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*Oct. 16, 17, 18, 19 Dec. 21

LLEWELLYN M. ROBERTS AND GEORGE B. BAGWELL (*Suppliants*) . . . APPELLANTS;

AND

HER MAJESTY THE QUEEN (*Respondent*) . . . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Compensation—Injurious affection of land—Regulations governing height of buildings and use of land in vicinity of airport—Effect of subsequent repeal of part—The Aeronautics Act, R.S.C. 1927, c. 3, s. 4, as amended by 1950, c. 23, s. 3, and 1952, c. 14, s. 1.

By s. 4 of the *Aeronautics Act*, 1927, as amended, power was given to make regulations with respect to, *inter alia*, "the height, use and location of buildings . . . situated on lands adjacent to or in the vicinity of airports", and subs. (8) of the section provided for compensation to anyone "whose property is injuriously affected by the operation of a zoning regulation". The *Toronto Malton Airport Zoning Regulations* were made pursuant to this section in 1953, and they prescribed, in s. 4(1), the maximum height of buildings within specified distances of the airport. They further provided in s. 4(2) that if any building exceeded the stated limits the Minister might require the owner to remove, demolish or modify it, and s. 5 prohibited the operation of "any machine, device, contrivance or thing" likely to cause "a hazard or obstruction to aircraft using the airport". In 1955, ss. 4(2) and 5 of these Regulations were revoked.

Held: (1) Lands could be "injuriously affected by the operation" of the Regulations notwithstanding that no order for demolition or modification had in fact been made by the Minister. Vertical regulation was necessary in the vicinity of airports and the vesting of the powers mentioned operated with an immediate effect on the use and value of the land. It became at once a burden on the land and the resulting diminution in value was a proper subject of compensation.

(2) The revocation of ss. 4(2) and 5 in 1955 did not affect the amount of compensation to which owners of lands affected were entitled. The Regulations should be considered as a whole, and the Court should not attempt to determine the extent of the loss produced by one particular section, such as s. 5. It would be impossible to distribute the diminution in value among different individual sections. It was quite clear that the subsequent revocation of a regulation could not give rise to a claim against the owner for the return of any part of a compensation already paid, and that result could not be in effect reversed by withholding compensation until after the particular burden had been removed.

(3) Evidence of sales in the vicinity of the lands in question, made after the enactment of the Regulations, might have been admissible as relevant to the value prior to the enactment. If a subsequent sale was shown to be as free in all respects from extraneous factors such as prior sales, and made within a time in which, according to the evidence, prices had not changed materially from those before the

*PRESENT: Rand, Locke, Cartwright, Abbott and Nolan JJ.

critical date, it was a relevant consideration. The rule should allow the Court to admit evidence of such sales as it found, in place, time and circumstances, to be logically probative of the fact to be found. In the circumstances of this case, however, the exclusion of such evidence did not affect the result.

Town planning—Effect of adoption of official plan and subdivision by-law —Subsequent annexation of municipality by another—Whether subdivision by-law abrogated—The Planning Act, R.S.O. 1950, c. 277, s. 24(3)—The Municipal Act, R.S.O. 1950, c. 243, s. 31.

When a municipality having a subdivision by-law is annexed by another municipality, having no such by-law, it is extremely doubtful whether s. 31 of *The Municipal Act* has the effect of abrogating the by-law. By s. 24(3) of *The Planning Act* a subdivision can be altered or dissolved only with the approval of the Minister, and therefore a by-law establishing a subdivision cannot be repealed by the council that passed it. The by-laws contemplated by s. 31 are primarily of legislative character, applicable throughout the whole municipality, whereas zoning is essentially administrative, and not a matter of general legislation so applicable. An official plan, under the Act, is not limited to a single municipality, but may cover several or parts of several, and it would defeat the purpose in view if a realignment of township boundaries were to effect a disruption of planned development.

APPEAL by the suppliants from a judgment of Thorson P., of the Exchequer Court of Canada (1). Appeal dismissed.

