SUPREME COURT OF NOVA SCOTIA
Citation: Delport RealtyLtd.v. Halifax (Regional Municipality), 2010 NSSC 290

Date: 2010/07/21
Docket: Hfx. No. 326469
Registry: Halifax

Between:

Delport Realty Limited and 1549433 Nova Scotia Limited

Applicants

v.

Halifax Regional Municipality

Respondent

D E C I S I O N

Judge:	The Honourable Justice Peter Bryson
Heard:	June 22, 2010, in Halifax, Nova Scotia
Decision:	July 21, 2010
Counsel:	Matthew Moir, for the Applicant Randolph Kinghorne, for the Respondent

By the Court:

[1] The applicants trade in commercial real estate. In 2001, they purchased undeveloped land at a tax sale. Nothing happened until 2005 when the Municipality received an unsightly premises complaint. After investigating, the Municipality issued an Order to Remedy. Nothing was done. The Municipality cleaned up the lands. It has issued a Notice of Intention to Sell to recover the cost. The applicants now challenge the validity of the Notice by way of judicial review.

FACTS

[2] The basic facts are uncontroverted. When the applicants purchased the lands, Richard Weldon, an officer of Delport, swore an Affidavit of Value providing a mailing address for both new owners. Mr. Weldon is a lawyer as well as a business person.

[3] Following a complaint from the public, the Municipality conducted an inspection of the lands in April of 2005 and forwarded a site inspection report to the address set out in the Affidavit of Value. The report noted various debris including discarded oil drums and derelict vehicles.

[4] Mr. Weldon contacted the Municipality and left a voice mail message raising issues concerning the boundaries of the property and asking for time to respond.

[5] On May 2, 2005 an Order to Remedy was issued by the Municipality and forwarded by registered mail to the mailing address in the Affidavit of Value. It was returned by Canada Post. It is common ground that neither Mr. Weldon nor anyone else on the behalf of the applicants actually received this Order to Remedy at that time.

[6] The applicants intended to sell the property. They posted a for sale sign; but owing to uncertainty about boundaries, the sign was actually placed on adjacent lands. In addition to having mailed the Order to Remedy, the Municipality posted a copy of the Order to Remedy on the for sale sign.

[7] In August, 2005 the Municipality was contacted by Mr. Lewis Smith, an officer of the numbered company, who said that he had the Order which had been posted on the for sale sign.

[8] On August 17, 2005 the Municipality granted a 14 day extension of the Order to Remedy.

[9] On August 26, 2005 Mr. Smith advised the Municipality that he believed that the debris complained about was not on the applicants' property.

[10] On September 22, 2005 Municipal officials met with Mr. Weldon and Mr. Smith. At that meeting, Messrs. Weldon and Smith raised concerns about the boundary lines and suggested that the offending material was not located on their property. They were not prepared to have a survey conducted. The Municipality informed Mr. Weldon and Mr. Smith that if necessary the Municipality would conduct a survey and would charge that cost, together with any remediation costs, to them. The meeting concluded without any agreement between the parties.

[11] As nothing had been done by the applicants, the Municipality ordered a survey in March of 2006 to confirm the boundaries of the property. The survey did establish that the offending material was located on the applicants' property.

[12] In April of 2006, the Municipality tendered a clean up contract, and the clean up was concluded by June of 2006.

[13] On March 5, 2010 the Municipality issued a Notice of Intention to Sell the lands in order to recover the clean up and survey costs.

[14] The applicants say that the Notice of Intention to Sell is invalid because:

1. The original Order to Remedy was not properly served;
2. The premises were not unsightly;
3. The survey costs are not a proper charge or lien on the property.

The Municipality disagrees and also argues that this proceeding is not timely.

TIME

[15] The Municipality argues that the applicants are out of time to challenge the Order to Remedy. It was originally issued in May of 2005. The clean up was completed by June of 2006. At that time, *Civil Procedure Rule 56* governed judicial review. *Rule 56.06* provided a six month period for the purpose of commencing proceedings to challenge the Order to Remedy.

[16] There does not seem to be any question that the Order to Remedy cannot now be attacked by the applicants. The sixth month period in former *Rule 56.06* was strictly applied by the courts. Absent extraordinary circumstances, there was no authority to extend that six month period (*Ingham v. West Hants (Municipality)* 2005 NSSC 115, affirmed in 2006 NSCA 37).

