C.A. No. 102004

NOVA SCOTIA COURT OF APPEAL
Cite as: Mills v. Halifax County (Municipality), 1994 NSCA 178

Matthews, Freeman and Pugsley, JJ.A.

BETWEEN:

BRUCE MILLS and ROBERT STEENWEG of Wellington, Halifax County Province of Nova Scotia	)	Peter A. McInroy for the appellants Bruce Mills and Robert Steenweg
Appellants	)	Peter W. Gurnham for the respondents Halifax County and Sharon Bond
- and -	)	
	)	E.A. Nelson Blackburn, Q.C. for the respondent Ralph Benvie
THE MUNICIPALITY OF THE COUNTY OF HALIFAX, a body corporate pursuant	)	
- and -	)	
MS. SHARON BOND, Development Officer from the Lower Sackville Office of the Municipality of the County of Halifax	)	Appeal Heard: September 20, 1994
	)	Judgment Delivered: September 28, 1994
- and -	)	
RALPH BENVIE of Wellington, Halifax County, Province of Nova Scotia	)	
Respondents	)	

THE COURT: Each ground of appeal dismissed per reasons for judgment of Matthews, J.A., Freeman and Pugsley, JJ.A. concurring.

MATTHEWS, J.A.:

The appellants, by Originating Notice (Application Inter Partes) applied for:

1. An Order in the nature of **certiorari** quashing the

> decision of the Development Officer for the Municipality of the County of Halifax to issue a Development Permit to the respondent, Ralph Benvie, in order to erect a detached garage of a size measuring 25 feet by 30 feet on the grounds that clause 4.11 of the applicable land Use By-law limits the total amount of accessory buildings on any property to 740 square feet and the respondent, Ralph Benvie, already has a garden shed on his property measuring approximately 12 feet by 20 feet;
>
> 2. An Order in the nature of injunction prohibiting the respondent, Ralph Benvie, from continuing with construction of the proposed 25 feet by 30 feet detached garage and directing that the respondent, Ralph Benvie, demolish and remove any portions of any structure which have been erected based on the said Development Permit and accompanying Building Permit;
>
> 3. An Order in the nature of injunction prohibiting the respondent, Ralph Benvie, from using, for commercial purposes, any portion of present structures on his property at Wellington, Halifax County, Province of Nova Scotia, being Lot #32 - 83K, Phase 4 of the resubdivision of Kendalmark Estates;
>
> 4. As an alternative to No. 3, an Order in the nature of injunction prohibiting the respondent, Ralph Benvie, from using, for commercial purposes, any building constructed on the said Lot #32 - 83K subsequent to the 1st of October, 1993.

Briefly put, a chambers judge of the Supreme Court on January 18, 1994, dismissed the application. It is from that decision and the order made thereunder that the appellants now appeal.

Counsel for the respondents, the Municipality of the County of Halifax and Sharon Bond, has succinctly set out the facts in this manner:

> 1. Ralph Benvie is the owner of lands being Lot 32-83K-A, Kendalmark Estates Subdivision, Halifax County, Nova Scotia.
>
> 2. Prior to October 1992, the lands contained an attached garage. Mr. Benvie has been operating a business manufacturing counter tops in the attached garage and his basement since the mid-1980s.
>
> 3. The appellants are neighbours of Mr. Benvie.

4. On October 5, 1993, Mr. Benvie applied to the Development Officer of Halifax County Municipality, Janice MacEwen for a development permit to permit the construction of a detached garage measuring 25 x 30 feet (750 square feet). The file material pertaining to this application is Exhibit "A" to the Affidavit of Janice MacEwen ... . Ms. MacEwen, upon being satisfied as to certain matters more particularly described in paragraph 3 of her Affidavit ... and upon being satisfied that the garage would not exceed 750 square feet and that the lot coverage would not exceed 35%, issued a development permit. In the Originating Notice filed by the appellants, the appellants sought an order in the nature **certiorari** to quash this decision

> "On the grounds that clause 4.11 of the applicable Land Use By-law limits the total amount of accessory buildings on any property to 750 square feet and the respondent, Ralph Benvie already has a garden shed on his property measuring 12 x 20 feet."

