NOVA SCOTIA COURT OF APPEAL
Citation: *Grove v. Chester (Municipality)* 2003 NSCA 4

Date: 20030114
Docket: CA 181794
Registry: Halifax

Between:

James H. Grove, Jr., Nancy H. Grove, and
Jonathan S. Grove

Appellants

v.

The Municipality of the District of Chester,
Geoff MacDonald, Development Officer for Chester, and
Bill Plaskett, Development Officer for Chester

Respondents

Judges:	Roscoe, Saunders and Hamilton, JJ.A.
Appeal Heard:	November 14, 2002, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs in the amount of $1,500.00, including disbursements, per reasons for judgment of Roscoe, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Robert G. Grant, Q.C. and Karen N. Bennett-Clayton, for the Appellants Samuel R. Lamey, Q.C., for the Respondents

Reasons for judgment:

[1] This is an appeal from a decision of Justice Gerald Moir [2002 NSSC 72] dismissing an application made by the appellants for an order in the nature of *certiorari* to set aside a development permit granted by the Lunenburg District Planning Commission to Jim Dimitroff for construction of a house situated adjacent to property owned by the appellants in the Municipality of the District of Chester.

[2] The appellants take objection with three aspects of the design of the home which they submit were in violation of the applicable land use by-law, listed by Moir, J. at ¶ 2:

> (1) The eaves on the east side of the home intrude by one or two feet into the side yard set-back, which is twenty-five feet.
>
> (2) The home includes a turret at the northeast corner and the roof over this turret exceeds the maximum height permitted by the by-law.
>
> (3) A large deck along the east side of the home intrudes well into the twenty-five foot side yard set-back.

[3] In his review of the development officers' approvals of the plans, the Chambers judge determined that the applicable standard of review was patently unreasonableness, and the parties take no issue with the selection of that standard.

[4] The land in question at Freda's Point, Chester, is zoned "Estate Residential" and as such it requires a minimum side yard of 25 feet and a maximum structure height of 33 feet above the established grade. The foundation of the house built by Mr. Dimitroff is exactly 25 feet from the boundary between his property and the appellants'. The eaves of the house overhang the side walls and the foundation by one to two feet. The highest point of the roof of the turret is 39 feet from ground level, approximately two feet higher than the top of the mean roof of the house. The deck, which is approximately 12 feet wide on the side of the house closest to the appellants, is 13 feet from the boundary line. The deck is however not physically affixed to the house. It is a free-standing structure one-half inch from the house.

[5] The land use by-law contains several definitions relevant to the issues before the court. "Side yard" is defined as follows:

> 15.81 ... (iv) SIDE YARD means a yard extending from the front yard to the rear yard of a lot between a side lot line and the nearest main wall of any building or

structure on a lot; and "minimum" side yard means the minimum width of a side yard between a side lot line and the nearest main wall of any main building or structure on the lot.

and "Main wall" is stated to mean:

15.44 ... the exterior front, side or rear wall of a building, and all structural members essential to the support of a fully or partially enclosed space or roof.

[6] The definition relevant to the issue of the roof of the turret is "height" which is said to be:

15.33 HEIGHT means the vertical distance on a building between the established grade and

i) the highest point of the roof surface or parapet, whichever is greater, of a flat roof; or

ii) the deckline of a mansard roof; or

iii) the mean level between the eaves and ridges of a gabled, hip, gambrel or other type of pitched roof.

[7] With respect to the deck, the significant definitions are:

4.5.1 Accessory Uses

No development permit shall be required for any use which is accessory to a permitted use.

4.5.2 Accessory Structures

. . . shall be permitted in any zone but shall not:

i) be used for human habitation except for the temporary accommodation of private guests; or

ii) be built closer than 1.2 meters (4 feet) to any rear or side lot line except that:

(a) common semi-detached garages may be centered on the mutual side lot line; and

(b) accessory buildings with no windows or perforations on the side of the building which faces the said lot line, may be located a minimum of 0.6 metres (2 feet) from the said lot line; and

(c) fishing gear sheds, boat houses and boat docks may be built across the lot line when the line corresponds to the water's edge.

iii) be considered an accessory structure if attached to the main building in any way, except that a fence or wall may join an accessory building with a main building.

