

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**THE TORONTO-DOMINION BANK**

Applicant

-and-

**TORONTO ARTSCAPE INC.**

Respondent

**FACTUM OF THE REGULATORY BODY,  
CITY OF TORONTO**

(Motion by the Receiver for approval of a sales process,  
returnable April 25, 2024)

April 24, 2024

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## PART I – OVERVIEW

1. The City of Toronto (the “**City**”) opposes this sales process motion in its capacity as a “regulatory body” because the proposed process is not appropriately fair and transparent. Among other issues, the proposed sales process does not contain specific necessary measures to:

- a. ensure bidders are advised of the requirement for compliance with a zoning order issued by the Ontario Municipal Board pursuant to the *Planning Act* (and related *Planning Act* requirements), which restrict the use of the 20 residential units at 38 Abell Street to below-market rental housing for artists and their households only (the “**OMB Artist Zoning Order**”), and restrictions registered on title to the 20 residential units at 38 Abell Street and the 2 residential units at 210 Simcoe (the “**Affordable Housing**”), in priority to all creditors, that serve to protect the affordable nature of these requirements by requiring the consent of the City to proposed changes in ownership;
- b. require consultation with the City so that the City may evaluate a potential purchasers’ ability to comply with all applicable legal restrictions governing the use or transfer of these properties and consider whether, or on what terms, the City may consent to the assignment or execution of related legal agreements necessary for the specific proposed transactions to achieve regulatory compliance; and
- c. include an assessment of the proposed bidder(s) intention and ability to operate the Affordable Housing in compliance with the applicable laws and legal agreements with the City as part of the Receiver’s evaluation of bids when it is determining the appropriate recommendation at the close of bidding.

The information provided in the Receiver’s Report is either silent on what a future purchaser(s)’s obligations will be or inconsistent with these obligations because the proposed sales process does not contemplate appropriate disclosure, consultation, or bid evaluation criteria.

***Restrictions Requiring Use As Affordable Housing Should Not be Vested Away***

2. Full disclosure and clarity with respect to the applicability of restrictions that the purchasers must satisfy if they acquire the Affordable Housing is essential to achieve a fair, transparent, and efficient sales process. This Court can determine on the record before it that:

- a. the OMB Artist Zoning Order restricts the use of the Abell Affordable Housing, an important fact that it is necessary for the Receiver to make potential bidders aware of; and
- b. the City's priority interests registered pursuant to s. 118 of the *Land Titles Act* restricting use or transfer of the Affordable Housing should not be vested away absent the City's consent, as to do so fails each step of the governing legal test set out by the Ontario Court of Appeal in *Third Eye Capital*.

Clarity on these issues now for potential bidders will increase the likelihood that acceptable bids are received for purchase of the Affordable Housing, which is in the interest of all creditors. The difficulty is that the Receiver's counsel has advised that they disagree with the City's position on the effect of the *Planning Act* and title restrictions. Therefore, there is, essentially, a fundamental dispute about what rights the debtor had in the Affordable Housing that exist to be sold.

3. The City's priority interests were registered prior to the interests of any creditors in this proceeding; the two mortgagees of the Abell Affordable Housing had express actual knowledge of the City's rights, and the Applicant TD lacks a registered interest in either property. All creditors also could or should have been aware of the zoning restrictions because those were adopted through a public process prior to the construction of the Abell Affordable Housing.

4. The Receiver proposes to set in place a process to sell the Affordable Housing that does not reference any disclosure of this information, nor address any of these issues. The City repeatedly told counsel for the Receiver, for months, about the OMB Artist Zoning Order and the

legal restrictions on the Affordable Housing. The Receiver's factum does not engage with the zoning / *Planning Act* issues at all – rather, it attributes to the City arguments the City has not (and does not advance) by suggesting that the City relies on merely contractual rights. While, as discussed below, the City does have some contracts, the agreements are integrated with the statutory and regulatory regime to require the Abell Affordable Housing to continue as such. The Receiver's reference to disclaiming these contracts leads to statutory non-compliance, giving the City the authority to pursue enforcement. The City respectfully submits that it serves no one's interest for the Court to set into motion a process that will result in statutory non-compliance.

5. In the Receiver's view, "It would be a waste of resources to engage in a court adjudication of the appropriateness of a vesting order before the Receiver has undertaken a sale process". While the City agrees that, in other cases and on other facts, the Court *could* vest title in a property without the consent of someone holding a s. 118 *Land Titles Act* restriction, the City submits that it is clear the Court should not do so on the facts in this case. The legal authorities which the Receiver cites in its factum as indicating the City's s. 118 *Land Titles Act* restrictions could be vested away are complete *non-sequiturs* and do not address issues raised in this case where the registered interest is to protect the provision of affordable housing to the public on behalf of the City.

