NOVA SCOTIA COURT OF APPEAL

Citation: *East Hants (Municipality) v. Shooters Sports Inc.*, 2002 NSCA 131

Date: 20021029
Docket: CA 178535
Registry: Halifax

Between:

The Municipality of East Hants, a body corporate

Appellant

v.

Shooters Sports Inc., a body corporate

Respondent

Judge(s): Bateman, Freeman and Oland, JJ.A.

Appeal Heard: September 18, 2002, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Freeman and Oland, JJ.A. concurring.

Counsel: Peter A. McInroy, for the appellant
Robert G. Belliveau, Q.C. and Robert J. Currie for the respondent

Reasons for judgment:

[1] This is an appeal by the Municipality of East Hants from an order of Justice David Gruchy of the Supreme Court, granting a declaration to the effect that a particular land use proposed by the respondent is permitted by the Land Use By-law.

BACKGROUND

[2] The respondent Shooters Sports Inc., a body corporate, (“Shooters”) has, since June of 1996, operated a commercial private billiards "club" which serves bar food and liquor, the latter under a “Special Premises Liquor License” from the Nova Scotia Alcohol and Gaming Authority. The special premises license contains certain restrictions, for example, liquor may only be served to members of the club and a limited number of guests and not later than 1 a.m.

[3] Shooters applied for and received a development permit from the appellant Municipality, allowing for the construction of enlarged kitchen facilities. The kitchen was completed in May, 2001. Shooters then applied for a change of the liquor license from a "Special Premises Liquor License" to a "Restaurant and Lounge License". Shooters wants to open its facilities to the public. Before issuing the license the Alcohol and Gaming Authority requires that Shooters supply confirmation that Municipal zoning allowed the operation of a restaurant or lounge at the Shooters location. The Municipality’s response was to the effect that the Land Use By-law only permitted the operation of a restaurant or lounge at that location through a “development agreement”. Shooters does not have such an agreement. The Alcohol and Gaming Authority would not issue the license.

[4] Shooters applied to the Supreme Court for a declaration “that the Land Use By-law of the [Municipality] permits the operation of a licensed billiard club open to the public at 192 Highway #2, Enfield, Nova Scotia”. Justice Gruchy granted the declaration [decision reported as **Shooters Sports Inc. v. East Hants (Municipality)** (2002), 200 N.S.R. (2d) 302; N.S.J. No. 33 (Q.L.)]. The Municipality has appealed.

ISSUES

[5] The Municipality frames the issue on appeal as follows:

> Whether the Learned Chambers Judge erred in law in finding that the Development Permit presently held by Shooters for its current use as a private billiards club also entitles Shooters to alter the use of its premises to a licensed billiards club open to the public.

ANALYSIS

[6] The record contains no information about the By-laws, if any, under which Shooters was originally permitted to operate. The physical premises was a former grocery store. We know only that the existing property was located within the "Core Village (CV) Zone" and that "[a] Pool Hall [was] a conforming use within the CV Zone". This comes from a Certificate issued by the Municipality in December of 1995 in response to a letter on behalf of Shooters indicating an intent to convert the store to a "private pool hall". Shooters has been licensed to serve liquor since its opening. It originally held a Special Occasion Class 2 License, which license was automatically renewed monthly for a year. In June of 1997 the Special Premises Liquor License was issued.

[7] Shooters is located in an area of the Municipality now known for land use purposes as "Village Core (C6) Zone". On July 17, 2000 the Municipality amended its Land Use By-laws whereby the permitted uses in a Village Core (C6) Zone, as are relevant here, were set forth as follows:

> 8.7.1 PERMITTED USES
>
> No development permit shall be issued in the Village Core (C6) Zone except for one or more of the following uses.
>
> * Lawfully existing uses
>
> . . .
>
> * Retail trade establishments as follows: furniture and home furnishings stores, electronics and appliances, building material and supplies dealers, nursery and garden centres, food and beverage stores, health and personal care stores, clothing and clothing accessories, sporting goods, hobby, book and music stores, and miscellaneous store retailers (with the exception of manufactured home dealers)

. . .

> * Arts, entertainment and recreation (with the exception of spectator sports, promoters (presenters) of performing arts, sports, and similar events with facilities)
>
> * Accommodation and food services as follows: bed and breakfasts, full-service restaurants **, limited service eating places (with the exception of drive-through restaurants), and special food services
>
> . . .
>
> ** Taverns, night clubs, bars, lounges, and pubs will be considered by development agreement only.

[8] At the hearing before Gruchy J. it was the Municipality's position that the Supreme Court had no jurisdiction to grant the declaration, in that Shooters had not complied with the **Municipal Government Act**, S.N.S. 1998, c. 18. The Municipality said that Shooters ought to have applied for a development permit which, if refused, entitled Shooters to appeal to the Nova Scotia Utility and Review Board. Appeals to the Utility and Review Board are provided by ss. 247 and 250 of the **Municipal Government Act**:

> 247(3) The refusal by a development officer to
>
> (a) issue a development permit;
>
> (b) approve a tentative or final plan of subdivision, ...
>
> may be appealed by the applicant to the Board.