4.5.3 Minor Accessory Structures

No development permit shall be required for miscellaneous minor accessory structures such as, by way of example but not to limit the generality of the foregoing: retaining walls; children's play structures; cold frames; garden trellises; clothes line poles; pet houses; monuments; and interpretive displays.

. . .

15.9 BUILDING means a structure, whether permanent or temporary, which is roofed and which is used for the shelter or accommodation of persons, animals, materials or equipment and includes all additions, porches and decks attached thereto, and for greater certainty:

i) MAIN BUILDING means the building in which is carried on the principal purpose for which the building lot is used.

. . .

15.76 STRUCTURE means anything that is erected, built, or constructed of parts joined together or any such erection fixed to or supported by the soil or by any other structure, and for greater certainty:

i) ACCESSORY STRUCTURE means a subordinate structure on the same lot as the main building and devoted to an accessory use.

[8] It should be noted that there is no provision in the governing legislation, the **Municipal Government Act**, S.N.S. 1998, c. 18, s. 1, as amended, for an appeal of a decision of a development officer to issue a development permit pursuant to s. 244. The only possibility for challenging the permit is by means of an application for *certiorari*.

[9] In the decision under appeal, Justice Moir considered the relevant definitions, and the reasons and explanations provided by the development officers in support of their decisions for granting the permit and concluded that those decisions were not patently unreasonable.

[10] With respect to the overhanging eaves, he determined that given the definition of main wall, it was a reasonable interpretation of the by-law that the side yard set back be measured from the boundary line to the supporting structure, in this case, the foundation.

[11] The approval of the height of the turret was explained by the development officer in his affidavit as follows:

> **THAT** when I issued the Development Permit for the proposed Dimitroff house, I understood that the turret at the Northeastern corner of the proposed house as shown on the plans dated June 13th, 2001, would be no higher than the highest part of the main structure of which it forms a part. I do not interpret the By-law as requiring the Development Officer to measure every secondary roof for compliance with the height requirements but rather that the requirements apply to the structure as a whole. Once the highest point or ridge line of the structure is determined using the definition then all components of the house must comply with that maximum. The definition found in part 15.33 of the LUB does not say "the vertical distance on each component of the building" but rather says "the vertical distance on a building". In the Dimitroff situation, I applied the definition of height under part 15.33 to the main roof and thus obtained the maximum overall height of the structure. While in fact the peak of the turret is apparently slightly higher then [sic] the ridge of the main roof, it is not a substantial amount and is still lower then [sic] the chimney.

[12] Justice Moir indicated that in a situation such as existed here, where there was a complex roof with eaves and ridges at various levels, the method chosen was reasonable. The fact that the by-law incorporated use of a mean level instead of requiring that the fixed highest point of a roof be calculated, supported the reasoning.

[13] The development officer explained the approval of the plans for the free-standing deck as follows:

THAT my interpretation of LUB definition 15.9 was that if the deck was not "attached" to the main building, it was not to be regarded as part of the main building and therefore not subject to the twenty-five (25) foot side yard requirement. Rather, the deck would be regarded as an accessory structure subject to the lesser minimum yard requirement of four (4) feet. In making this interpretation, I was taking a literal definition of the word "attached" to mean "fixed to, connected to, or joined with ...". Although I recognized that this exposed a large loophole in the LUB, I felt it to be the correct interpretation. At this point then, I felt that the revised plans were now in compliance with the LUB and I wrote to Mr. Dimitroff (by fax) informing him of this.

[14] After discussion of the various relevant definitions, Justice Moir summarized his interpretation of the legislative scheme at ¶ 16:

... Part 5.3.2 requires all structures, including a dwelling, to be set at least twenty-five feet from the side line measuring from the line to a main wall or a support. All sorts of ancillary buildings or structures are permitted within twenty-one or twenty-three feet, but none are permitted within the side yard set-back if they are attached in any way to the main building. Additions, porches and decks attached to a building are part of it. The scheme for regulating side yards is part of a broader scheme regulating land use including the kind of activity that may be carried on in a zone, where mobile homes may go, lot sizes, frontages and so on. The administration of these requirements is essential to the scheme, and that is the important aspect not yet discussed. The municipality must appoint development officers, such as Mr. MacDonald and Mr. Plaskett: 2.1. A property owner cannot undertake any development on his or her property unless the development officer issues a development permit: 2.3. One applies for a permit, and the application must include drawings showing the location and dimensions of the proposed structure: 2.6. Part 2.10(i) provides: "No development permit shall be issued by the Development Officer unless ... the proposed development is in conformance with this Land Use By-Law...". In case there might be any question about it, 3.5 provides "the word 'shall' is mandatory and not permissive". The owner may apply to the development officer for a minor variance from the terms of the by-law: 2.10(iii), but this assumes that the variance has been identified. Part 2.10(i) puts Mr. MacDonald and Mr. Plaskett in the position where they must decide whether drawings conform with the by-law. They shall not approve drawings that do not conform with the by-law. This implies that the substantive provisions of the by-law will be sufficiently precise that compliance is reasonably ascertainable.