6. The City's existing registered interest which is in priority to all creditors is continuing and greater than a mere financial interest; it changes the inherent nature of the property rights available for sale, by securing the requirement that they be operated as below-market housing. In short, the Receivership process cannot be used to change the fundamental nature of the property rights which the debtor had to the benefit creditors, and at the expense of the public. As the Supreme Court of Canada said, in *Orphan Well Association*, insolvency "does not amount to a licence to disregard rules" and Receivers "must comply with valid provincial laws ... notwithstanding the



consequences this may have for the bankrupt's secured creditors." In this context, that means the sales process must be amended to provide transparency by providing accurate information about the regulatory context, make the relevant documents at issue available to bidders, require bidders to specify how they intend to address the regulatory requirements, and include in the evaluation of bids a consideration of how bidders intend to achieve regulatory compliance. With its proposed sales process, the Receiver is putting the cart before the horse in failing to be clear as to what precisely is being sold before it asks bidders to bid.

7. Finally, the City notes that its position is consistent with the decision of Justice Steele in granting the Receivership Appointment Order. Justice Steele found that the Court of Appeal's decision in [\*Thornhill Green Cooperative Homes\*](#) applied. That decision states that, as it relates to legally protected affordable housing, "special factors" under the *Soundair* principles must be considered. In this case, the "special factors" that must be considered are the OMB Artist Zoning Order, the City's priority registered interests, and that the Affordable Housing was created and acquired as "community benefits" under the *Planning Act* for Artscape to provide affordable housing to the public at a below market price. All of these considerations inform how the Affordable Housing must be dealt with in the context of this Receivership.

***Requirements the City Submits Should be Included in the Order Sought***

8. The City has, for several months, repeatedly been advising both the Applicant and the Receiver about these issues, and even offered to assist the Receiver in identifying prospective bidders that could legally operate the properties. The Receiver has refused to discuss any changes to the sales process that might satisfy the City's concerns.

9. The City therefore requests that the Court order that the sales process include appropriate disclosure, consultation and evaluation, and the City has set out specific steps it submits be

required in more detail at the end of this factum under “Order Requested.” Alternatively, the City submits the Court dismiss the Receiver’s motion as it relates to the Affordable Housing, without prejudice to its right to return to Court to seek approval for a new sales process in accordance with the reasons reflected in this Court’s decision.

## **PART II – FACTS**

### ***The City is a “Regulatory Body”***

10. The City of Toronto is a “regulatory body” as defined in the *Bankruptcy and Insolvency Act*, as it has powers, duties and functions relating to the enforcement or administration of various acts of the legislature of Ontario, which in this case include laws related to land use planning and the provision of affordable housing including, the *City of Toronto Act*, *Planning Act*, and *Housing Services Act*, among others.

### ***City Obtained Abell Affordable Housing as Planning Act Community Benefits***

11. The affordable housing properties at 38 Abell Street consist of twenty “*artist live/work studio*” rental condominium units located on the first through third floors of a residential condominium near Queen Street West and Dufferin Avenue, an area of the City known as West Queen West (the “Abell Affordable Housing”).<sup>1</sup>

12. In order to understand and apply the “special attention” to affordable housing mandated by the Court of Appeal’s [Thornhill Green](#)<sup>2</sup> case, it is necessary to consider how the Abell Affordable Housing came to exist. In 2006 and 2007, there were two hearings before the Ontario Municipal

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<sup>1</sup> Affidavit of Sarah Phipps (“Phipps Affidavit”, para. 6, City’s Responding Motion Record (“City’s MR”), pg. 8.

<sup>2</sup> [York \(Region\) v. Thornhill Green Co-operative Homes Inc., 2010 ONCA 393 at 23 – 24.](#)

Board (“OMB”) concerning the proposed re-developments in the area, including the property in which the Abell Affordable Housing is now located.<sup>3</sup> When these development applications were being considered, one of the City’s significant priorities was to try and protect affordable not for profit arts and culture in the area because this area was the nucleus for the creative sector in the west downtown.<sup>4</sup> Ultimately, the developer agreed to a settlement to provide “community benefits” in the form of conveyance of an ownership interest in 20 units to Artscape for a below market price, to be rented to artists as live/work studios; these units are the Abell Affordable Housing.<sup>5</sup>

13. Thereafter, on January 8, 2008, the OMB issued an Order that amended the City’s comprehensive zoning by-law to integrate the requirement to provide these community benefits, the 20 below market rental units available only for artists, into the zoning for the property.<sup>6</sup> This is the OMB Artist Zoning Order, and it included the following definition:

“*artist live/work studio*” shall mean a dwelling unit containing a studio space for the production of art and which is the subject of an agreement between the City and the housing provider, registered on title, that it will be **rented** at **no more than 0.8 times the** [Canada Mortgage and Housing Corporation] **average market rent** for dwelling units of similar size in the City of Toronto and **inhabited only by a working artist and his or her household.**<sup>7</sup>

The basic “structure” of the OMB Artist Zoning Order works as follows: the property in question is required to have a designated amount of “non residential gross floor area,” and the artist / live work studios only count toward that requirement if the units meet the definition of “*artist live/work studio.*” If the Abell Affordable Housing ceases to comply with the definition above of “artist live

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<sup>3</sup> OMB Decision, Jan. 10, 2007 & Jan. 8, 2008, Exhibit 1C & 1I, City’s MR, pg. 71 & 174.