[17] While the applicants do not purport to directly challenge the 2005 Order to Remedy, it is clear that they indirectly do so by questioning the propriety of what occurred at that time. For example, the applicants argue that the charges which are the subject matter of the present Notice of Intention to Sell are not "taxes" within the meaning of the relevant provisions of the *Municipal Government Act* because the premises did not meet the definition of "dangerous or unsightly" at the time the order was issued (*Amended Notice for Judicial Review*, ¶*3b*). Likewise, the applicants allege that they were not served with the order pursuant to the *Act* or in accordance with the principles of natural justice. So, indirectly or collaterally, they are certainly challenging the original Order to Remedy. In my view, they cannot now collaterally attack the original Order to Remedy. The only live issue is whether or not the cost of the survey in establishing the boundaries of the property can be recovered. However, before looking at that question, I will address the applicants other arguments by way of alternative to their being time barred.

NOTICE

[18] The applicants challenge the service of the Order to Remedy because it was not posted on their property (it was posted on the applicants' for sale sign which itself was located on a neighbouring lot). They also say that the notice mailed to the applicants was not received because it was returned by Canada Post undelivered. However, the *Act* does not require personal service of an Order to Remedy. Section 509(1) of the *Act* provides:

> Any notice, decision or other document required to be served pursuant to this Act may be served personally by mailing it to the person at the latest shown address on the assessment role, by electronic mail or facsimile.
>
> (2) A notice, decision or other document is deemed to have been served on the third day after it was sent.

[19] There is no obligation that a notice actually be received; rather it must be sent (see also: *Hill v. Halifax (Regional Municipality)* 2007 NSSC 348 at ¶14-18; 31-32). In any event, it is clear that both Mr. Smith and Mr. Weldon, directors of the applicants, received actual notice of the Order to Remedy. That much they admit. It was why they met with Municipal officials in September, 2005. The whole purpose of the notice provisions in the *Act* is to provide knowledge or a likely means of knowledge to the owner or owners of the property in question. I am satisfied that this purpose was accomplished. The address provided by the applicants was set out in Mr. Weldon's affidavit. That address was indicated for both applicants. The *Act* does not require service on each and every owner; rather it anticipates there may be more than one owner, as set out in Section 3(a)(y). The mailing of the notice to Delport at the address given in the affidavit sworn by Mr. Weldon complied with the statutory obligation to give notice.

[20] Moreover, there is no question that the applicants knew about the Order to Remedy, which is the whole point of service, (*Hill v. Hill* [1997] N.S.J. No. 465 (NSCA)). There was some disagreement between the parties about the time period for appealing the designation of their premises as unsightly and dangerous under the *Act*. However, there is no evidence that they tried to appeal or had an intention of doing so. Regardless, the applicants retained the right of judicial review which they did not exercise at that time.

[21] The applicants also argue that the principles of natural justice require that they each should have received actual notice of the Order to Remedy before the order could be effective. They rely on *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] S.C.J. No. 39. However, *Baker* makes it clear that the question of fairness is one of degree and depends on the circumstances. One of the most important circumstances is the statutory regime in place. In this case, the *Act* mandates a mode of service which was followed. Even if that mode of service were not followed, the reality is that the applicants knew of the Order to Remedy in

ample time to pursue a judicial review, had they then wished to do so. There was no denial of natural justice.

PREMISES UNSIGHTLY ?

[22] Section 3(r) of the *Act* defines dangerous and unsightly premises:

> 3(r) "dangerous or unsightly" means partly demolished, decayed, deteriorated or in a state of disrepair so as to be dangerous, unsightly or unhealthy, and includes property containing
>
> (i) ashes, junk, cleanings of yards or other **rubbish or refuse or a derelict vehicle**, vessel, item of equipment or machinery, or bodies of these **or parts thereof,**
>
> ....
>
> (v) "**derelict vehicle**, vessel, item of equipment or machinery" includes a vehicle, vessel, item of equipment or machinery that
>
> (i) is left on property, with or without lawful authority, and
>
> (ii) appears to the administrator to be **disused or abandoned by reason of its age, appearance, mechanical condition** or, where required by law to be licensed or registered, by its lack of licence plates or current vehicle registration; (Emphasis added)

[23] The applicants' lands contained an auto body and related parts as well as numerous rusted oil drums. The test of "unsightly" or "dangerous" is objective. In *Colchester (County) v. Spencer* [2004] 5 N.S.J. 307 at ¶23, Justice Moir noted that whether premises were "unsightly" was related to their use:

> As regards to determining whether a property is unsightly, the court had to accept the actual use of the property and ask whether the property met the standard of grooming for that use.