[17] If the deck to the east of the Dimitroff home is "attached" to the home then the side yard set-back is measured to the supporting posts of the deck, and the building encroaches. If the deck is an unattached structure but not accessory, the measurement is to the supporting posts, and the freestanding deck encroaches.

> Leaving aside for the moment the question of attachment, the deck seems to fall within the definitions of accessory structure and accessory use. It is a "subordinate structure on the same lot as the main building" and its apparent uses are "subordinate ... and ... incidental to, and exclusively devoted to, a main use of land or building", that is, use as a residence. Nor, is the deck excluded from being an accessory structure as being "used for human habitation" just because it is so closely associated with the home. An attached garage is no place for human habitation although it may be integral to some homes. I can see no patent unreasonableness in treating the deck as an accessory structure, the question of attachment aside.

[15] The Chambers judge then turned his attention to the legislative meaning of the crucial word "attached", which "would both incorporate the deck into the main building by virtue of 15.0 and exclude it from accessory structure under 4.5.2(iii)".

[16] The judge thoroughly examined the etymology and lexicology of the words "attach" and "attached" and concluded as follows:

> [22] To conclude this discussion of the word "attached" and the dictionary commentaries to which I have been referred. When we are speaking of attached physical objects, we usually mean "physically attached", the OED's "fastened by a material union", the original Norman sense, as in fastened with small nails called tacks. When we use the word as in "functionally attached" we are usually speaking of a relationship more abstract than physical attachment. When legislators provide for a physical object "attached" to another object, the intent which appears just from the immediate words is fastened by material union.
>
> [23] That meaning for "attached" in parts 15.9 and 4.5.2.(iii) of the Chester land use by-law is most in harmony with the legislative scheme. The planners must refuse a development permit if the drawings do not conform with the by-law. Thus, the by-law needs some precision. That the deck is unattached can be told with certainty if attached means fastened by a material union. It could not be told with any certainty if the legislators required the planners to determine whether the structures were connected in function or any other of the more abstract meanings sometimes indicated by "attached". Such vagueness would make the scheme unworkable.
>
> [24] I quite agree that a provision which allows an ancillary structure to be separate but almost imperceptibly separate from the home is out of harmony with a legislative purpose of preserving an appearance of much distance between homes on large lots. However, the purpose of 5.3.2 is layered. It captures both an intent to keep homes apart and an intent to allow structures between them. The legislators had to choose some demarcation between homes and accessory

> structures. They did not choose so many feet away from the home and, in my opinion, they did not choose something vague. I cannot say that the opinion of Mr. Plaskett, in effect that the legislators chose something precise but almost imperceptible, is patently unreasonable.

[17] The appellants submit that the Chambers judge erred in law in finding the deck met the requirements for the side yard set back as contained in the by-law, that the height of the turret complied with the definition of "height" as contained in the by-law, and that the overhang of the eaves met the requirements for the side yard set back as contained in the by-law.

[18] As noted above, it is agreed that Justice Moir was required to defer to the decisions of the development officers unless it was demonstrated that the decisions were patently unreasonable. In **Dalhousie Faculty Assn. v. Dalhousie University**, 2002 NSCA 1, [2002] N.S.J. No. 5 (Q.L.), Justice Flinn considered the patently unreasonable standard of review, and in reviewing the relevant authorities beginning at ¶ 89, cited the following explanations of the standard:

