C.A. No. 02925

NOVA SCOTIA COURT OF APPEAL

Cite as: Armoyan Group Ltd. v. Halifax County (Municipality), 1994 NSCA 24

Clarke, C.J.N.S., Matthews and Chipman, JJ.A.

BETWEEN:

ARMOYAN GROUP LIMITED	)	
	)	David P.S. Farrar
	)	Meinhart Doelle
Appellant	)	for the Appellant
	)	
- and -	)	
	)	Jocelyn Campbell
	)	for the Respondent
MUNICIPALITY OF THE COUNTY OF HALIFAX	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	February 8, 1994
	)	
	)	
	)	Judgment Delivered:
	)	February 16, 1994
	)	
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	)	
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	)	

THE COURT: Appeal allowed and an order in the nature of mandamus issued per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

MATTHEWS, J.A.:

The issue on this appeal concerns the interpretation of s. 105(3) of the **Planning**

Act, R.S.N.S. 1989, c. 346 on an application in the nature of mandamus.

On January 18, 1993, the appellant applied to the respondent under s. 105(3) of the **Act** for a subdivision of land located at Morris Lake Estates, Cole Harbour. The respondent forwarded that application to the provincial department of transportation (DOT) and to the municipality's Department of Engineering and Works (DEW) for review and comment.

DOT approved the application. Representatives of the appellant and DEW held meetings and exchanged correspondence which resulted in several revisions to the original application. The appellant then requested from the development officer of the municipality final endorsement of the lots under the application in order to register the subdivision at the Registry of Deeds. If granted it could then proceed with the subdivision and the sale of lots therefrom. In that respect sections 104(1) and 110(1), (2), (3), (4), (5), (6), (7), (8) and (9) of the **Act** are relevant:

> "104(1) A council shall appoint a municipal development officer to administer its subdivision by-law and to approve plans of subdivision and endorse final plans of subdivision and file them in the office of the appropriate registrar of deeds.
>
> 110(1) No plan of subdivision shall be filed and no instrument of subdivision shall be registered in the office of any registrar of deeds until the plan or instrument has been approved by a development officer in accordance with this Act, and no registrar of deeds shall accept or file any plan of subdivision or instrument of subdivision until a certificate of approval is endorsed thereon

in accordance with this Act.

> (2) A development officer shall endorse his approval on a final plan of subdivision and file the final plan of subdivision in the office of the registrar of deeds for the registration district in which the land is located, within thirty days after having been endorsed with his approval, unless the applicant has failed to comply with the subdivision regulations or subdivision by-law.

(3) A development officer shall endorse approval on an instrument of subdivision and register the instrument of subdivision in the office of the registrar of deeds for the registration district in which the land is located, within thirty days after having been endorsed with the development officer's approval, unless the applicant has failed to comply with the subdivision regulations or subdivision by-laws.

(4) At the same time as the development officer files an approved final plan of subdivision at the registry of deeds in accordance with subsection (2), the development officer shall register a notice in the registry of deeds which indicates approval of the final plan of subdivision.

(5) The instrument or notice referred to in subsection (3) or (4) shall be indexed at the registry of deeds as if the instrument or notice were a conveyance by the person who is shown as the owner of the land in the instrument or on the final plan of subdivision.

(6) The endorsement of approval on a plan or instrument of subdivision by the development officer shall indicate

> (a) what other approvals have been granted or refused pursuant to any other enactment by other departments or agencies of the Province; and
>
> (b) which streets and roads, if any, shown on the plan are to be owned and maintained by the Province.

(7) Where pursuant to subsection (4) of Section 105 there is a deemed approval by a department or agency of the Province of a final plan of subdivision or instrument of subdivision, the endorsement of the development officer pursuant to subsection (6) shall indicate that the approval of the department or agency is a deemed approval pursuant to subsection (4) of Section 105.

(8) A provincial development officer shall give notice of the endorsement of approval on a final plan of subdivision or an instrument of subdivision to the council of the municipality in which the land which is the subject of the plan or instrument is located and to the Director within two days of the endorsement.