On October 25, 1993, Mr. Benvie applied for a development permit authorizing a change of use for the new garage to permit the relocation of his counter top business to that garage. The relevant file material on this application is attached as Exhibit "B" to Ms. MacEwen's affidavit. To date, the appellants have not amended their pleadings seeking any order to quash the granting of this second permit. On November 16, 1993, a permit was issued upon Ms. MacEwen being satisfied that (a) Mr. Benvie's use was a Existing use in accordance with the provisions of s. 4.6(d) of Land Use By-Law for Planning Districts 14 and 17 and (b) the relocation would not increase the area of any building devoted to the commercial use (Affidavit of Janice MacEwen, para, 7, Appeal Book, p. 94).

The appellants set out six grounds of appeal:

1. Whether the respondent, Ralph Benvie, constructed a second floor in the subject building.

2. Whether the subject building exceeds the allowed gross floor area of an accessory building as described in Section 4.11(a)(iv)(1) of the subject Land Use By-law.

3. Whether provision 4.6 of the subject Land Use

> By-law - which provision purports to deal with certain existing uses and purports to allow such existing uses to "be rebuilt or altered" is **ultra vires** the Municipality in light of the specific provisions of the **Planning Act** dealing with non-conforming uses.
>
> 4. Whether the words "rebuild or alter" is used in Section 4.6 of the subject Land Use By-law include the right to construct a new building at a completely new location from the building it is purported to replace.
>
> 5. Whether the Learned Trial Judge erred in ordering that the action against the respondent, Mr. Ralph Benvie, regarding the validity of any Restrictive Covenants affecting Mr. Benvie's property be dismissed.
>
> 6. What is the scope of review by the Court of Appeal of a decision of a Judge of the Supreme Court of Nova Scotia in these circumstances?

Issues 1 and 2 may be considered together.

It is of importance to note that the principal matter before the chambers judge was the application to quash the development permit. That document permitted Benvie to construct a detached garage measuring 25 x 30 feet (750 square feet). That he did. Whether subsequently Benvie erected a second storey in that building cannot affect the validity of the issuance of the permit. The Development Officer did not err in issuing the permit to construct a detached garage measuring 25 x 30 feet.

In addition the trial judge was not satisfied that there was sufficient proof adduced before him there was a second floor in the building. That is a finding of fact. An appellate court will not overturn such a finding which affected the chambers judge's assessment of the facts absent palpable and overriding error. Such error does not exist here.

It does appear that at one place in his oral decision the chambers judge did not accurately interpret the provisions of s. 2.26 of the By-laws but that error does not affect the conclusion respecting the validity of the issuance of the permit.

I would dismiss these grounds of appeal.

Issue #3:

Simply put this issue is not set out in the Originating Notice. No amendment was sought before the chambers judge and none granted. However, the chambers judge did consider the use to which the building was put. He correctly related that Benvie for some time prior to the passing of the Municipal By-laws had carried on the commercial enterprise of making kitchen counter tops on the property. Benvie applied for permission to carry on that business in the new accessory building. The permit was granted.

The appellants contended that Benvie's use of the building for which the permit was issued was a non-confirming use. The chambers judge rejected that contention holding that it was an existing use as defined particularly in s. 4.6(d) of the By-laws:

> Existing Uses
>
> Except as may be stated elsewhere in this By-Law, the uses listed below shall be permitted as existing uses within any zone, subject to the following:
>
> > (d) Existing industrial and commercial uses are permitted to the extent that they presently exist and may be rebuilt or altered but no alteration shall be permitted which would increase the area of any building devoted to the use.

Section 2.22 is also relevant:

> EXISTING means in existence on the effective date of this By Law.