A. S. Pattillo, Q.C., A. F. Rodger and *J. F. Howard,* for the appellants.

W. B. Williston, Q.C., and *D. S. Maxwell,* for the respondent.

The judgment of the Court was delivered by

NOLAN J.:—This is an appeal from the judgment of the learned President of the Exchequer Court of Canada (1) awarding the appellants the sum of $40,000 as compensation for the decrease in value of their lands which were injuriously affected by the enactment of the *Toronto Malton Airport Zoning Regulations.*

The *Aeronautics Act,* R.S.C. 1927, c. 3, as amended by 1950, c. 23, s. 3, and 1952, c. 14, s. 1 (now R.S.C. 1952, c. 2), authorized the Minister, subject to the approval of the Governor in Council, to make regulations for the control of air navigation over Canada and provided, in part:

4. (1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under

(1) (1955), 1 D.L.R. (2d) 11, 73 C.R.T.C. 150.

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which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to . . .

(*j*) the height, use and location of buildings, structures and objects, including objects of natural growth, situated on lands adjacent to or in the vicinity of airports, for purposes relating to navigation of aircraft and use and operation of airports, and including, for such purposes, regulations restricting, regulating or prohibiting the doing of anything or the suffering of anything to be done on any such lands, or the construction or use of any such building, structure or object.

(2) Any regulation made under subsection one may authorize the Minister to make orders or directions with respect to such matters coming within this section as the regulations may prescribe.

Subsections (3) and (4) of s. 4 provided penalties for the violation of the provisions of a regulation or of the order of the Minister made under a regulation. Subsections (5), (6) and (7) dealt with the publication and registration of the Regulations.

Subsection (8) provided:

(8) Every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty, as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, minus an amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport.

Subsection (9) limited the time for the recovery of compensation to two years after a copy of the Regulations was deposited pursuant to subs. (6) or (7).

Regulations under this authorization were approved by the Governor General in Council on April 9, 1953 (1) and a copy was deposited in the Registry Office for the County of Peel on June 1, 1953, together with a plan and description of the lands affected by the Regulations. A copy was published in the Toronto Daily Star on July 13 and July 14, 1953, and in The Globe and Mail on July 11 and July 13, 1953.

The Regulations provided, in part:

4. (1) No person shall erect or construct, on any land to which these regulations apply, any building, structure or object or any addition to any existing building, structure or object, the highest point of which exceeds in elevation the elevation at that point of such of the surfaces hereinafter described as projects immediately over and above the surface of the land upon which such building, structure or object is located, namely,

(*a*) a horizontal surface, the outer limits of which are at a horizontal radius of 13,000 feet more or less;

(1) [1953] S.O.R. 285.

(*b*) the approach surfaces abutting each end of the strip designated as 10-28, the strip designated as 14-32 and the strip designated as 05-23, and extending outward therefrom, the dimensions of which approach surfaces are 600 feet on each side of the centre line of the strip at the strip ends and 2,000 feet on each side of the projected centre line of the strip at the outer ends, the said outer ends being 200 feet above the elevations at the strip ends, and measured horizontally, 10,000 feet from the strip ends; and

(*c*) the several transitional surfaces, each rising at an angle determined on the basis of a ratio of one foot vertically for every seven feet measured horizontally from the outer lateral limits of the strips and their abutting surfaces,

as shown on a Plan No. T724 dated December 17, 1952, and revised February 20, 1953, of record in the Department of Transport.

(2) Where any building, structure or object on any land to which these regulations apply exceeds the limits in elevation specified in subsection (1), the Minister may order the owner or occupier of the land to remove, demolish or modify such building, structure or object or do any act or thing necessary to ensure that such building, structure or object complies with the limits in elevation so specified and may, in any such order, specify the time within which such removal, demolition, modification, act or thing shall be done.

5. No person shall operate or cause to be operated on any lands to which these regulations apply any machine, device, contrivance or thing after being notified by the Minister that, in the opinion of the Minister, the machine, device, contrivance or thing causes or is likely to cause, by the emission of light, smoke, noise or fumes, a hazard or obstruction to aircraft using the airport.

By order in council P.C. 1955-1302, dated September 1, 1955 (1), the Regulations were amended by revoking subs. (2) of s. 4 and s. 5, and a copy of the order in council was deposited in the registry office on September 29, 1955. In order to remove any doubt as to the effectiveness of this amendment, a further order in council, P.C. 1955-1580, dated October 19, 1955 (2), was passed and deposited in the registry office on November 4, 1955.