> (9) When a final plan of subdivision has been approved, an applicant may lay out and construct streets, blocks, lots and land for public purposes, and any other services or utilities required, in such phases as may be agreed upon at the time of approval of the final plan and before endorsement of approval on the final plan."

I will set out excerpts from the most relevant correspondence between the parties.

By letter of March 1, 1993 to the development officer the appellant made its position clear: it requested that the officer either approve or reject the application for final endorsement and if the latter, the reasons. That letter reads in part:

> "It is my understanding that the only outstanding issue holding of Final Endorsement of lots under this application is the Engineering Department. With my Engineering Consultant Tom Swanson we have met with the Engineering Dept. to try and resolve the issues they have raised.
>
> ...
>
> The drawings submitted to the Dept. on February 26, 1993 (DWG no. 920241-5) is the Armoyan Groups final position. We request all lots now be approved or rejected. If the county wishes to approve only a portion of lots please do so but we request written confirmation of the rejection of any lots. With this rejection, please advise in writing as to why this has occurred and which standard has not been adhered to. This information will be required to allow us to examine how and where we can next proceed."

The development officer informed the appellant that final endorsement could not be considered until she received a positive response from DEW. A letter from the development officer to the appellant dated March 9, 1993 reads in part:

> "You have requested that the Municipality approve all lots that currently meet our requirements and to reject those which do not. As you are aware, comments from our Engineering Department as well as compliance with Part 18 of the Subdivision By-law remain as the outstanding requirements for the endorsement of this application. When a response is received from the Engineering Department, we will be in a position to recommend endorsement or rejection,

as is applicable, of the requested lots."

There followed an exchange of correspondence between officials of the municipality and the appellant.

From time to time the development officer informed the appellant that positive comments had been received from the DOT but that comments had not been received from DEW and that final endorsement could not be considered until positive comments had been received from DEW.

On March 22, 1993, the director of DEW wrote to the appellant, reviewed the problems with the application and rejected the proposals as submitted. In respect to Morris Lake Estates he remarked:

> "Our requirements have evolved because of problems which have been experienced in the past, and we are being consistent in attempting to ensure that they don't reoccur in new development. We strongly disagree with your consultant's current submission, and **reject the proposal as submitted**. Your option is to appeal to the Municipal Board, or to submit drawings which our staff can agree with."

Section 115(1) of the **Act** concerns appeals:

> "115(1) Where a development officer refuses to approve a plan or an instrument of subdivision, the applicant therefor may appeal the decision to the Board."

By s. 3(2) "Board" means the Nova Scotia Utility and Review Board.

However, the appellant could not appeal that position taken by DEW to the Board because that Board had previously ruled in another matter that since "there was no refusal by the Development Officer and that there was no written decision and that therefore the Board had no jurisdiction to hear the appeal".

On June 29, 1993 the staff engineer of DEW wrote a memo to the planning department of the respondent setting out that DEW could not recommend approval at that time until certain listed deficiencies were resolved. That memo was forwarded to the

appellant by an official of the respondent by letter dated July 6, 1993, instructing the appellant to contact DEW and that "Final endorsement of approval cannot be considered until we are in receipt of positive comments from their department." The appellant submitted revised survey and drainage plans to DEW. By memo dated July 9, 1993 DEW informed the development officer that DEW "was prepared to recommend final approval of the application but that prior to final endorsement being given the appellant had to comply with Part 17 of the Subdivision By-law with respect to the proposed storm sewage system". On July 13, 1993 the development officer informed the appellant:

> "The above noted subdivision application was given final approval on July 9, 1993.
>
> Prior to endorsement of approval of this plan it will be necessary to meet all applicable requirements of Parts 15.2, 16, 17 and 18 of the Municipality's Subdivision By-Law. In addition, as outlined in Section 16.2(a) and 17.2(a), you must enter into an agreement with the Municipality, the Engineering Department being the agent, before starting construction. It is also recommended that any work necessary to satisfy the requirements of the Department of the Environment and the Department of Transportation, be completed as soon as possible to enable those departments to recommend endorsement of the plan."