[9] Shooters argued that, because it is not proposing a "development" within the meaning of the By-law, a development permit is not required. Shooters relied upon the definition of "development" contained in the **Municipal Government Act**:

> 191(c) "development" includes the erection, construction, alteration, placement, location, replacement or relocation of, or addition to, a structure and a change or alteration in the use made of land or structures;
> (Emphasis added)

and in the **Land Use By-law**:

> 33. **Development** means any erection, construction, alteration, demolition, replacement, relocation, or addition to any structure, and any change or alteration in the use of land or structures.
>
> 34. **Development Permit** means a permit, other than a building permit, issued by the Development Officer which indicates that a proposed development complies with the provisions of the Land Use By-law.
> (Emphasis added)

[10] Gruchy J. accepted that, as Shooters had not applied for and had therefore not been refused a development permit or agreement, it had no recourse to the Utility and Review Board. In this regard the **Municipal Government Act** provides:

> 250 (1) An aggrieved person or an applicant may only appeal
>
> (a) an amendment or refusal to amend a land-use by-law, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;
>
> (b) the approval or refusal of a development agreement or the approval of an amendment to a development agreement, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy;
>
> (c) the refusal of an amendment to a development agreement, on the grounds that the decision of the council does not reasonably carry out the intent of the municipal planning strategy and the intent of the development agreement.
>
> (2) An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land-use by-law, a development agreement, an order establishing an interim

> planning area or an order regulating or prohibiting development in an interim planning area.
> (Emphasis added)

[11] The judge held that in these circumstances he did have jurisdiction to grant the relief sought by Shooters. This finding is not on appeal.

[12] It was the Court's view that if the alteration of the liquor license to that of a "restaurant and lounge" (with the consequent changes to access and opening hours of the club) did not constitute a "change of use" of the premises, within the meaning of the **Municipal Government Act** and the **Land Use By-law**, then the proposed change in the operation of Shooters did not require a development permit or agreement and continued to be permitted within the By-law, as is the current use of Shooters.

[13] The Municipality was of the view that Shooters, operating as a private billiard club, was a "conforming use". Shooters did not hold a development agreement and therefore could not be considered a "tavern, night club, bar, lounge or pub". It followed, said the Municipality, that the club, as it now exists, must fit within one of the permitted uses for the C6 Zone listed in ¶7 above, most likely "food services" or "arts and entertainment". Moving to a "restaurant and lounge" license would, as submitted by the Municipality, "change the use" of the facility to that of a "tavern, night club, bar, lounge or pub". Thus, in accordance with the meaning of s. 191(c) of the **Municipal Government Act** and s. 33 of the **Land Use By-law** Shooters must apply for a development permit.

[14] Shooters argued before Gruchy J. that the existing use of the premises as a private billiard club was a legal non-conforming use. The judge was to consider whether the alteration of the liquor license to provide for public access and extended hours of operation to the formerly private club constituted a "change of use" in the context of Shooters currently operating as a "legal non-conforming use". In this regard Shooters relied upon the decision of the Supreme Court of Canada in **Saint-Romuald (City) v. Olivier**, [2001] 2 S.C.R. 898; S.C.J. No. 54 (Q.L.). The head note (Q.L.) captures the facts of that case:

> The individual respondents are owners of a building located within the territory of the appellant City where country and western entertainment had been presented since 1990. In 1991, a new zoning by-law came into force under which uses

> "restaurant or bar with entertainment" and "restaurant or bar with erotic entertainment or films" are not permitted although they are not expressly prohibited. The by-law also provides that a non-conforming use protected by acquired rights may not be replaced by another non-conforming use. In 1994, the respondent corporation bought out the business and began operating a bar which presented entertainment involving nude dancers. The appellant tried to obtain an order requiring the cessation of what it regarded as the unlawful replacement of one non-conforming use by another. The Superior Court dismissed the appellant's application on the ground that the respondents enjoyed acquired rights. The Court of Appeal affirmed that decision.

[15] As is relevant to the issue on this appeal, the majority of the Court in **Saint-Romuald** held that the owners' pre-existing use was characterized as the commercial offering of a combination of food, drink, ambiance and lawful entertainment to the public. The switch to a different form of entertainment was within this general nightclub purpose and therefore permitted.

[16] In so deciding Binnie J., for the majority explained the doctrine of acquired rights which applies to uses which become non-conforming when by-laws are altered:

> ¶ 19 Under the doctrine of "acquired rights", the respondents were not only entitled to continue to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use. . . .