The lands of the appellants consist of 100.09 acres of vacant property and form part of the north half of lot 8, 7th concession, of the township of Toronto (formerly Toronto Gore), county of Peel. They lie immediately east of Malton Airport and in the direct path of the east-west runway. The property has a frontage of 755 feet on the 6th line (known as the Airport Road), a depth of 4,460 feet, a rear frontage of about 807 feet on the unopened 7th line and a railway frontage of approximately 302 feet on the Canadian National Railway line, which crosses the north-east corner of the property.

(1) [1955] S.O.R. 1659. (2) [1955] S.O.R. 1799.

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On March 26, 1951, one Harry R. Walker, the owner of the lands, in consideration of the payment of $600, granted to Alan R. Campbell an option until October 1, 1951, to purchase at a price of $400 per acre. On August 28, 1951, Campbell assigned the option to the appellant Roberts for a consideration of $600. The option, in consideration of a payment of $200, was extended to November 1, 1951, and was exercised by Roberts on October 29, 1951. By deed registered on November 30, 1951 Walker conveyed the lands to the appellants, who hold their interest in common in trust for certain others, the particulars of the trusteeship being set out in a deed of trust dated January 21, 1952. On November 28, 1951 the appellants entered into an agreement with Walker, who owned and operated a farm on the south half of lot 8, for the construction of a roadway between the two properties, which agreement was registered on November 30, 1951.

The lands were subject to two easements: one in favour of the Hydro-Electric Power Commission of Ontario to erect and maintain three poles across the north-east corner of the lands, about 150 feet from and parallel to the railway line; the other in favour of Her Majesty the Queen to erect and maintain eight approach light poles, a minimum distance of 200 feet apart, in a line running eastward from the west boundary of the lands. The easement is 15 feet wide and 2,398.67 feet deep.

The evidence is that Roberts wanted to purchase the lands for development, subdivision and resale for industrial and commercial use and, before exercising his option, in order that he might be certain that the land could be so used, engaged a surveyor, W. S. Winters, to prepare a plan of a proposed subdivision, and approval of the Department of Planning and Development was sought.

On October 24, 1951, the Department wrote to Winters that the draft plan of the subdivision had been approved, subject to certain conditions and amendments noted thereon. One of the conditions was: "1. That the owner observe the height restrictions shown on the attached draft plan." The maximum building height restrictions endorsed on the draft plan began at 19 feet, approximately 50 feet from the Airport Road frontage, and increased to 34 feet at approximately 725 feet from the front of the property.

The option was exercised after receiving the conditional approval of the plan and the condition quoted does not appear to have been objected to by the appellants.

The proposed plan of subdivision was not registered and in 1952 and 1953 the lands were leased to Walker for farming purposes.

Subsequently the appellants furnished one Lyons, a real estate agent, with a copy of the proposed plan and attempted, unsuccessfully, to sell the lands through him. In May 1952 the appellants listed the property for sale with Willoughby & Sons for a period of 60 days at a price of $110,000 and in April 1953 they again listed the lands for sale with Shortill & Hodgkins Limited for a period of 30 days at a price of $150,000. No offers to purchase were made.

On February 26, 1954, the appellants entered into an agreement with one Oliver to sell a portion of the lands 500 feet wide and 700 feet deep at a price of $40,000. A deposit of $1,000 was made and, although the transaction was not completed at the time of trial, the deposit had not been returned.

The learned President of the Exchequer Court, in his reasons for judgment, reviewed with great particularity the opinions both of the expert witnesses called by the appellants and of those called by the respondent to establish the value of the injuriously affected lands, together with the other evidence of value introduced by the parties. The learned President came to the conclusion that the valuations of the appellants' expert witnesses must be rejected as being much too high. He concluded that the valuation of $95,500 submitted by Mr. Davis, a witness for the respondent, while high, came nearest to reality and he adopted it as the value of the property immediately prior to the enactment of the Regulations on April 9, 1953, and was of the opinion that the sum of $95,500 was adequate to cover every factor of value to the owners as at that date.

The President further held that there was no evidence to support a finding that any increase in the value of the appellants' property after its acquisition by the appellants on October 29, 1951, was attributable to the airport and

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that the revocation of subs. (2) of s. 4 and s. 5 of the Regulations, by order in council dated September 1, 1955, did not reduce the amount by which the lands had been decreased in value by the enactment of the Regulations. He further held that the term "zoning regulation" in s. 4(8) of the *Aeronautics Act* should be interpreted as meaning the *Toronto Malton Airport Zoning Regulations* in their entirety and that the section did not contemplate separate effects of the several sections of the "zoning regulation" referred to.