<sup>4</sup> Staff Report to City Council, Exhibit 1A, City’s MR, pg. 22.

<sup>5</sup> Phipps Affidavit, para. 6, S.37 *Planning Act* Agmt., Ex. 1G, City’s MR, pg. 8&132.

<sup>6</sup> In 2008, the OMB was the appellate authority for zoning under the *Planning Act*, it has since been renamed.

<sup>7</sup> OMB Decision, Jan. 8, 2008, Exhibit 1 I, City’s MR, pg. 194.

work studio”, the entire building’s “non residential gross floor area” requirement is not met, and the entire 438 unit building in which the two condominium corporations are located is in breach of its zoning requirements.<sup>8</sup>

### ***City Directed Community Benefit Space be Conveyed to Artscape To Benefit the Public***

14. The Abell Affordable Housing “community benefits” are an example of benefits obtained through voluntary agreements between the City and developers pursuant to s. [37 of the Planning Act](#).<sup>9</sup> In exchange for developers being afforded additional height and density beyond what they would otherwise be entitled to, the developer agrees to provide value to the community that may take the form of either money or space that is in or near the development. The space is conveyed to the City (or, at the City’s direction, to a third party such as a not-for-profit organization) so the space can be available for the benefit of City residents.<sup>10</sup> The s. 37 *Planning Act* agreement which references all these issues in this case was registered on title to the Abell Affordable Housing on August 23, 2010, before all creditors at issue obtained an interest in the property.<sup>11</sup>

### ***Site-Specific Official Plan Amendment to Comply with Rental Preservation Regulations***

15. The Abell Affordable Housing is also subject to site-specific regulations pursuant to which the City regulates the conversion of rental housing that could otherwise be lost when land is re-developed or re-zoned. These general regulations are in [s. 111 of the City of Toronto Act](#),<sup>12</sup> s. 3.2.1 of the City’s Official Plan, and *Chapter 667 – Residential Rental Property Demolition And Conversion Control of the Toronto Municipal Code*.<sup>13</sup> Pursuant to these and other laws, the City

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<sup>8</sup> Phipps Affidavit, para. 19, OMB Decision, Jan. 8, 2008, Ex. 1 I, City’s MR, pg. 13 & 183

<sup>9</sup> [S. 37 of the Planning Act, R.S.O. 1990, c. P.13.](#)

<sup>10</sup> Phipps Affidavit, para. 13 - 15, City’s MR, pg. 11

<sup>11</sup> S. 37 *Planning Act* Agt., Ex. 1G, Parcel Register PINS, Ex. 1F, City’s MR, pg. 132 & 93.

<sup>12</sup> [S. 111 of the City of Toronto Act, S.O. 2006, c. 11, Sch. A.](#)

<sup>13</sup> Official Plan 3.2.1, *Chapter 667 – Building Rental Property Demolition*, Exhibit 1N, 1O, City’s MR, pg. 239 & 251.

regulates and approves condominium declarations (as it did for condominium in which the Abell Affordable Housing are located) and, if the requirements regulating the protection of affordable rental housing are not met, then the City can withhold its consent. The condominium declaration states that the Abell Affordable Housing:

“shall be occupied and used in accordance with the applicable zoning by-laws pertaining to the Property ... and for no other purpose whatsoever.”<sup>14</sup>

There is also a substantially similar clause that requires compliance with “any statutes, regulations and rules of any governmental authority having jurisdiction.” The Receiver has not put this condominium corporation on notice about its proposed sales process and, depending upon which bidder the Receiver ultimately recommends, there may be an issue of the condominium’s non-compliance with their condominium declaration.

16. The site-specific regulations currently applicable to the Abell Affordable Housing as it relates to rental housing replacement are contained in a *Planning Act* Official Plan Amendment (“OPA”), another *Planning Act* instrument. The structure of the site-specific regulation in the OPA is such that the Abell Affordable Housing:

- a. were only permitted to be registered as condominium units on the basis that they were:
  - i. owned by a not-for-profit housing provider; and
  - ii. secured in agreements with the not-for-profit housing provider as affordable for 25 years, and as rental units for an additional 25 years, and
- b. must remain as “artist live/work studios” to satisfy the requirements of the Official Plan enacted under the *Planning Act*.<sup>15</sup>

The Abell Affordable Housing replaced the original artist spaces that would have been lost due to the original re-development of the area but for the protections arising from City’s statutory regime

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<sup>14</sup> Condominium Declaration, Exhibit 1P, City’s MR, pg. 276.

<sup>15</sup> Official Plan Amendment 121, Exhibit 1K, City’s MR, pg. 223.

of general application. This site-specific OPA worked as part of a package because it is supported by the OMB Artist Zoning Order, and the City's s. 118 *Land Titles Act* restriction.

