

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Attorney General) v. Spence, 2004 NSSC 18

Date: 20031204
Docket: S.H. 02-188272
Registry: Halifax

Between:

The Attorney General of Nova Scotia

Applicant

v.

Ian Spence

Respondent

Before: The Honourable Justice Glen G. McDougall

Heard: November 4, 2003

Counsel: Stephen T. McGrath, on behalf of the applicant
Robert H. Pineo, on behalf of the respondent

McDougall, J.: (orally)

[1] This is an application pursuant to section 42 of the *Agricultural Marshland Conservation Act* (“AMCA”) and Civil Procedure Rule 37 for an order for the removal of the sheep barn located at 45 Redden Road, Martock, Hants County, Nova Scotia and for the recovery of all costs associated therewith.

[2] The application was first filed on an ex parte basis on October 24, 2002. It was later amended to an inter partes application. In support of the application an affidavit of Mr. Hank Kolstee, the Supervisor of Land Protection for the Nova Scotia Department of Agriculture and Fisheries was filed. In addition, a supplemental affidavit of Mr. Kolstee along with an affidavit of Mr. Darrell Douglas Hingley, a Survey Technician with the Nova Scotia Department of Agriculture and Fisheries, and an affidavit of Mr. Kenneth Jack Carroll, Aboiteau Superintendent for the Nova Scotia Department of Agriculture and Fisheries were filed.

[3] The respondent, Mr. Ian Spence (“Mr. Spence”) in reply filed an initial affidavit followed by a subsequent supplemental affidavit.

SUMMARY OF THE FACTS:

[4] The facts of this case as I find them are as follows:

- (1) That the Nova Scotia Legislature passed the *Agricultural Marshland Conservation Act* on November 20, 2000. This piece of legislation

replaced the *Marshland Reclamation Act* which had been in effect since May 15, 1952.

- (2) That the Martock Marsh Body was incorporated under the provisions of the Marshland Reclamation Act effective May 15, 1952. The sheep barn constructed by the respondent is located wholly within the boundaries of the Martock Marsh based on the survey results of Mr. Darrell D. Hingley, a survey technician employed by the Nova Scotia Department of Agriculture and Fisheries, which results I accept.
- (3) That the “Spence” sheep barn is not located in a part of the Martock Marsh exempted from the prohibition against development contained in the *Agricultural Marshland Conservation Act* and as provided for in the Non-Agricultural Use Land Exemption Regulations. I accept the evidence of Mr. Hank W. Kolstee, the Supervisor of Land Protection for the Nova Scotia Department of Agriculture and Fisheries who viewed the area including Mr. Spence’s property on January 7, 2000 for the express purpose of determining whether certain parts of the Martock Marsh should be exempted from the prohibition against development.

- (4) That site preparation prior to the actual commencement of construction of the sheep barn began prior to the passing of the “AMCA” perhaps as early as September 9, 2000.
- (5) That actual construction, and by that I mean erection of the framework for the barn, did not commence until sometime after December 13, 2000. In establishing this date I accept the evidence of Mr. Kenneth J. Carroll, Aboiteau Superintendent for Nova Scotia Department of Agriculture and Fisheries as contained in the affidavit file in support of this application and sworn to on the 2nd day of July, 2003.
- (6) That on December 19, 2000, Mr. Spence applied to the Windsor-West Hants Planning Department for the necessary permits to commence lawful construction of the barn estimated to be 48' in length and 40' in width (see permit application attached as exhibit “B” to the first affidavit of Mr. Hank Kolstee).

(7) That on December 19, 2000, the Windsor-West Hants Joint Planning Advisory Committee issued a Development Permit to Mr. Spence authorizing the planned project but subject to certain requirements including:

1. Development Permit issued for an Agricultural Sheep Barn (50 additional head of sheep, approx. 100 sheep in total), Livestock to be enclosed on property.

2. Setbacks from property lines approved as per site plan submitted with application. Barn or manure pile not to be located within 300 feet of a well or watercourse, not to be located within 200 feet of an adjoining property other than another farm property or within 150 feet of a highway.

