A.6.2 of the Official Plan, under the heading “Zoning”, states that zoning “will continue” to reflect the built form provisions in the Downtown Zoning By-law, and specifically states that this will ensure that “new development” is compatible. The plain meaning of the text, within the context of the Official Plan as a whole, is that the built-form provisions in the Downtown Zoning By-law apply, and it is mandatory to maintain these performance standards in any future zoning. There is no legal error in the Tribunal’s interpretation that the Official Plan adopts the built form and compatibility provisions as set out in the Downtown Zoning By-law.

[31] The City of Niagara Falls adopted a similar approach when restricting building heights in its tourist area to a maximum of four storeys. Through an official plan amendment, the City of Niagara provided that building heights must be in accordance with the applicable zoning by-law in force at the time the official plan amendment was passed. Any additional height would be dependent on whether the proposed development, in the opinion of Council, adhered to built form and design criteria to be established by Council. The Council for the City of Niagara Falls later

prepared a guideline setting out these criteria. This was accepted by the Ontario Municipal Board: *3414574 Canada Inc. v. Niagara Falls (City)*, [2001] O.M.B.D. No. 1064 (OMB) at paras 34-35.

[32] As submitted by the respondents, section 10A.4.6 of the Official Plan “identifies, through reference to the Downtown and Harbour Zoning By-law, what scale and massing is considered to be complementary to the existing buildings in the area. In effect, the heritage policies apply limits or boundaries on development.” The Tribunal found that policy and performance standards set out in the Downtown Zoning By-law restrict height, massing and scale in Downtown Kingston, and issues of compatibility and proportionality must also be considered given the robust heritage policies.

[33] It is also important to note the exemption to height limitation policies set out in section 10A.4.7 of the Official Plan, providing that greater heights may be approved where a taller building “is compatible with the massing of surrounding buildings” and “meets the land use compatibility policies of section 2.7” of the Official Plan. The Downtown Zoning By-law does not supersede the Official Plan to prevent all development but provides a framework for evaluating future growth and development in the Downtown and Harbour Special Policy Area.

[34] The appellant also takes issue with the Tribunal’s reliance on the Guidelines. But the Official Plan recognizes that the basis of many policies pertaining to the Downtown and Harbour Special Policy Area are from special studies including the Guidelines. Section 10A.6 specifically provides that the implementation of the Official Plan policies applicable to the site are to be undertaken with regard to the recommendations of the Guidelines. Section 10.A.4 of the Official Plan recognizes that the Guidelines “contain guidelines for further development that will be compatible with the heritage character of the area.”

[35] The Tribunal acknowledged that the Guidelines were not binding policy but recognized the relevant references to the Guidelines in the Official Plan as part of the constellation of policies to be considered. There was no error of law in the Tribunal’s approach to this issue as a matter of law. Questions about the application of the Guidelines are not questions of law, but questions of mixed fact and law, and are not properly before this Court.

**Issue #3: Did the Tribunal err in its interpretation and application of the Official Plan and its policies by concluding that the Official Plan policies impose height, density, and angular plane limitations on the Property even though the Official Plan does not make this explicit?**

[36] The appellant argues that the Tribunal erred in holding that the Official Plan policies impose height, density and angular plane limitation on the site, which was part of the reason the Tribunal determined that the Amending By-law did not comply with the Official Plan.

[37] Before the Board, IN8 argued that section 10.A.4.6 of the Official Plan provides a build-to-plane height of 17 m to maintain a continuity of street level heights, and if the development complied with the height limitations for street facing walls and the required step-back from the street, the Official Plan imposed no height limit on the building. IN8 submits that the angular plane and maximum height performance standards in the Downtown Zoning By-law, which provide for maximum heights of 17 m or 25.5 m, have no basis in the Official Plan. IN8 essentially argued



that other than the 17m street-facing limit with set-back, height is unregulated, and there are no overall height restrictions at the site.

[38] The Tribunal did not accept IN8's argument that there are no height restrictions. As set out above, the Tribunal found as a matter of law that the built form and compatibility provisions of the Downtown By-law were adopted in the Official Plan. The Tribunal found that the development would include a tower which increase the angular plane from 39 to 86 degrees; would exceed the as of right height from 6-storeys to 16-storeys; and have a density almost seven times the maximum density standard under the Downtown Zoning By-law.

[39] The Tribunal recognized the exemption to height limitation policies set out in section 10A.4.7, which provides that a greater height within a specific building envelope may be approved where a taller building "is compatible with the massing of surrounding buildings" and "meets the land use compatibility policies of section 2.7" of the Official Plan.

[40] The Tribunal considered relevant land use compatibility policies set out in section 2.7 including that land use changes through development will only be approved if they are compatible and avoid adverse effects including "reduction in the ability to enjoy...[the]...historic quality or setting of a property, "visual intrusion that disrupts the streetscape, building or cultural heritage resource", and "architectural incompatibility in terms of scale, style, massing and colour." The Tribunal considered all the evidence in assessing compatibility and thus conformity with the Official Plan.