17. The City doesn't disagree with the statement in the Receiver factum that it has the authority to disclaim contracts, but its factum fails to consider that, in this case, disclaiming the agreements will result in contraventions of applicable law. If the Abell Affordable Housing is transferred or vested to someone who is not a non-profit housing provider, or who does not have a housing agreement with the City, the OPA at issue and the condominium declarations are in non-compliance. Neither these obligations nor the potential consequences for non-compliance are disclosed in the Receiver's sales process.

***City's Priority s. 118 Land Titles Act Restriction***

18. In addition to foregoing provisions in the OMB Artist Zoning Order, the Abell Affordable Housing is also protected as affordable housing by a registered priority real estate instrument. After the Abell Affordable Housing was transferred to Artscape, a s. 118 *Land Titles Act* restriction was registered on title to each unit of the Abell Affordable Housing. The specific text of the registered restriction is:

The applicant [Artscape] hereby applies to register a restriction, pursuant to s. 118 of the *Land Titles Act*, on title to each unit set out above ... requiring the prior written consent of the City's Director, Affordable Housing Office to any transfer of the Project, in whole or in part.<sup>16</sup>

19. This s. 118 *Land Titles Act* restriction was registered on August 12, 2012. The two mortgages at issue in this proceeding were registered in 2020 and 2021.<sup>17</sup> The mortgagees were also aware of this restriction when advancing monies to Artscape because the mortgages both state:

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<sup>16</sup> S. 118 *Land Titles Act* Restriction, Exhibit 1H, City's MR, pg. 171.

<sup>17</sup> S. 118 *Land Titles Act* Restriction, Ex. 1H, Parcel PINS, Ex. 1F, City's MR, pg. 171 & 93.

“In accordance with registration AT3110448 registered on 2012/08/24 [the s. 118 *Land Titles Act* restriction], the consent of City of Toronto, Executive Director of the Housing Secretariat has been obtained for the registration of this document.<sup>18</sup>

The Applicant TD has no registered interest in the Abell Affordable Housing, its general security agreement interest is not registered.

### ***Context of Acquisition of Simcoe Affordable Housing as Planning Act Community Benefits***

20. The Affordable Housing units at 210 Simcoe Street consist of two live-work rental condominium units on the third floor of a residential condominium building (and two storage lockers) (the “Simcoe Affordable Housing”).<sup>19</sup> The property is located a block west of University Avenue between Dundas and Queen Streets West, near the Art Gallery of Ontario and Ontario College of Art and Design (OCAD). Given that there are two units at the Simcoe Affordable Housing, as compared to twenty at the Abell Affordable Housing, the City will speak to the background of their acquisition more briefly.

21. In sum, the City received an application to re-develop a property into two residential high-rise towers. As part of the approval of the re-development, the developer agreed to provide the City with “community benefits” and obtained additional height and density for its proposed development which took the form of a s. 37 *Planning Act* agreement (one of the instruments used with reference to Abell Affordable Housing, discussed above). The community benefits obtained by the City was eight residential units, which had to be conveyed to two not-for-profit arts and culture groups (one of which was Artscape). Of those eight units, two are the Simcoe Affordable Housing.<sup>20</sup>

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<sup>18</sup> Mortgages, Exhibit 2F and 2G, City’s MR, pg. 172.

<sup>19</sup> Affidavit of Doug Rollins, para. 3, City’s MR, pg. 3.

<sup>20</sup> Report to City Council, s. 37 *Planning Act* Agmt., Ex. 2A & 2D, City’s MR, pg. 317 & 356.

22. One of the requirements of the s. 37 *Planning Act* agreement was that “forthwith” upon registration of the development as a condominium, a s. 118 *Land Titles Act* restriction would be required against the “Artscape Units” (which included the Simcoe Affordable Housing), in favour of the City “in order to preserve the long-term intended use of the of the Artscape Units.”<sup>21</sup> The s. 37 *Planning Act* agreement, and the s. 118 *Land Titles Act* restriction, were registered on the Simcoe Affordable Housing on September 11, 2012 and June 23, 2015, respectively. The only secured creditor on the Simcoe Affordable Housing is the condominium corporation (who has a lien that we presume to be for unpaid common element fees). The Applicant TD has no registered interest on the Simcoe Affordable Housing either.<sup>22</sup>

***City Sets out Position and Reasoning to Applicant and Receiver Over Six Months That Affordable Housing Can Only Be Sold To be Used As Affordable Housing, Neither Responds***

23. In the months leading up to the initial Receivership appointment, counsel for the City wrote to counsel for the Applicant setting out in detail all of the above issues and advising that the City would, in principle, consent to the sale of the Affordable Housing if it was satisfied that the proposed purchaser(s) would comply with the legal restrictions that require these units to continue to be affordable housing for artists.<sup>23</sup>

24. The City sent the same correspondence to the Receiver shortly after the Receivership was commenced. The City also offered to introduce the Receiver to entities which might be able to purchase and legally operate some of the properties within the Receivership, and offered to arrange a meeting between the Receiver and the City’s real estate and land-use planning lawyers to further explain the issues and documents are discussed above.<sup>24</sup>

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<sup>21</sup> s. 37 *Planning Act* Agreement, Exhibit 2D, City’s MR, pg. 360.