At trial there was conflict in the evidence adduced by the appellants and by the respondent as to whether the lands were ready for development and the valuations of the experts called on behalf of the appellants were, to a large extent, based on the assumption that they were ready immediately prior to April 9, 1953.

It appears from the evidence that the water supply, having regard to the demands upon it, was perilously close to inadequacy. The maximum capacity of the system was 1,250,000 gallons a day. Of this the A. V. Roe company required 1,000,000 gallons, Malton Subdivisions Limited a maximum of 125,000 gallons a day and the construction of water-mains in the village of Malton was under contemplation. Some additional water had been promised to one Levinter. There was evidence that the capacity of the water-main could be increased by further pumping facilities involving a large expenditure of money, but that immediately prior to the enactment of the Regulations no additional pumping stations had been installed and consequently water was not then available for use by developers of the property.

A great deal of evidence was adduced at trial as to whether or not a sewage system was available, which was a matter of importance because, without sewage facilities, the appellants could not sell their land by lots for industrial and commercial use. In the latter part of 1953 work had been begun by Malton Subdivisions Limited on a sewage-disposal plant sufficient to serve 3,000 people in the subdivision where approximately 2,400 people were expected to reside. When a large parcel of the land owned by Malton Subdivisions Limited was expropriated in February 1954, work on the sewage-disposal plant stopped

and there was no evidence to show that the appellants would have the right to connect their lands with this sewage-disposal plant even if it were completed.

On the whole of the evidence I agree with the conclusion of the learned President that the lands were not ready for development immediately prior to April 9, 1953, and would only become so gradually and when sewer and water facilities were available.

Moreover, as has been pointed out, the lands in question were situate at the end of a runway and land in such a position and underneath a flightway would be less desirable if other land were available. In addition, the A. V. Roe plant was situated nearby and one major industry had moved from the area because of difficulty in competing in the labour market with A. V. Roe because that company paid substantially higher wages than those paid in other industries. There was some evidence that the financial position of the Township of Toronto would be a discouragement to subdividers.

I have examined the evidence of the sales of other properties in the area prior to the enactment of the Regulations. This evidence discloses that there were five sales in 1951, the price per acre varying between $500 and $700. There were no sales of lots in concession 7 in 1952 or prior to April 9 in 1953. There was a sale of part of lot 7 in concession 8 on February 18, 1953, from one Levinter to Malton Subdivisions Limited, but this property was purchased for the purpose of building a sewage-disposal plant for a subdivision then being developed and was the sale of property in a particular place and for a particular purpose. In Etobicoke Township, which lies immediately west of Toronto Township, there were four sales in 1952.

In 1953 there were eight sales, five of which were to the Ontario Jockey Club. I am of the opinion that these sales are not a safe guide to the value of the lands in question, as it seems to have been common knowledge that the Ontario Jockey Club was buying land in the area for the purpose of building a race-track and it appears plain that the prices it paid were above the market price and are not indicative of the value of the lands of the appellants.

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With regard to the value of the lands after the enactment of the Regulations, the learned President rejected the opinion of the experts for the appellants that they had no value other than for agricultural purposes and were only worth, in the opinion of the witness Bosley, $10,000, and, in the opinion of the witness Stewart, $20,000. The evidence discloses that within the area affected by the Regulations some sales were made for speculation or development and, while the effect of the enactment of the Regulations was to postpone the development of the lands, it did not preclude long-term speculative possibilities and the lands were more valuable than farm land. With regard to the decrease in value, the learned President found that the frontage on the Airport Road, for a distance back of about 400 feet, being approximately 4 acres, with a potential use for a service-station, or motel, or some similar use, had a value of not less than $26,000. He then placed a value on 14 acres up to a height restriction of 35 feet at $200 an acre, making a total of $2,800 for this acreage. The remaining 82 acres he valued at $350 an acre, or $28,000, bringing the total value of all the lands to $57,500. He then came to the conclusion that the decrease in value of the appellants' property could be fairly fixed at $40,000.

The appellants, in proof of the value of the lands prior to the enactment of the Regulations, tendered evidence of sales in the vicinity of those affected after that date, but such evidence was excluded. The Crown was subsequently permitted to adduce similar sales as evidence to refute the statements of the appellants' witnesses as to diminution of value resulting from the Regulations. If sales made after the enactment were totally excluded, obviously there could be no evidence whatever of sales affected by the Regulations in the Malton area and apparently there was no other airport area which afforded such instances.

