Cite as: Dartmouth (City) v. Ramia, 1991 NSCA 4

S.C.A. No. 02358

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hallett and Matthews, JJ.A.

BETWEEN:

CITY CLERK, on behalf of the CITY OF DARTMOUTH, duly authorized by City Council	)	Floyd K. Horne, Q.C. for the appellant
	)	David G. Coles for the respondent
Appellant	)	Appeal Heard: March 19, 1991
- and -	)	Judgment Delivered: April 19, 1991
CHAFICA RAMIA	)	
Respondent	)	

THE COURT: Appeal dismissed with costs in the amount of $1,000.00 per reasons for judgment of Jones, J.A.; Hallett and Matthews, JJ.A. concurring.

JONES, J.A.:

This is an appeal from a decision of Mr. Justice Davison dismissing an application by the City of Dartmouth to restrain the respondent from using her property in a manner which does not conform to the Dartmouth Land Use By-law.

Mrs. Ramia is the owner and operator of Ramia Grocery at 79 Boland Road, Dartmouth. She and her husband purchased the store in 1980. It apparently had been operated as a grocery store for some thirty years. Mr. Ramia died in 1987 and Mrs. Ramia took over the business.

In 1989 Mrs. Ramia decided that it was necessary to expand the business to include sandwiches and snack foods in order to raise sufficient revenue to support her family.

She discussed her proposal with Mr. Hawley Turner the Chief Building Inspector for the City, to renovate the store to allow for the installation of cooking equipment for pizzas and sub-sandwiches and to provide take out services. Mr. Turner assured Mrs. Ramia that her proposal was acceptable and she was issued a building permit by the City. She hired a contractor who completed the necessary repairs to the premises. She obtained a license from the Board

of Health for the City for an eating establishment. Mr. Turner inspected the renovations. The renovations cost some $22,000.00.

There was no dispute on the hearing before Mr. Justice Davison that the area was zoned residential and that the operation of a grocery store in the district was a non-conforming use.

Mrs. Ramia acknowledged that she operates a pizza oven and donair machine on the premises and that pizzas and donairs are delivered from the store. The only groceries observed on the premises were cigarettes, chocolate bars and potato chips together with a refrigerated dairy case containing soft drinks and an ice cream freezer.

Evidence was adduced from Mr. Glenn L'Esperance, the City Development Officer, that no development permit had been issued by his department and that the change in use did not comply with the zoning by-laws. Evidence was also produced on behalf of the City to show that Mrs. Ramia was familiar with the zoning regulations.

The application before Mr. Justice Davison was made under s. 108 of the **Planning Act**, 1983, c. 9, which provided as follows:

"**RIGHT OF ACTION WHERE CONTRAVENTION**

108(1) In the event of any contravention of or failure to comply with this Act or any by-law or regulation under this Act and in addition to or in lieu of any other proceedings authorized by law

(a) the clerk in the name of the municipality when authorized by the council or by a standing committee of the council; or

(b) the Director in the name of Her Majesty in the right of the Province where authorized by the Minister,

may bring an action or other legal proceedings in respect thereof in the Trial Division of the Supreme Court or in a county court for any or all of the remedies provided by this Section or otherwise provided by law.

POWERS OF JUDGE

(2) A Judge of the Trial Division of the Supreme Court or a judge of the county court may hear and determine the same at any time, in court or in chambers, and in addition to any other remedy or relief may

(a) make orders restraining the continuance or repetition of any such contravention or failure in respect of the same property;

(b) make orders directing the removal or destruction of any structure or part thereof which is in contravention of or fails to comply with this Act, or a by-law or regulation made under this Act, and authorizing the council or a standing committee thereof or an official of the municipality, or the Director, if such order is not complied with, to enter upon the land and premises with necessary workers and equipment and to remove and destroy the structure or part thereof at the expense of the owner;

(c) make such further order as to the recovery of the expense of any such removal and destruction and for the enforcement

> of this Act, or by-law or regulation, and as to costs, as the court or judge deems proper,
>
> and any such order may be interlocutory, interim or final."

Section 85 of that **Act** provided:

> **"RESTRICTION ON NON-CONFORMING USE**
>
> 85(1) No increase in volume of or any addition to a structure shall, except as required by an enactment, be made while a non-conforming use therein is continued, but such use may be extended throughout the structure.
>
> **NO EXTENSION OF NON-CONFORMING USE**
>
> (1A) For greater certainty, no extension of a non-conforming use not contained within a structure shall be made beyond the limits that the use occupies.
>
> **CHANGE IN USE**
>
> (2) A non-conforming use shall not be changed to any other use unless the use is permitted for that property by the land-use-by-law."

The trial judge found that Mrs. Ramia relied on the represention of the City Building Inspector and expended monies as a result of those discussions. He also held that the burden was on the City to show that there was a change of use in the premises. On that issue he concluded as follows:

> "Use of premises as a restaurant is a distinct change from use of premises as a store. But at what point between the two extremes can it be said that the use of the premises has changed? A restaurant which sells bakery products does not change its use anymore

> than the use of premises as a store changes because sandwiches are prepared and sold on the premises. It is a question of fact as to when the character of the property changes to the extent it can be said there has been a change in use. I am not prepared on the evidence before me to find there has been a change in use.
>
> In any event, it is my view that the defendant has received the permission of the City to carry on the use to which she is now putting her property."

The trial judge dismissed the application. The City has appealed from that decision. The main issue on the appeal is whether the existing non-conforming use had been changed to any other use as envisaged under s. 85 of the **Planning Act**.

The appellant contended that the changed use consisted of the preparation of food on the premises and the delivery of the prepared food to the homes of customers. On this issue the trial judge stated:

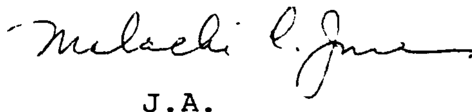
> "Has there been a change in use? The premises has been a neighbourhood grocery store for decades. The character of grocery stores has changed considerably over the years to the point where many grocery stores are referred to as 'convenience stores'. Undoubtedly, the emergence and growth of major food chains have contributed to the change in the smaller neighbourhood stores.
>
> Corner stores are now selling a multitude of wares which have no resemblance to food - e.g. video tapes and magazines. It cannot be said that the addition of these new products amount to a change in use.
>
> The City takes the position that the delivery of the products to homes and the preparing of food on the premises are the factors

> which indicate a 'change in use'. In years gone by, delivery of groceries from small stores to private homes was commonplace."

It is clear from these passages that the trial judge appreciated the issue that was before him. In the final analysis whether there had been a change of use was a question of fact. The power of this Court to review findings of fact was stated in **Stein** v. **The Ship Kathy K.** (1976), 2 S.C.R. 802 at p. 808 as follows:

> "These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view part of its function to substitute its assessment of the balance of probability for the findings of the Judge who presided at the trial."

The trial judge after hearing the evidence was not satisfied that the appellant had discharged the burden of proof. I cannot say that he made any palpable and overriding error in coming to that conclusion. I would dismiss the appeal with costs to the respondent which I would fix at $1,000.00.



J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.