[41] Section 2.3.7 of the Official Plan provides that cultural heritage resources will continue to be "conserved", and section 7.3.D.2 of the Official Plan provides that it is the intent of the plan to "maintain" the heritage integrity of Heritage Character Areas. The Tribunal made a finding of fact that the low-profile building landscape formed an important part of the heritage character of the Lower Princess Street Heritage Character Area and that heritage preservation was a central objective of the Official Plan. The angular plane, height and density findings reflect the Tribunal's assessment of the evidence given the relevant built form provisions and compatibility concerns set out in the Downtown Zoning By-law as reflected in the Official Plan's provisions. Given the factual findings, the Tribunal concluded that the height and massing of the proposed building were excessive and did not conform to the policies of the Official Plan.

[42] The Tribunal found at para. 151 that there were "solid and cohesive policy restrictions on height" as contained in the Official Plan, the Downtown Zoning By-law and the Downtown Guidelines. The Tribunal found that the angular plane requirements in the Downtown Zoning By-law and the designated maximum height on Queen Street did provide a restriction on height, in a context where the Official Plan states that zoning will continue to reflect the built form provisions in the Downtown Zoning By-law. The Tribunal at para. 152 then considered these restrictions within the context of many policy provisions within the Official Plan that speak to limiting heights in the Downtown, Lower Princess Street and St. Lawrence Ward to conserve the continuity of the low profile built form character; requiring compatibility of taller buildings with the massing of surrounding buildings; avoiding adverse impacts including visual intrusions that disrupt the streetscape or cultural heritage resources; architectural incompatibility in terms of scale and massing; and protecting the cultural heritage resource of the traditional downtown which includes the "continuity of height."

[43] The Tribunal evaluated the question of compliance within the framework of applicable planning instruments, including the compatibility of height, massing and density when considered in the context of robust heritage policies. There is no extricable error of law in the Tribunal's finding that the Downtown Zoning By-law and Official Plan restricted the height and angular plane, and limited density.

**Issue #4: Did the Tribunal err in its interpretation and application of the Official Plan and its policies by concluding that the Development was not in the public interest**

[44] The Tribunal found at para. 173 that “a Tower with the proposed height of 16-storeys, with enlarged floor plates, on this Site, is too high, and too massive, and does not represent good planning in the public interest.” The determination of the public interest may be a question of law where the issue is whether the correct legal test was applied, for example whether an administrative decision-maker has considered statutorily required elements. However, whether or not on the evidence a development proposal represents “good planning in the public interest” is at the heart of the Local Planning Appeal Tribunal's expertise and is a question of mixed fact and law, not a question of law.

[45] The importance of the Tribunal's public interest mandate on a zoning by-law amendment appeal was described by this Court in *Ottawa (City) v. Minto Communities Inc.*, 2009 CanLII 65802 (ON SCDC) with reference to the Ontario Municipal Board, the predecessor tribunal:

Furthermore, it is important to keep in mind that the appeal process before the Ontario Municipal Board is not merely a *lis* between parties, but a process requiring the OMB to exercise its public interest mandate. The decision to be made by the Board transcends the interests of the immediate parties because it is charged with responsibility to determine whether a land planning proposal is in the public interest. At first instance, that public interest is determined by Municipal Council, but on an appeal the Board has the obligation to exercise its independent judgment on the planning merits of the application and to assess the proposal and the positions of the parties from the perspective of applicable legislation, regulations, provincial plans, the provincial policy statement, official plans and bylaws and even the potential impact on neighbouring municipalities. In doing so, it brings its own expertise to bear.

[46] The appellant argues that since the Tribunal erred in interpreting and applying the Official Plan and its policies, as well as Provincial Policy Statements, then its conclusion that the development was not in the public interest was also in error. Having found no error in law regarding the Tribunal's interpretation of the applicable planning instruments, and thus no error in consideration of the relevant factors, the Tribunal's exercise of its public interest jurisdiction and assessment of the evidence is not a question of law. It is a question of discretion within the planning expertise of the Tribunal, considering the goals and objectives of the Official Plan. There is no error of law in the Tribunal's approach to the assessment of the public interest.

**Order**

[47] The appeal is dismissed, with costs to the Respondents of \$40,000.00, inclusive of costs on the motion for leave.



\_\_\_\_\_  
Kristjanson J.

I agree



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Aston J.

I agree



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Penny J.

**Date of Release:** October 14, 2020

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**SUPERIOR COURT OF JUSTICE  
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**Aston, Penny and Kristjanson JJ.**

**BETWEEN:**

IN8 (THE CAPITOL) DEVELOPMENTS INC.

Appellant

– and –

BUILDING KINGSTON'S FUTURE INC. and  
FRONTENAC HERITAGE FOUNDATION

Respondent

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**REASONS FOR JUDGMENT**

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**Kristjanson J.**

**Date of Release: October 14, 2020**