In my view, evidence of a sale after the enactment can, in the absence of special circumstances, be relevant to the value prior to the enactment. The sale must be shown to be as free in all respects from extraneous factors such as prior sales and made within such time as the evidence shows prices not to have changed materially from those before the critical date. In other words, the mere circumstance of the sale being before or after a particular date cannot

nullify the relevance of subsequent sales while the general market conditions have remained the same. The rule should allow the Court to admit evidence of such sales as it finds, in place, time and circumstances, to be logically probative of the fact to be found. In my respectful view, however, the exclusion of the evidence in this case as evidence of value based upon the element of time alone, while technically erroneous, did not materially affect the finding of the learned President as to compensation to which the appellants should be held to be entitled.

As has been pointed out, subs. (2) of s. 4 and s. 5 were revoked by order in council P.C. 1955-1302 dated September 1, 1955. These Regulations provided:

> 4. (2) Where any building, structure or object on any land to which these regulations apply exceeds the limits in elevation specified in subsection (1), the Minister may order the owner or occupier of the land to remove, demolish or modify such building, structure or object or do any act or thing necessary to ensure that such building, structure or object complies with the limits in elevation so specified and may, in any such order, specify the time within which such removal, demolition, modification, act or thing shall be done.
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> 5. No person shall operate or cause to be operated on any lands to which these regulations apply any machine, device, contrivance or thing after being notified by the Minister that, in the opinion of the Minister, the machine, device, contrivance or thing causes or is likely to cause, by the emission of light, smoke, noise or fumes, a hazard or obstruction to aircraft using the airport.

Two questions present themselves for determination in connection with the two Regulations. In the first place, the appellants contend that they are entitled to compensation for the diminution in value due to the effect of these revoked Regulations.

It was argued by counsel for the Crown that, until an order was actually made by the Minister, the property could not be said to have been "injuriously affected". Under s. 23 of the *Expropriation Act*, R.S.C. 1952, c. 106, injurious affection can result only from some positive act by the Crown, but that is because of the language contained in the section itself, which provides that the injurious affection must be caused by the "construction" of a public work. Under s. 4(8) of the *Aeronautics Act*, 1927, as amended, compensation is to be awarded to every person whose property is injuriously affected "by the operation of a zoning regulation". The question arises whether there

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can be injurious affection giving rise to a claim for compensation when no order has actually been made by the Minister. If this question were answered in the negative, the Minister, by forbearing to make an order within two years, could effectually deprive an owner of compensation for what might render his land almost valueless. The purpose of the statute is clear. Vertical regulation is necessary in the vicinity of airports and the vesting of the powers mentioned operates with an immediate effect on the use and value of the land. It becomes at once a burden on the land and the resulting diminution in value is a proper subject for compensation.

The second question for consideration is, what is the effect of the revocation of the two Regulations in 1955 on the compensation?

In determining the extent of loss in value due to the Regulations, in my view, the Regulations as a whole should be considered, and not the extent of loss produced by one particular section such as s. 5, and it would be impossible to attempt to distribute the diminution in value among individual Regulations. It is quite clear that the subsequent revocation of the Regulation could not give rise to a claim against the owner for a return of any part of compensation already paid and that result cannot, in effect, be reversed by withholding compensation until after the particular burden has been removed. In any event, the revocation did not affect the quantum of the award of compensation in the present case, as the learned President states specifically that the revocation of ss. 4(2) and 5 was not taken into account in making the award.

Section 4(8) of the *Aeronautics Act*, 1927, provides that every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty, as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, "minus an amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport". I agree with the learned President that there is nothing in the evidence to indicate that there has been an increase in the value of the property which is attributable to the airport.

A cross-appeal was made by the Crown against the award on the ground, to put it shortly, that at the time of the enactment of the restrictive Regulation there was already, on a portion of the land, a provincial height limitation which, on the evidence, reduced the value of the whole radically and to little more than was paid for it. This contention makes it necessary to go into the facts in some detail.