3. It is the responsibility of the applicant to satisfy the requirements of and obtain approval from any other agency that may be required, including Nova Scotia Power. The Municipality has been advised by the Dept. of Agriculture of the Province of Nova Scotia that the area in which you plan to build may be dyked marshland & subject to flooding. The Municipality has no restrictions on building in dykeland areas at the present time & the decision to build is entirely in the hands of the property owner. However, you may wish to verify for yourself whether the area in which you plan to build is dykeland or within a floodplain. Upon request the Municipality would be pleased to make available any documentation it has on hand. This information is offered for your convenience only & it should be clearly understood that you must satisfy yourself as to whether the subject property is located on dykeland or within a floodplain. The Municipality accepts no liability in the event flooding should occur. Take notice that the Municipality does not at present have a by-law which restricts the granting of this permit, however the Municipality hereby gives you notice that on November 30, 2000 the Nova Scotia Legislature passed Bill No. 77, an Act for the Conservation of Agricultural Marshland (Agricultural Marshland Conservation Act) which may restrict development on this property. Please contact Mr. Hank Kolstee, Department of Agriculture & Fisheries at 1-902-893-6569 for further information or seek legal advice.

- (8) That despite the notice contained in requirement number 3 of the Development Permit, Mr. Spence did nothing to determine the requirements of the new legislation and particularly whether the proposed development complied with the *Act*.
- (9) That the Windsor-West Hants Joint Planning Advisory Committee issued a Building Permit to Mr. Spence on the 20th day of December, 2000.
- (10) That sometime around this date, it could have been either before or after but in any event certainly after December 13, 2000, wooden posts were driven into the ground and the framing of the barn began being erected.
- (11) That an inspection of the Spence property by Mr. Hank Kolstee on January 5, 2001 alerted him to the commencement of construction of the barn.
- (12) That Mr. Kolstee advised Mr. Spence that he would have to remove the partially completed barn as it was in contravention of the *AMCA*.

(13) That by letter dated January 8, 2001 Mr. Spence acknowledged the meeting with Mr. Kolstee on the previous Friday, January 5, 2001 and stated "...my partially constructed sheep barn appears to be located on land designated as Marsh Land". In an effort to get permission to continue with the construction Mr. Spence referred to the conversation he had had with Mr. Kolstee regarding an application for a variance which although provided for in the legislation was not then possible as the mechanism and provisions for granting a variance were yet to be established. This procedure was not finalized until June 25, 2001.

(14) That Mr. Spence's letter also contained a reference to another parcel of land containing some 40± acres that he proposed to buy in order to prevent it from being developed for a residential subdivision. In an apparent plea to allow him to continue with the construction of the barn, Mr. Spence wrote:

"...If you decide that I am unable to continue with the construction, I see no other choice but to withdraw from the purchase of the 40± acres of land and to allow residential development to proceed. **In**

short, I need less than ½ an acre of marshland to save over 35 acres from residential development.” [emphasis added]

- (15) That by letter dated January 21, 2001 Mr. Spence again wrote to Mr. Kolstee this time attaching data prepared by Redden and Lyons Surveys Ltd. purporting to show ground elevations after excavation of the site on which the barn was constructed. This was done in an effort to establish that the site on which the barn was being constructed exceeded the level for marshland - that being 26.0'. The letter concluded by saying:

“My intent is to recommence construction on January 29th. If I have not heard from you to the contrary by this date, I will assume that you agree with my findings.”

- (16) That on January 23, 2001 Mr. Kolstee wrote to Mr. Spence making it clear that if Mr. Spence wished to establish that the elevation of the site on which the barn was being constructed was above 26.0' prior to the start of construction he would have to provide a properly signed survey plan meeting certain technical/survey requirements. This letter concluded by stating:

“[A]t the present time the construction you have started is not allowed according to the Marshland Conservation Act. I had forwarded the proper documentation to you previously. If you have any questions do not hesitate to contact me.”