<sup>22</sup> s. 37 *Planning Act* Agreement, s. 118 *Land Titles Act* restriction, Parcel Register PINS, Exhibit 2D, 2C, City’s MR, pg. 352 & 344.

<sup>23</sup> Correspondence from City to Applicant, Sept. and Oct. 2023, Ex. 2N, City’s MR, pg. 443.

<sup>24</sup> Correspondence from Counsel for City to Receiver, Feb. 7, 2024, Ex. 2O, City’s MR, pg. 442.



25. The Receiver’s Report attempts to frame the issues as just the simple sale of “distressed assets”, ordinary condominiums rather than protected Affordable Housing. In particular, while Avison Young notes that an efficient bid process requires bidders be “presented with the most accurate and complete property information”,<sup>25</sup> the information put forward in the motion record indicates that Avison Young may not have complete information because:

- (a) the discussion about the value of the Abell Affordable Housing notes the rents are well below market as potentially dissuading purchasers, but this is linked only to contractual rights of existing tenants;
- (b) the discussion about the value of the Simcoe Affordable Housing notes rents are below market, but with no further discussion;
- (c) all comparable valuation information regarding the Affordable Housing is with reference to market sales; and
- (d) there is no mention whatsoever of the requirement that potential purchasers will have to obtain the City’s consent to release its s. 118 *Land Titles Act* restriction or to the assignment of the existing housing agreement or execution of a new housing agreement.<sup>26</sup>

26. In contrast, however, the proposed sales process treats the Youngplace property very differently. Youngplace is a forty-five unit condominium in a former school that is currently used for not for profit arts and culture, but with no housing. Artscape owns fifteen of the units. The City takes no position regarding the Receiver’s proposal to sell the Artscape Youngplace units. The description of Youngplace in the Receiver’s proposal contains the following comment:

Property has site-specific Zoning and OP designations to allow the current uses. General commercial uses do not appear to be permissible and may deter potential buyers/users.<sup>27</sup>

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<sup>25</sup> Avison Young Executive Summary, Marketing Initiatives and Sales Process, Receiver’s Motion Record, pg. E119.

<sup>26</sup> Avison Young Executive Summary, Marketing Initiatives and Sales Process, Receiver’s Motion Record, pg. E119.

<sup>27</sup> Avison Young Executive Summary, Marketing Initiatives and Sales Process, Receiver’s Motion Record, pg. E129.

The issues at Youngplace with respect to the application of site-specific zoning and OP designations have similar elements to the Affordable Housing, but there is no comparable discussion for the Affordable Housing in the Receiver’s proposed sales process.

27. Given all of its concerns, counsel for the City promptly wrote to counsel for the Receiver when it received the motion record and, among other things, provided a precedent court order as an example of the terms appropriate in this case. The City thought the example of the order granted in that other case would be helpful as it set out terms for disclosure of information, consultation, and evaluation criteria that included consideration of the potential bidder’s planned treatment of particular agreements in place.<sup>28</sup>

28. Counsel for the Receiver responded in two brief emails baldly stating that the City’s analysis of its own zoning instruments was wrong, rejecting any proposed role for the City in the sales process, asserting that addressing the City’s concerns in the context of the sales process motion is a waste of resources, and ignoring the request to discuss a possible resolution.<sup>29</sup> Also, its factum does not respond to the OMB Artist Zoning Order and the *Planning Act* issues in any way.

### **PART III – LAW AND ARGUMENT**

29. As the Receiver’s proposed broker Avison Young states in its proposal:

Based on our extensive experience, the smoothest disposition processes that results in the highest sale price are achieved by performing as much due diligence and collection of information at the outset ahead of going to market. Buyers are willing to offer the highest price and/or overall best business terms when they have been presented with the most

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<sup>28</sup> Correspondence to Counsel for the Receiver, April 15, 2024, Exhibit 2P, pg. 444.

<sup>29</sup> Correspondence from Counsel for the Receiver, April 15, 2024, Exhibit 2P, pg. 444.

accurate and complete property information which typically lessens their due diligence review.<sup>30</sup>

30. The City agrees. Therefore, the only issue on this motion is: what is required to ensure fairness and transparency given the special non-commercial nature of the Affordable Housing over which the Receivership has control? The inadequacies of the sale process proposed by the Receiver will not yield a fair and transparent process.

***What are the requirements for a fair, transparent and efficient sales process in this case?***

31. Bidders are entitled to certainty and transparency<sup>31</sup> about what the rights are that are to be sold, and what regulatory requirements or consequences will flow to them if they are the successful purchaser. Without that clarity, further litigation is likely.

***What is the legal interest available for sale?***

***a. Potential Purchasers Must Take Title Subject to Applicable Zoning and the Terms of Instruments Executed Pursuant to Powers under Statute***

32. The OMB Artist Zoning Order which further protects the Abell Affordable Housing clearly cannot be vested away. An order of a quasi-judicial tribunal ordering a zoning change is not an interest in land, it is an amendment to legislation. Zoning under the *Planning Act* can no more be vested away than can requirements imposed under provincial or federal legislation.