Under *The Planning Act,* R.S.O. 1950, c. 277 (now 1955, c. 61), provision is made for the formulation of what is called an "official plan" of an area in any municipality or municipalities. Its purpose is to exhibit a programme of development, in the language of the definition, "designed to secure the health, safety, convenience or welfare of the inhabitants of the area". The "development" of an area means its settlement, utilization and growth in all features and aspects of urban and suburban life. When a planning area has been defined by the Minister, a planning board is appointed by the council of the municipalitiy, or, in the case of two or more municipalities, that one designated by the Minister. The planning board thereupon applies itself to an investigation and a survey of the physical, social and economic conditions pertinent to the development; it prepares maps, statistical information and other material necessary for the "study, explanation and solution" of the problems presenting themselves, holds public meetings, draws up a plan and recommends it to the council for adoption. Upon adoption the plan is submitted to the Minister, and upon his approval it becomes the official plan of the planning area.

The plan necessarily deals broadly and somewhat generally with features of the development, such as the designation of industrial, commercial and residential sectors, and other prescriptions of the mode and character of use to which the area may be put. From time to time the planning board may recommend to the council the implementation of any of these features of the plan.

When an official plan comes into effect no public work shall be undertaken and, except for a qualification which is not material here, no by-law shall be passed by the council for any purpose that does not conform with it.

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The effect of this is that wherever a by-law is required to enable private action to be taken, it must conform with the plan, but where a by-law is unnecessary, and in the absence of action by the Minister, who is authorized by s. 25 to exercise any of the powers conferred on councils by s. 390 of *The Municipal Act,* R.S.O. 1950, c. 243, the scope of action, so it is argued by the appellants, is at large.

Here an official plan for the township of Toronto Gore was approved by the Minister on March 5, 1951, and in an appendix to the map and as part of the plan it was stipulated as Item B. 1:

> Special height regulations are shown on the plan of the Department of Transport for one flightway and may be extended to others if required by the Department of Transport. These will apply to all structures. A maximum height limitation will be imposed on the whole urban area of 40 feet, to be measured from the present ground level to the highest point of the roof, not only as a flight safety factor, but also as a means of reducing the ultimate cost of fire fighting equipment.

Although the maximum height limitation "will be imposed on the whole urban area", it would seem that this is a specific feature of the plan and that it is as effective as if it were embodied in a by-law of the council or an order of the Minister.

There is next the matter of the subdivision of property. By s. 24 of *The Planning Act, supra,* the council may, by by-law, designate any area within the municipality as an area of subdivision control and thereafter no agreement to sell land and no conveyance of land can be made otherwise than by describing the land in accordance with a registered plan of subdivision. To this there are three exceptions: (a) where the land to be sold or conveyed is more than 10 acres in area; (b) where it is the whole part then remaining to the owner of one parcel described in a registered conveyance to him; or (c) where the consent of the planning board or the Minister is obtained.

The lands in question were formerly part of the township of Toronto Gore which, on the west, adjoined the township of Toronto. By a by-law of the Township of Toronto Gore dated November 15, 1948, the whole of the township was, under the provisions of the Act then in force, declared an urban development area. Prior to that, on August 4, 1948, a by-law of the Township of Toronto made a similar declaration, but described the area by a specification of

lots. By an amendment made to the Act in 1949, where a council had so designated such an area and the by-law was in force on March 9, 1949, the area was to be deemed to be one of subdivision control. By virtue of that enactment the land in question became part of a subdivision area.

By an order of the Ontario Municipal Board of June 18, 1951, effective June 30, 1951, the southerly portion of the township of Toronto Gore, embracing the area designated urban on the official plan and including the land in question, was annexed to the township of Toronto. By s. 31 of *The Municipal Act, supra*:

> Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them.

Counsel for the appellants argued that the effect of that section was to nullify the by-law of the Township of Toronto Gore of November 15, 1948, and, as the by-law of the Township of Toronto of August 4, 1948, was specific and limited to the lots described, there was no by-law regulating the subdivision of the land in question from and after June 30, 1951. At the same time it was contended that the official plan created no restriction until implemented by by-law or order of which there was none.

Whether a subdivision by-law can be said to come within s. 31 of *The Municipal Act, supra,* is extremely doubtful. By s. 24(3) of *The Planning Act, supra,* a subdivision can be altered or dissolved only with the approval of the Minister: a by-law establishing a subdivision cannot, therefore, be repealed by the council which passed it. The by-laws contemplated by the section are primarily of legislative character which as general laws can apply throughout the municipality. But zoning is not a matter of general legislation in that sense; it is essentially administrative; it may be limited to a small portion of the township; there might be several areas so declared within a township with different features and it could not be said that any one or which of them extended to the annexed area.