- (17) That what followed was a series of letters between Mr. Spence and Mr. Kolstee that demonstrated their two opposing positions. Mr. Spence gave notice of his intention to seek a variance which was still not possible since as mentioned earlier the regulations had still not been passed to allow for such an application. Mr. Kolstee in a letter to Mr. Spence dated February 7, 2001 again reiterated that he was in contravention of the *Marshland Conservation Act* as passed on November 30, 2000.
- (18) That Mr. Spence then sought the help of his MLA to intervene on his behalf.
- (19) That on February 26, 2001 Mr. Spence was sent a letter by Mr. Peter Underwood, the Deputy Minister of Agriculture and Fisheries for the Province of Nova Scotia confirming the on-going correspondence between Spence and Kolstee and stating:

“...I must inform you that you are in contravention of the Act and your barn is inappropriately located on Marshland.”

The letter concluded by stating:

“I trust that you will take appropriate action to remedy this situation at your earliest opportunity.”

It did not indicate what the appropriate action should be.

- (20) That construction of the barn continued after receipt of these letters by Mr. Spence such that by March 22, 2001 the walls of the building and a portion of the roof were complete as evidenced by a photograph taken by Mr. Kenneth J. Carroll and attached to his July 2, 2003 affidavit as exhibit “B”.
- (21) That eventually construction of the barn was completed.
- (22) That after the regulations providing for an application for variance were passed on June 25, 2001 Mr. Spence did not make a formal application

although he had indicated earlier in correspondence to Mr. Kolstee that he intended to make an informal application and later asked Mr. Kolstee to provide him with the necessary forms to do so.

- (23) That after completion of construction nothing further happened until Mr. Spence was sent a letter by Mr. Kolstee dated August 4, 2001 attaching a copy of the “Permit for Variance Regulation under the *AMCA* along with a copy of the *Act* and an Application for Variance.
- (24) That Mr. Spence did not pursue a formal application for variance under s. 41(1)(a) of the *Act*.
- (25) That nothing further happened until the Province commenced this application on October 24, 2002 - some 14 months after the application form for variance was sent to Mr. Spence.

ANALYSIS:

[5] As indicated in my findings of fact I am satisfied that the applicant - the Attorney General of Nova Scotia on behalf of Her Majesty the Queen, as represented by the Minister of Agriculture and Fisheries, has established on a balance of probabilities that the sheep barn constructed by Mr. Ian Spence is located on marshland as defined in the *AMCA*.

[6] Furthermore, neither a permit for variance as provided for in s. 41(1)(a) of the *Act* nor an exemption from the Governor in Council as contemplated in s. 41(2) has been issued to Mr. Spence.

[7] Since the barn in question meets the definition of development as contained in s. 2(6) of the *Act* and since it does not meet any of the criteria listed in s. 41(1)(b)(i) to (v) and particularly s. 41(1)(b)(iii) which states: (iii) was lawfully commenced before November 7, 2000, it is in violation of the *Act*.

[8] It was argued by Counsel for Mr. Spence that if construction of the barn had not been lawfully commenced before November 7, 2000 then under s. 41(1)(b)(iv) “... *it could have been lawfully commenced before...*” that date. Since the development permit was not issued until December 19, 2000 and the Building Permit the following

day the construction could not possibly have been “lawfully” commenced before November 7, 2000. Indeed Mr. Spence’s application was not even made until December 19, 2000. If there was any construction before November 7, 2000 and, as I have earlier indicated it amounted to at most some site preparation, then such work was not being carried out lawfully.

[9] The argument advanced by counsel for Mr. Spence does not hold up when one interprets the meaning and intent of s. 41(1)(b)(iii) and (iv). If I was to accept his argument then any construction that could have received the proper development and building permits regardless of whether an application had been made or not would be exempted under the *Act*. This interpretation would virtually nullify the purpose and intent of the *Act* which is to not only protect agricultural marshland but also to restrict the construction of buildings in flood prone land.