Also on July 13, 1993 the development officer received a letter from the appellant stating that the appellant was seeking final endorsed approval and requested that it be informed of "exactly what is required to obtain it".

The development officer responded by letter of July 14, 1993 stating in part that "prior to endorsement of approval" compliance with certain stated provisions of the subdivision by-law was required.

Precluded from appealing to the Board the appellant applied to a chambers judge of the Supreme Court "for an order in the nature of mandamus requiring the Development Officer to forthwith make a decision and exercise his jurisdiction, pursuant to Section 105(3) of the **Planning Act**, R.S.N.S., 1989, c. 346 ..."

There was no disagreement as to the facts presented to the chambers judge.

The importance of an endorsed approval cannot be overstated. Without endorsement the appellant cannot proceed with the subdivision. Simple "approval" or "final approval" is not sufficient: those do not meet the needs of the appellant.

The sole issue requested by the parties to be decided by the chambers judge on the mandamus application was the interpretation of s. 105(3) of the **Act**.

> "105(3) Within thirty days of receiving a completed application, the development officer shall
>
> (a) approve the plan or instrument if it
>
> (i) conforms to the subdivision regulations or by-law, and
>
> (ii) has received all approvals, if any, of departments or agencies of the Province or of the municipality or an agency thereof in addition to those set out in the regulations or by-law, as the case may be;
>
> (b) notify the applicant in writing of all approvals received and, where necessary, departments or agencies of the Province which have not approved the plan or instrument as submitted, where such approval is required; or
>
> (c) notify the applicant in writing of his decision refusing to approve the plan or instrument as submitted, which decision shall contain the reasons for the refusal."

In my opinion the language used in s. 105(3) is ambiguous. For example, the usage of "or" and "and"; whether or not there are three options open to the development officer and the meaning to be attributed to "approval".

Briefly put, the position of the appellant before the chambers judge was that s.

105(3) provides for either approval or refusal by the development officer within thirty days of receiving the application; that "approval" incorporates "endorsed approval"; and that there must be finality in the system. Because there was no decision from the development officer the appellant cannot appeal to the Board and its only recourse was to apply for mandamus for either approval or refusal of its application.

The respondent argued what it considered to be the proper interpretation of s. 105(3), drew a distinction between approval and endorsed approval and stressed that upon final approval having been given to the appellant in July of 1993, the appellant received all that was required under the section.

The chambers judge commented:

> "Section 105(3) contemplates the Development officer performing the duty of approving or refusing to approve the subdivision plans. No reference is made to 'endorsing' the plans, although endorsing final subdivision plans is certainly one of the duties of the Development Officer, along with approving plans under Section 104(1) of the **Planning Act**. I was referred to various Sections throughout the **Planning Act**, which draw a distinction between approval and endorsement, such as Section 104(1), Section 110(1), Section 110(2), Section 110(6) and Section 110(7). This is confirmed by Part 10 and 15 of the Subdivision By-law, which deals separately with procedures for approvals and requirements for endorsement after approval. I am satisfied that the applicant is entitled to no more than the final approval contemplated in Section 105(3), regardless of the internal municipal forms."

The chambers judge considered the words used in s. 105 and in particular the usage of "and" and "or".

The chambers judge found that the development officer carried out her statutory duties in respect to s. 105(3)(b). She had, as required, notified the appellant in writing of all that was necessary to be done by her under that subsection. The chambers judge therefore concluded that mandamus was not an appropriate remedy in the circumstances.

With deference to the carefully crafted decision of the chambers judge I cannot agree with the conclusion reached.