> [89] ... In **Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)** (1996), 134 D.L.R. (4th) (S.C.C.), Mr. Justice Major stated at pp. 5-6 as follows:
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> ...
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> > Patent unreasonableness was described by Beetz J. in *Re Syndicat de employés de production du Québec et de l'Acadie and Canada Labour Relations Board* (1984), 14 D.L.R. (4th) 457 at p. 463, [1984] 2 S.C.R. 412, 84 C.L.L.C.
> >
> > > [Patently unreasonable refers to an error in] interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the whole court in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 at p. 425, [1979] 2 S.C.R. 227, 26 N.B.R. (2d) 237, it is
> > >
> > > > "... so patently unreasonable that its construction cannot be rationally supported

> by the relevant legislation and demands intervention by the court upon review."
>
> An error of this kind is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice.
>
> In considering the Board's interpretation of the collective agreement, the court should not interfere unless the decision cannot be rationally supported by the collective agreement. The focus will be on whether a rational basis for the Board's decision exists.

[90] In **United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.** (1993), 102 D.L.R. (4th) 402, Mr. Justice Sopinka stated at pp. 418-419 as follows:

> Once it has been determined that curial deference to a particular decision of a tribunal is appropriate, the tribunal has the right to be wrong, regardless of how many reviewing judges disagree with its decision. A patently unreasonable error is more easily defined by what it is not than by what it is. This court has said that a finding or decision of a tribunal is *not* patently unreasonable if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same conclusion *(W.W. Lester (1978) Ltd. v. U.A, Local 740,* (1990), 76 D.L.R. (4th) 389 at pp. 418-19, [1990] 3 S.C.R. 644, 48 Admin. L.R. 1), ...

[91] In **Canada (Attorney-General) v. Public Service Alliance of Canada** (1993), 101 D.L.R. (4th) 673 (S.C.C.), Cory, J. defined the meaning of patently unreasonable as follows at p. 690:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "not having the faculty of reason, irrational, not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

[19] In the most recent decision of the Supreme Court of Canada dealing with the patently unreasonable standard of review, **Moreau-Bérubé v. New Brunswick (Judicial Council)** 2002 SCC 11, [2002] S.C.J. No. 9 (Q.L.), Justice Arbour, for the Court, summarized the current approach in the following passage:

> [37] This Court's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review, which focuses on a critical question best expressed by Sopinka J. in **Pasiechnyk v. Saskatchewan (Workers' Compensation Board)**, [1997] 2 S.C.R. 890, at para. 18:
>
> > [W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?
>
> (See: **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982, and generally **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817; **Canada (Director of Investigation and Research v. Southam Inc.**, [1997] 1 S.C.R. 748; **U.E.S., Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048.)
>
> [38] This pragmatic and functional approach creates a spectrum of levels of deference that may be required. In the words of Bastarache J. in **Pushpanathan**, supra, at para. 27, referring to **Southam**, supra, at para. 30.:
>
> > Traditionally, the "correctness" standard and the "patent unreasonableness" standard were the only two approaches available to a reviewing court. But in [**Southam**] a "reasonableness simpliciter" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end".
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> The more exacting end is represented by the correctness standard, which places relatively low deference on the decision under review and allows the court wide discretion to investigate, while at the more deferential end is the patently unreasonable standard. Reasonableness simpliciter, or unreasonableness, falls

somewhere in the middle, as described by Iacobucci J. in **Southam**, supra, at para. 57:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

[20] I agree with the Chambers judge that the decisions of the development officers could not be said to be patently unreasonable, or that there were obvious defects in their reasoning. The approval of the plans based on their interpretation of the by-law, a matter the Legislature intended to leave entirely within the control of the development officers since no appeal is allowed, cannot, in my opinion, be found to be clearly irrational. In his able submission, Mr. Grant, counsel for the appellants, proposed other rational or reasonable interpretations of the by-law, for example, that the word "attached" means "functionally attached" as opposed to "actually fastened". However, that is not an adequate justification for interference with the decisions. Even if the interpretations presented by the appellants were thought to be preferable or more acceptable, that would not satisfy the necessary threshold for interference. The development officers' decisions are to be accorded the highest level of deference, and so are not reviewable on a standard of correctness. As observed by the Supreme Court of Canada in **Ivanhoe Inc. v. United Food and Commercial Workers, Local 500**, [2001] 2 S.C.R. 565, at ¶ 116, the fact that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if there were only one acceptable solution.

[21] I would dismiss the appeal with costs in the amount of $1,500.00, including disbursements.

Roscoe, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.