[10] The evidence of Mr. Spence was that he had grown up on the land and it, to his recollection, has never flooded. This indicates to me that the system of dykes and drains and other controls that have been constructed over the years are working. Should proper maintenance of the system be allowed to deteriorate, Mother Nature might intervene to re-claim what has now become valuable agricultural land.

[11] In interpreting legislation of this kind dealing with land use and control, the court should take a liberal and purposive approach. The legislation does not seek to deprive the owner of his/her ownership rights - it is not a vehicle for expropriation or anything even resembling it. It seeks to provide a framework to preserve and properly utilize marshland for agricultural use and to prevent construction of certain types of development on flood prone lands.

[12] For Mr. Spence to commence construction albeit perhaps only site preparation and excavation prior to getting a development permit and a building permit and then to ignore the recommendation of the Windsor-West Hants Planning advisory Committee contained in the permit to satisfy himself of the requirements of the newly minted legislation and then to further ignore the directions of the supervisor of Land Protection for the Province of Nova Scotia as well as the letter of the Deputy Minister of Agriculture and Fisheries after partially constructing the barn and then to proceed to final completion of the barn was to do so at his own peril. Perhaps he was under the impression that if he did not have authority to build the barn as of right then at least he could get a variance. For him to ignore the variance application process left the Province with very little alternative - it had no choice but to seek enforcement of

the *Act* or risk having the legislation ignored altogether by anyone wishing to construct on marshland.

[13] Having said this, I am somewhat concerned why it took some 14 months after the variance application information was sent to Mr. Spence for the Province to act. Despite this I am satisfied that Mr. Spence had already completed construction of the barn probably as much as 2 ½ to 3 months before the regulations pertaining to the variance had been passed. He did not incur any additional expense of construction as a result of the Province's failure to act more expeditiously in enforcing the legislation.

CONCLUSION:

[14] I therefore conclude that the sheep barn constructed by Mr. Spence is a contravention of s. 41 of the *Agricultural Marshland Conservation Act*. I find that Mr. Spence intentionally ignored the advice he had received from the Windor - West Hants Planning Advisory Committee to ensure he did everything required of the *AMCA* and that in spite of the directives or warnings of representatives of the Department of Agriculture & Fisheries he continued with construction to completion.

Although the variance application process might not have proved successful, Mr. Spence nonetheless decided not to pursue this option.

[15] I am therefore granting the application by the Attorney General to order the removal of the offending structure - the sheep barn - and I give Mr. Spence until September 30, 2004 to do this, failing which, the Attorney general can make further application for an order authorizing the Province of Nova Scotia to either perform the work internally or to engage a private contractor to demolish and remove the structure. Either way it shall be at Mr. Spence's expense.

[16] In deciding as I have, I have concluded there are no exceptional circumstances warranting the exercise of my discretion to deny the requested relief. I realize that Mr. Spence has incurred considerable expense in constructing the barn and will no doubt incur considerable more in dismantling and removing it and perhaps re-constructing it in another permitted area on his land, however he could have avoided a great deal of expense if he had not decided to ignore the law. For doing so he has no one to blame but himself.

[17] I have heard from both counsel with regard to costs and unless anyone wishes to add to what has already been said I am prepared to make an order for costs now.

[18] Given the circumstances of this case and the fact that the Province was not in a position to even provide a mechanism to apply for variance when the legislation was passed - indeed it took nearly 7 months to put the variance application regulations in place - and given the fact that the Province waited another 14 months to commence this application after providing Mr. Spence with the variance application package and considering the additional expense Mr. Spence is likely to incur, I order that neither party be awarded costs and that each party bears his/its own costs of the application.

[19] I will conclude by saying that in the course of the next 11 months there is nothing to prevent Mr. Spence from making an application for variance and if it should be allowed then application can be made to set aside this order.

[20] I would ask counsel for the Attorney General to prepare the order for consent by Mr. Spence's counsel. Upon receipt I will be happy to have it issued.

J.