The appellant clearly indicated that it was seeking endorsed approval of Morris Lake Estates. Equally clear were its reasons for that request. DEW fully understood the appellant's position as did the development officer. Unfortunately the option of an appeal to the Board was not open to the appellant until the development officer pursuant to s. 105(3)(c) of the **Act** notified the appellant of her refusal. The appellant is effectively stymied. It obviously disagrees with the position taken by DEW. As matters stand it must bend to the will of DEW or the application is simply in limbo. It can resubmit its application but it is obvious: the same result will follow. The "final approval" granted by the development officer by letter of July 13, 1993 is not sufficient for the needs of the appellant and was so recognized by that officer as is evident from the final two paragraphs of that letter earlier quoted. As matters now stand the development officer would never be required to decide whether to approve or refuse the application for endorsed approval and the appellant has no recourse.

Section 105(4) of the **Act** provides:

> "(4) Where a department or agency of the Province is required by an enactment to approve a final plan of subdivision and the decision by the department or agency has not been received by the department officer within six months from the date that the complete application for approval of the final plan was forwarded to the department or agency by the development officer, the department of agency is deemed to have approved the final plan."

That subsection does not assist the appellant for it only concerns deemed approval by a department and not the development officer. However, it does demonstrate the intent of the legislature to bring matters to a conclusion.

How should s. 105(3) be interpreted?

It is necessary to consider the provisions of s. 9(5) of the **Interpretation Act**,

R.S.N.S. 1989, c. 235:

> "(9) Interpretation of enactment
>
> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject."

With deference, the respondent desires a technical interpretation of s. 105(3) which leads to the unsatisfactory result previously discussed. It falls far short of fairness to the appellant.

The object to be here attained (s. 9(5)(d) of the **Interpretation Act)** is found in s. 2(d) of the **Planning Act**, to:

> "2(d) provide for the fair, reasonable and efficient administration of this Act, in order that sound development may be encouraged."

Can it be said that the result sought by the respondent is in accord with that subsection? I think not.

The consequences (s. 9(5)(f) of the **Interpretation Act**) of the interpretation persued by the respondent in my opinion results in an injustice, whereas that sought by the

appellant brings the matter to a conclusion, a laudable object. The development officer need not approve of the requested endorsed approval. It may refuse. The position taken by DEW may be well founded. The interpretation sought by the appellant simply requires that officer to decide: approval or refusal and if refusal the reasons. That is all. Such an interpretation is in accord with the purposes set out in s. 2(d) of the **Act**. It is also in accord with the statement from **Maxwell on Interpretation of Statutes** (12 ed. 1969) at p. 208:

> "Wherever the language of the legislation admits two constructions and, if constructed in one way, would lead to an obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words."

If the words in s. 105(3) are, as submitted by the respondent, clear and do not include "endorsed" approval and thus the appellant cannot require such approval, is that not an unjust and unreasonable reading when consideration is given to the other sections of the **Act**, previously discussed, which require endorsed approval by the development officer for registration of the subdivision?

As E.A. Driedger in his text **Construction of Statutes**, 2nd ed. 1983, discussed at p. 33:

> "When two constructions are open the courts must make a choice, and in making that choice such factors as absurdity, injustice, anomaly, hardship, and inconvenience are relevant. Generally speaking, as was indicated in **R. v. Judge of the City of London Court**, the courts will adopt a construction that will avoid such consequences. If the language is equivocal and there are two reasonable meanings of that language, the interpretation that will avoid a penalty is to be adopted."

Those comments are particularly apt here for not only would a hardship result from the interpretation urged by the respondent, but the other sections of the **Act** requiring endorsed approval would have no effect. The object of the **Act** must be taken into consideration.

As Driedger remarked at p. 36:

> "The object of the Act may be resorted to, not only to make a choice between two alternative meanings, but also to determine the scope of words. Thus Doak J. in **R. v. Pinno**, said:
>
> > It is not necessary, however, in the present case to do any violence, either to the meaning of words or the grammatical construction of the section under consideration but simply to clarify its meaning by restricting the generality of the words employed to bring them into harmony with the manifest purpose and intent of the Act.
>
> E. Scheme of the Act
>
> The relation of the various provisions of a statute to each other is also relevant in determining meaning or scope. This factor is called the 'scheme' or 'framework' of the Act, and a provision should, if possible, be so construed as to fit into that scheme or framework."