33. If the provisions of the OMB Artist Zoning Order are not satisfied, the entire building in which the Abell Affordable Housing is located (all 438 units) will fail to meet its minimum

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<sup>30</sup> Avison Young Executive Summary, Marketing Initiatives and Sales Process, Receiver's Motion Record, pg. E119.

<sup>31</sup> [\*CCM Master Qualified Fund v. blutip Power Technologies\*, 2012 ONSC 1750](#)

required non-residential gross floor area and will be in contravention of zoning. Should that occur, the City has the authority to commence an application in the nature of an injunction pursuant to s. 380 and 384 of the *City of Toronto Act* to restrain the contravention of zoning under the *Planning Act*.<sup>32</sup>

34. Since the Receiver does not agree with the City, its sales process does not contain express provisions to ensure appropriate information is provided to bidders about the City's interest in protecting the Affordable Housing. In fact, the commentary in the Portfolio Overview provided by Avison Young seems to indicate that the Affordable Housing has been valued as if the units were unencumbered by the statutory and other legal restrictions described above requiring them to be maintained as affordable housing,<sup>33</sup> although the City has not received a copy of the Confidential Appendices to confirm this. Since these restrictions will obviously have an impact on the value of the Affordable Housing, it is essential that these instruments be disclosed to the bidders and considered by the Receiver when it is evaluating any bids received.

*b. Implications of the s. 118 Land Titles Act Restriction Registered on the Affordable Housing*

35. Section 118 of the *Land Titles Act* provides that:

**Power to place restrictions on register**

**118** (1) Where the registered owner of freehold or leasehold land or of a charge desires to impose restrictions on transferring or charging the land or charge, the registered owner may apply to the land registrar to make an entry on the register that no transfer shall be made or charge created unless the following things, or such of them as the owner determines, are done:....

2. The consent of some person or persons, to be named by the registered owner, is given to the transfer or the creation of a charge.....

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<sup>32</sup> [S. 380 and 384, City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A.](#)

<sup>33</sup> Avison Young Executive Summary, Marketing Initiatives and Sales Process, Receiver's Motion Record, pg. E133.

## Land registrar to enter restrictions in register

(2) If the land registrar is satisfied of the right of the applicant to impose such restrictions, he or she shall make a note of them on the register and no transfer shall be made or charge created except in conformity therewith. R.S.O. 1990, c. L.5, s. 118 (2).<sup>34</sup>

36. As set out above, the s. 118 *Land Titles Act* restrictions registered on title to the Affordable Housing provide that the consent of the City's Housing Secretariat is required for any transfer. The City will not consent to the transfer of any interest in these units unless the City's Housing Secretariat is satisfied that to do so will promote the provision of affordable housing and promote the long-term stewardship of the property.<sup>35</sup>

37. Specifically, the order of priority of the relevant interests on the Abell Affordable Housing is as follows:

- (a) City of Toronto (s. 118 *Land Titles Act* restriction)
- (b) First Ontario Credit Union (mortgage);
- (c) Community Forward Fund (mortgage); and
- (d) TD Bank (unregistered general security agreement).<sup>36</sup>

38. Section 78(5) of the *Land Titles Act* states:

“instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register, and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.”<sup>37</sup>

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<sup>34</sup> [S. 118, \*Land Titles Act\*, R.S.O. 1990, c. L.5.](#)

<sup>35</sup> S. 118 *Land Titles Act* restrictions, Exhibits 1H and 2E, Affidavit of Doug Rollins, para. 11, City's MR, pg. 171, 314, 383.

<sup>36</sup> Parcel Register PINS, Exhibit 1F, City's MR, pg. 93.

<sup>37</sup> [Land Titles Act, R.S.O. 1990, c. L.5](#)

39. The order of priority on the Simcoe Affordable Housing is even more straightforward – there are no mortgages on those properties. Moreover, for each unit in the Simcoe Affordable Housing, the City’s registered s. 37 *Planning Act* and s. 118 *Land Titles Act* interests are in priority to TD’s unregistered general security agreement.<sup>38</sup>

40. The nature of s. 118 *Land Titles Act* restrictions is explained in real estate texts as follows:

- (a) They are a form of self-restriction that, once registered by an owner, must be observed by that owner;
- (b) They are given in favour of municipalities to secure zoning requirements or like benefits is a common use of the s. 118 restriction;
- (c) The owner cannot unilaterally withdraw the restriction without the third party’s consent;
- (d) restrictions registered *after* a mortgage do not have priority and can be deleted under power of sale proceedings, as is the case with most subsequent registrations (here, the City’s s. 118 *Land Titles Act* restriction is a prior interest).<sup>39</sup>

41. The cases cited by the Receiver in its attempt to cast doubt of the s. 118 *Land Titles Act* restrictions are completely irrelevant:

- (a) *Re Strutus*<sup>40</sup> concerned a *Land Titles Act* instrument which failed to comply with the statutory requirements for that instrument. That is not the case here;
- (b) *Durham Condominium*<sup>41</sup> and *Black*<sup>42</sup> discusses the treatment of positive covenants at common law. Section 118 *Land Titles Act* are not covenants, they are restrictions. Section 118 restrictions exist only by virtue of statute and do not exist at common law.<sup>43</sup> Covenants

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<sup>38</sup> Parcel Register PINS, Exhibit 2C, City’s MR, pg. 344.