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An official plan is not bound by the limits of one municipality; it may cover several or parts of several; and it would defeat the purpose in view if realignment of township boundaries were to effect a disruption of a planned development. Under s. 14 a by-law that conforms with an official plan, and whether passed before or after the plan, is to be deemed to implement the plan. This means that the official plan of March 5, 1951, was implemented by the by-law of the Township of Toronto Gore of November 15, 1948. The effect of this was to continue the plan and the by-law as in force after the transfer of part of the township of Toronto Gore to the township of Toronto.

In that situation, the appellants, in September 1951, applied to have about 950 feet of this land, running back from the Airport Road, brought under a plan of subdivision. On October 24, 1951, the approval of the Minister to a draft plan was given, subject to certain conditions, among which was a height restriction endorsed on the plan. This fixed a maximum building height of 19 feet at a distance of 50 feet from the street line, of 24 feet at 275 feet, and of 34 feet at 725 feet. It was argued that these restrictions were beyond the power of the Minister to impose, but this would seem to be without substance in view of s. 26(4), which provides that in considering a draft plan of subdivision regard shall be had by the Minister to

> (*f*) the restrictions or proposed restrictions, if any, on the land, buildings and structures proposed to be erected thereon and the restrictions, if any, on adjoining lands.

Moreover, under s. 25(1)(*a*), the Minister, as already mentioned, has all the powers of a council under s. 390 of *The Municipal Act* and the imposition of the limitation here comes within the scope of that power. It was suggested that the limitation was in conflict with the official plan and so far violated s. 25(1)(*a*) which requires such an order to conform with the official plan. As the latter establishes only a maximum height of 40 feet, the limitations within that maximum made by the Minister are in conformity with it.

Although I have expressed my views on the legal questions raised, it is not necessary to make a definite holding on them. It is sufficient for the purposes of this appeal that the official plan, the by-law and the restrictions on

the draft plan of subdivision were in *de facto* existence with a strong presumption of their validity at the time of the imposition of the Dominion restrictions. That fact itself was sufficient to cast such a cloud upon what has been claimed to have been free land as to affect the market value almost as significantly as if their validity were unchallenged.

It is argued in support of the cross-appeal that the learned President has failed to give sufficient weight to the existence of this cloud, but I am not satisfied that this is so. He refers to the contention in some detail in his reasons and, in speaking of the draft plan conditionally approved in October 1951, says in part (1):

> One of the conditions was that the owner should observe the height restrictions shown on the draft plan. The height restrictions were marked on it. The maximum building heights were 19 feet at just a little back from the frontage on the Airport Road, 24 feet at about 225 feet further back and 34 feet at about 450 feet still further back. This plan with the height restrictions on it and Mr. Tyrrell's letter attached was filed as ex. 38. It was not until Mr. Roberts was satisfied that the draft plan was approved that he decided to exercise the option and he did so on October 29, 1951. He then listed the property. It is clear that he knew of the height restrictions and never tried to have them changed. They are, of course, somewhat less severe than those imposed by the Regulations.

I am unable to say that the learned President did not give this factor due consideration in arriving at his final figure.

It was a necessary step in ascertaining the amount of compensation in this matter to determine, first, the value of the land to the owners, freed of the restrictions. The principle to be applied is stated in the judgment of this Court in *Woods Manufacturing Company Limited v. The King* (2). The question is as to what amount a prudent person in the position of the owners, being in possession of the property but without title to it, would be willing to give sooner than fail to obtain it. The learned President has not applied this principle, but rather the one stated by him in his judgment in *The Queen v. Supertest Petroleum Corporation Limited* (3), decided since the date of the *Woods* judgment. I am, however, of the opinion that

(1) 1 D.L.R. (2d) at pp. 22-3.
(2) [1951] S.C.R. 504, [1951] 2 D.L.R. 465, 67 C.R.T.C. 87.
(3) [1954] Ex. C.R. 105, [1954] 3 D.L.R. 245, 71 C.R.T.C. 169.

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the amount determined upon as the value of the property is adequate and that the sum of $40,000 allowed as compensation for injurious affection is sufficient.

I would dismiss the appeal and the cross-appeal both with costs.

Appeal and cross-appeal dismissed with costs.

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