The chambers judge held:

> In this case, there has been a switching of the commercial enterprise from the house building and garage to the new accessory building. I find that the power to grant that permit is within the power of the Municipality under s. 4.6(d) and this is not a matter of a non-conforming use and any arguments relating to non-conforming use do not apply. As a result, therefore, again, the remedy sought is denied and no injunction shall grant.

The **vires** of s. 4.6 of the By-laws was not put in issue in the Originating Notice, not argued by either counsel before the chambers judge, and was not considered by him. Consequently it is not properly before this Court. See among others **Canadiana Towers Limited v. Fawcett et al** (1979), 21 O.R. (2d) 545 (Ont. C.A.) at p. 546-7.

I would dismiss this ground.

Issue #4:

To reiterate: the building permit issued on October 5, 1993 permitted the construction of a detached garage. There was no rebuilding or alteration of a building. The second permit, that applied for on October 25, 1993, authorized a change of use for the new garage which permitted the relocation of the counter top business to that garage. It was at this time that s. 4.6 was applied to permit a change in use from a garage to the existing permitted use: making kitchen counter tops. Further the pleadings do not seek an order to quash the granting of the second permit. None was sought before the chambers judge.

I would dismiss this ground.

Issue #5:

The Originating Notice does not specifically mention restrictive covenants. Attached as an exhibit to the Originating Notice is the affidavit of the appellant, Bruce Mills, which, in part, alleges that the building for which the permit applied for on October 5, 1993 was issued, violates the restrictive covenants contained in the deeds to lands in the subdivision wherein his property and that of Benvie are located.

The appellants decided not to pursue the restrictive covenant argument at the time of the application to the chambers judge and so informed him and counsel for the other parties by way of pre-trial brief.

Subsequent to the submissions to the chambers judge by appellants' counsel that the appellants would not be proceeding with any arguments based on restrictive covenants respondents' counsel requested that the restrictive covenant portion of the appellants' action

be dismissed.

The chambers judge held:

> There was a third alleged area which would involve the consideration of the restrictive covenants in the deed. That ground has not been pursued and that part of the application is hereby dismissed.

The appellants now contend that the chambers judge was in error in dismissing that part of the application. They urge that they made their position clear to the chambers judge, when during argument, the chambers judge remarked that he presumed that the issue had been abandoned:

> Mr. McInroy: I can clarify that, My Lord. Yes, we are abandoning it for the purposes of this action, not saying that we wouldn't initiate other action down the road on restrictive covenants, but we are abandoning it for the purposes of this action.
>
> The Court: All right, I understand what you're saying.

The appellants complain that the "dismissal works a serious injustice and prejudice" to their rights.

The respondent Benvie says that he replied to the affidavit of Mills by way of affidavits of six persons and thus this issue was properly before the chambers judge and that he was correct in dismissing that ground as it had not been pursued by the appellants. He urges that the appellants not be permitted to "return another day to deal with other issues raised in the pleadings".

Counsel for the municipality comments that this issue is a matter of no particular consequence to it, but points out that the issue having been pleaded, it should be dealt with or dismissed. The appellants "cannot try some of the issues one day and return another day to deal with other of the issues raised in the pleadings".

Both counsel for the respondents cite Halsbury's, 4th Edition, vol. 37, para. 483:

> The characteristic mode of trial sticks to the form of one continuous episode in which all the matters in dispute between the parties will be completely and

> finally determined, and all multiplicity of legal proceedings with respect to any of these matters will be avoided.

In my opinion the trial judge did not err in exercising his discretion to dismiss this ground.

In summary, I would dismiss each ground of appeal for the reasons stated.

I would award costs on the appeal in the amount of five hundred dollars ($500.00) to the respondents, the Municipality of the County of Halifax and Sharon Bond and the same amount to the respondent, Ralph Benvie.

J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A. No. 102004

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

BRUCE MILLS and ROBERT STEENWEG	)	
Appellants	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT BY:
THE MUNICIPALITY OF THE COUNTY OF HALIFAX	)	MATTHEWS, J.A.
- and -	)	
MS. SHARON BOND	)	
- and -	)	
RALPH BENVIE	)	
Respondents	)	