<sup>39</sup> *Section 118 Restrictions in Ontario*, Practical Law Canada Practice Notice, Thomson Reuters Canada, City’s Brief of Unreported Authorities, Tab 1.

<sup>40</sup> *Strus et al. and New Peel Developments Corp. Ltd. et al.*, 1986 CanLII 2820

<sup>41</sup> *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited*, 2002 CanLII 44913 (ON CA)

<sup>42</sup> *Black v. Owen*, 2017 ONCA 397

<sup>43</sup> *Section 118 Restrictions in Ontario*, Practical Law Canada Practice Notice, Thomson Reuters Canada, City’s Brief of Unreported Authorities, Tab 1.

are addressed in s. 119 of the *Land Titles Act*. Although both s. 118 restrictions and covenants are administratively registered in the Land Registry Office in a similar matter, that does not make them the same at law;<sup>44</sup> and

(c) *Hongkong Bank* – discusses public policy. It is not against public policy to protect affordable housing obtained as a community benefit, and subject to restrictions of which the secured creditors had full knowledge.

***c. Application of the Third Eye Capital Will Also Protect the Affordable Housing***

42. Moreover, the foregoing information is important as the various instruments intended to ensure the Affordable Housing remains such cannot be vested away because to do so would fail all elements of the test set out by the Court of Appeal in *Third Eye Capital*.<sup>45</sup> As discussed in *Third Eye Capital*, the criteria to be applied by the Court in considering whether to exercise its discretionary authority to delete an interest via Vesting Order include the:

(a) nature of the interest: the City's s. 118 *Land Titles Act* restriction is greater than a mere financial interest, and akin to an easement or option to purchase, in importance, provided as examples in *Third Eye Capital* and *CIM Bayview Creek*<sup>46</sup> as the kind of interests that should not be vested out. The City's s. 118 *Land Titles Act* restriction and a property owner's resulting obligations to obtain consent from the City are registered in priority and are in force and effect at this time;

(b) reasonable expectation of the parties: mortgagees with interests in the Abell Affordable Housing were on full notice of the City's s. 118 *Land Titles Act* restrictions – the mortgages state their registration followed the City's consent;

(c) consent – clearly the City does not consent to deletion of the s. 118 *Land Titles Act* restriction;

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<sup>44</sup> *Section 118 Restrictions in Ontario*, Practical Law Canada Practice Notice, Thomson Reuters Canada, City's Brief of Unreported Authorities, Tab 1.

<sup>45</sup> [Third Eye Capital v. Ressources Dianor, 2019 ONCA 508.](#)

<sup>46</sup> [Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc., 2023 ONCA 363.](#)

(d) balance of the equities – as discussed above, the City’s s. 118 *Land Titles Act* restrictions protect public rights - the value the City obtained from the developers as a condition of granting approvals for the construction of the condominium developments at issue. When the City’s chose Artscape to own and manage the Affordable Housing the s. 118 *Land Titles Act* restrictions were for the protection of the City insofar as they provided public notice of the City’s interest; those impacted now cannot properly be heard to complain that the City’s rights exist or that these rights will reduce the market value of the Affordable Housing.

***d. Interests of Regulatory Bodies Differ from those Enshrined in Standard Commercial Agreements***

43. In addition to the fact that the City’s s. 118 *Land Titles Act* restrictions should not be vested away in accordance with the *Third Eye Capital* test, additional legal considerations also protect the Affordable Housing. Courts have consistently held that that the interests of regulatory bodies – such as the City as it relates to land use development or the provision of affordable housing – should not be treated the same as other commercial or private entities under the *Bankruptcy and Insolvency Act* (or the *CCAA*).

44. In the within case, the City acts as a regulatory body by entering into statutory agreements to provide for and protect below-market housing and to regulate land use development. These regulatory agreements are distinct from private agreements the City could enter into in its commercial or private capacity. As the Supreme Court of Canada noted in *Orphan Well Association*, regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules and, where they do, “as a matter of principle, reorganization does not amount to a licence to disregard rules.<sup>47</sup> Regulatory instruments intended to protect the public interest should be respected.