[17] The Court drew a distinction between the nature of the non-conforming use and the intensity of that use. Continuing the precise pre-existing activity, even at an intensified level, is protected, provided the intensification is not of such a degree as to create a difference in kind. (**Saint-Romuald** at paras. 22 and 25, per Binnie J.).

[18] Binnie J. wrote:

> ¶ 34 . . . The Court's objective is to maintain a fair balance between the individual landowner's interest and the community's interest. The landowner overreaches itself if (i) the scale or intensity of the activity can be said to bring about a change in the type of use, as mentioned above, or if (ii) the addition of new activities or the modification of old activities (albeit within the same general land use purpose), is seen by the court as too remote from the earlier activities to be entitled to protection, or if (iii) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local

> authorities, or the neighbours, as compared with what went before. The factors are balanced against one another. . . .

[19] It was the position of the Municipality before Gruchy J. that the reasoning in **Saint-Romuald** as regards "change of use" only applies where the current use is non-conforming.

[20] Gruchy J. held that the current use of Shooters was "conforming" in accordance with the new By-law but that the "change of use" test in **Saint-Romuald** was helpful in determining whether the proposed move by Shooters to a public billiards club serving liquor was a "change of use" requiring an application for a development permit and ultimately a development agreement. He concluded that Shooters, as a private but licensed billiard club, is in essence a "drinking establishment" and, therefore, no change of use is involved in moving from a "Special Premises Liquor License" to a "Restaurant and Lounge License".

[21] It is my view that in holding that the current use of Shooters is conforming, the judge erred, but not in a material way.

[22] "Drinking Establishment" is defined in s. 3 of the **By-law** as:

> . . . an establishment, licensed by the Nova Scotia Liquor Licensing Board, in which alcoholic beverages are served for consumption on the premises, and any preparation or serving of food is accessory thereto, and includes a licensed lounge that is ancillary to a restaurant. Drinking establishment includes a tavern, lounge, and/or cabaret.

[23] The judge held that Shooters is a "drinking establishment" which includes a "lounge or tavern". "Taverns, night clubs, bars, lounges, and pubs", as categorized in the current By-law, require a development permit. Shooters does not hold a development permit. It follows that the current use of Shooters is "non-conforming". The analysis in **Saint-Romuald** is therefore directly applicable.

[24] As explained by Binnie J. in **Saint-Romuald**, Shooters is not entitled under the "acquired right" theory to expand to any of the full range of activities which would have been permitted by the Zoning category "permitted use" under which it was formerly classified:

> ¶ 4 The facts and applicable enactments are outlined in my colleague's reasons for judgment. I fully agree with his rejection of the "categorical" approach. This is the theory under which an owner, whose use of land does not conform to a new by-law, nevertheless has an "acquired right" to expand, alter or modify an existing use to include anything and everything permitted on that land under the "use category" defined in the prior law (if indeed there was a prior law). . . .
>
> ¶ 5 However, as my colleague Gonthier J. demonstrates, the "categorical" approach is wrong in principle and will often deliver a result that unduly favours individual landowners at the expense of the community interest. The protected "acquired right" properly relates only to the status quo. It does not protect a potential or contemplated use that has never materialized. A similar rule prevails in the common law provinces: see Heutinck v. Oakland (Township) (1997), 42 M.P.L.R. (2d) 258 (Ont. C.A.), at para. 6:
>
> > Central to this analysis is our reliance upon the well established rule that the nature of a non-conforming use is not defined by reference to definitions in the by-law. Rather, it must be determined by reference to the use to which the property was put at the time the by-law was passed.
>
> (Emphasis added)

[25] It was therefore appropriate for Gruchy J. to inquire, as he did, into the "status-quo" of Shooters using the **Saint-Romuald** analysis and to focus upon the question of a "change of use". He said:

> ¶ 20 The applicant's present establishment falls within the definition of "drinking establishment" as that term is defined in the By-law, set forth above. That is the "purpose" of the business. The various subcategories of defined drinking establishments all fall within that primary definition. The change proposed by the applicant will only have the effect of moving the applicant's use from one subcategory of drinking establishment to another. The premises as it currently exists constitutes an establishment wherein liquor and food are served in conjunction with the operation of the pool hall. The proposed change will have the effect of making it publicly accessible and with certain changes in the closing hours.
>
> (Emphasis added)

[26] He was not satisfied on the record before him that the variation in the liquor license would result in an intensification of that use or, even if so, that such

would result in a change of use. In summary, he concluded that "the change of liquor license sought by the applicant will not constitute a change of use from that presently enjoyed by the applicant". We are not persuaded that in so doing he erred at law.

DISPOSITION:

[27] I would dismiss the appeal with costs to the respondent in the amount of $1,500 inclusive of disbursements.

Bateman, J.A.

Concurred in:
Freeman, J.A.
Oland, J.A.