Driedger continued at p. 87:

> "Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Viewed in this matter it then is unnecessary to minutely examine the usage of "or" and "and" in s. 105 and give an overly technical meaning to them.

The interpretation sought by the appellant is further in accord with the expression of Chipman, J.A. (although in a somewhat different matter) in **Smith's Field Manor Development Limited v. Halifax City** (1988), 84 N.S.R. (2d) 29 at p. 35:

> "...The provisions of the **Planning Act** dealing with the issue of a municipal development permit are clear. The application is made to the municipal development officer who is required within 15 days of its receipt to advise the applicant whether or not his application is complete. Within 30 days of receiving a completed application the Municipal Development Officer shall

> either grant the municipal development permit or inform the applicant of the reasons for not granting it."

It is of importance to keep in mind that this is an application for an order in the nature of mandamus requiring the development officer to do nothing more than forthwith exercise her jurisdiction and make a decision either approving or rejecting the subdivision applied for by the appellant. See **Civil Procedure Rule** 56.

In **Smith's Field**, Chipman, J.A. said this at p. 40:

> "The law relating to orders in the nature of mandamus was summarized in **Rawdon Realties Limited v. Rent Review Commission** (1983), 56 N.S.R. (2d) 403; 117 A.P.R. 403, by Rogers, J., wherein he stated at p. 405:
>
> > 'In order for mandamus to lie, or an order in the nature of mandamus to lie, there must be, first of all, standing, a sufficient legal interest in the parties making the application. There must also be no other legal remedy, equally convenient, beneficial and appropriate. Thirdly there must be a duty to the applicant by the parties sought to be coerced to do the act requested. Fourthly, the duty owed must not be one of a discretionary nature, but may be established either at common law, or by statute. Fifthly, the act requested to be done must be required at the time of the application, not at some future date. Sixthly, there must be a request to do the act and that request must have been refused."

Here there is no other legal remedy. If mandamus is not granted, the respondent, by simply not responding to the appellant's request for endorsement or refusal, will have achieved an inequitable result and one, in my opinion, not contemplated by those who framed the legislation. Indeed it is one not earlier contemplated by the respondent. I again refer to a position of the development officer's letter to the appellant of March 9, 1993:

> "When a response is received from the Engineering

> Department we will be in a position to recommend endorsement or rejection, as is applicable, of the requested lots."

It is difficult to appreciate why the development officer has not acted under s. 105(3)(c). It would be simple to refuse the application for final endorsed approval, giving as reasons, for example, those set out in the memo from the staff engineer of DEW to the planning department dated July 9, 1993 or reiterating that which the development officer set out in her letter to the appellant dated July 14, 1993.

The respondent objects to do so and seeks to rely upon its interpretation of s. 105(3) to prevent the mandamus application from succeeding.

As Lacourciere, J.A. commented in **Hall v. Toronto** (1979), 8 M.P.L.R. 155 (Ont. C.A.) at p. 163 "the objective pursued was not planning, but the blocking of the appellant's right to an order in the nature of mandamus".

I would allow the appeal and direct that the requested order in the nature of mandamus issue. The development officer must either approve the application under s. 105(3)(a)(i) or refuse in accord with subsection (c).

The chambers judge awarded costs to the respondent inclusive of disbursements in the amount of $1500.00 "payable forthwith". The appellant is

entitled to and shall be paid a return of that amount together with the sum of $1500.00 as costs of the chambers motion inclusive of disbursements and $1000.00 plus disbursements as costs on the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

C.A.CLAVIER(No.CLAVIER(02925

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CLAVIER(ARMOYAN GROUP LIMITED

Appellant	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT BY:
MUNICIPALITY OF THE COUNTY OF HALIFAX	)	JONES, J.A.
)))		