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<sup>47</sup> [\*Orphan Well Association v. Grant Thornton Ltd.\*, 2019 SCC 5 at 118](#)



45. *Orphan Well Association* confirms that where a regulatory body is acting in the public interest and for the public good, it should be treated differently than a typical commercial creditor:

...is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders ... and that it is, therefore, not a creditor... It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them.<sup>48</sup>

46. Similarly, the OMB Artist Zoning Order and the related *Planning Act* instruments, as well as the City's priority real estate instruments that protect affordable housing and were part of the comprehensive regulations of land-use development stand on a different footing than private, commercial interests. The public, both current and future low-income artists, and others in the community who benefit from access to or the enjoyment of their work, are the beneficiaries of the City's statutory *Planning Act* rights and priority registered real estate interest. It must be emphasized that *maximizing value for creditors is not the only purpose of insolvency legislation*. As the Supreme Court stated in *Callidus Capital*, the objectives of Canada's insolvency statutes include "protecting the public interest," which in this case, includes protecting priority registered interest which preserve affordable housing.<sup>49</sup>

47. As stated above, the Receiver has resisted the City's requests that the OMB Artist Zoning Order and related *Planning Act* information be disclosed to prospective bidders because it asserts the City's conclusions are wrong. The City notes, however, that the Receiver has no expertise in land-use planning (where, by contrast, the City does). In *Forjay Management*, the Court held where an issue falls outside "business choices" that are within the Receiver's expertise, the appropriate outcome is for the Receiver to disclose the *facts* known to it (ie. here, the existence of

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<sup>48</sup> [\*Orphan Well Association v. Grant Thornton\*, 2019 SCC 5 at 122.](#)

<sup>49</sup> [\*9354-9186 Québec inc. v. Callidus Capital Corp.\*, 2020 SCC 10 at 40.](#)

the OMB Artist Zoning Order and related statutory instruments, among other things) but remain neutral as to result.<sup>50</sup> This conclusion flows from the direction that there should be candid and full disclosure of both favourable **and** unfavourable facts. A similar approach should be taken in this case insofar as the Receiver's sales process should be required to ensure full disclosure of information that is likely to be relevant to prospective bidders about the restrictions on the Affordable Housing.

***Conclusion: Order Sought to Promote a Fair and Transparent Sales Process***

48. The City submits that the Receivership would benefit from having clarity with respect to the correct interpretation of the *Planning Act* and *Land Titles Act* restrictions impacting future sale or use of the Affordable Housing, and the current record is sufficient to enable the Court to provide this direction.

49. In any event, however, even if this Court declines to issue a definitive ruling on these matters at this stage, amendments to the sales process for disclosure, consultation and evaluation are still necessary to achieve an efficient, fair and transparent process.

50. Therefore, the City submits that the Proposed Sales Process should explicitly include requirements respecting:

- (a) the provision of complete information regarding the legal and regulatory context in marketing materials and the confidential information memorandum;
- (b) contact information for a representative of the City's Housing Secretariat to whom bidders may direct any inquiries;
- (c) consultation with the City regarding information to be distributed to potential buyers, with the Receiver required to consider the City's comments in good faith;

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<sup>50</sup> [\*Forjay Management Ltd. v 0981478 B.C. Ltd.\*, 2018 BCSC 527](#)

- (d) provision of a copy of all materials distributed to potential buyers to the City, subject to its execution of the same or similar non-disclosure agreement;
- (e) a requirement that bidders provide a statement outlining their experience in the operation of below market affordable housing, and specific statements respecting their proposed treatment of the applicable housing agreements, all prior to submitting a proposed agreement of purchase and sale. This is necessary so the City can evaluate the bidder's ability to comply with all applicable legal restrictions and consider whether, or on what terms, the City may consent to the assignment or execution of related legal agreements necessary for the specific proposed transactions to achieve regulatory compliance;
- (f) the City be provided an opportunity to provide its assessment to the Receiver of each proposed bidder(s) intention and ability to operate the Affordable Housing in compliance with the applicable laws and legal agreements with the City;
- (g) the Receiver be required to consider the City's assessment as part of its evaluation of bids in good faith when it is determining the appropriate recommendation at the close of bidding and, if the Receiver rejects the City's assessment, that it be required to provide reasons in support of its decision.

51. The City reiterates what it has stated to the Receiver prior to this motion – it will work with the Receiver in good faith toward the shared goal of identifying prospective purchasers who can *legally* operate the Affordable Housing. The City understands the sales process must proceed efficiently and without undue delay.

52. When its consent to a proposed transfer is sought, the City will act reasonably and in good faith.<sup>51</sup> In the context of this Receivership proceeding, the City acknowledges that the exercise of its discretion may be reviewable by this Court if it is alleged that the City has failed to act reasonably. Embedding explicit requirements for disclosure to and consultation between bidders, the City, and the Receiver in the sales process, together with the inclusion of criteria for the Receiver to evaluate the bidder's intention and capacity to continue the use of the Affordable

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<sup>51</sup> Affidavit of Doug Rollins, para. 11, City's MR, pg. 314.

Housing properties as such, will create an appropriate factual record for the Court to fully evaluate any proposed transactions presented by the Receiver at a later date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of April, 2024.

A series of dark, horizontal, overlapping scribbles used to redact a signature.A handwritten signature in blue ink, appearing to read "Michele Wright".

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Christopher J. Henderson and Michele A. Wright  
City Solicitor's Office  
Counsel for the City of Toronto

B E T W E E N :

THE TORONTO-DOMINION BANK

-and-

TORONTO ARTSCAPE INC.

*Applicant*

*Respondent*

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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**FACTUM OF THE REGULATORY  
BODY, CITY OF TORONTO**

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