But unlike *Spencer*, this case involves no active use to which the offending material could relate. From the evidence, the debris looks like junk - and dangerous junk.

[24] The applicants have argued that the property is vacant and that the by-law only applies to structures or buildings on a property. Moreover, they say that the debris on the property is not visible from the road. These arguments cannot prevail. The statutory language is no so limited. And when interpreting the powers of the Municipality, it is important to ensure that those powers are given proper effect. Municipalities are constrained within the authority provided by the statutes under which they operate. However, that does not mean that these statutes should be narrowly interpreted. To do so would frustrate the purpose of the legislation. Courts now take a broad and "purposive" approach to Municipal powers, (*Halifax Regional Municipality v. Ed DeWolfe Trucking Ltd.*, 2007 NSCA 89).

[25] The approach advocated by the applicants would frustrate the purpose of the Municipal legislation. The interpretation of that legislation is a question of law and the standard of review with respect to same is one of correctness. However, the finding that the premises are dangerous or unsightly is a question of fact, attracting a high level of deference, (*Dunsmuir v. New Brunswick* 2008 SCC 19; *Cumberland (County) v. W.B. Wells Ltd.* 2004 NSCA 64). The Municipality's determination that the premises were dangerous and unsightly conformed with the legislature language and was reasonable and amply supported by the evidence.

SURVEY CHARGES RECOVERABLE ?

[26] The applicants complain that there is no specific statutory basis for including survey costs as a recoverable lien against their land. Absent this, they say there is no authority for charging them for survey costs.

[27] Section 3(bx) of the *Act* defines "taxes" as follows:

> (bv) "taxes" includes municipal rates, area rates, change in use tax, forest property tax, recreational property tax, capital charges, one-time charges, local improvement charges and any rates, **charges or debts prescribed, by the enactment authorizing them, to be a lien on the property;**

These words are replicated in the new City Charter (3(bx)).

[28] The *Act* goes on to set out when the Municipality may perform certain work and charge a property owner for it:

> 503(1) Where a council, village commission, committee or community council or the engineer, the administrator or another employee of a **municipality lawfully directs that anything be done and it is not done**, the council, village commission, engineer, administrator or employee **may cause it to be done at the expense of the person in default**. [Now Charter section 367(1)]
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> 507 Where a council, village commission, committee or community council or the engineer, the administrator or another employee or a municipality **lawfully causes work to be done pursuant to this Act, the cost of the work, with interest** at the rate determine by council, by policy, or by the village commission, by by-law, from the date of the completion of the work until the date of payment, **is a first lien on the property** upon which, or for the benefit of which, the work was done. [Now Charter section 371]

[29] From this, the Municipality argues that the Order to Remedy was lawful; and that in order to do the work contemplated by the Order, the Municipality was required to conduct a survey because the boundary lines of the property and the location of the debris on it were specifically challenged by Messrs. Weldon and Smith. In effect, the Municipality argues that the cost of the survey should be included in the "work".

[30] The Municipality relies upon *Ed DeWolfe Trucking, supra* for the view that the court should take a liberal and purposive approach to interpretation of the legislation so as to permit the Municipality to recover survey costs as a proper charge against the lands.

[31] In reply, the applicants say that the imposition of a lien on lands is serious and it is one which the legislature should specifically authorize. The applicants draw the court's attention to Section 139(4) of the *Act* which does authorize recovery of the costs of survey in the context of a tax sale. The applicants argue that the absence of such authority in Sections 503 and 507 prevents an interpretation that would permit recovery of survey costs as a tax or lien on the lands.

[32] In my view, the applicants are right in principle; in other words, survey costs and other expenses which are not explicitly authorized in the legislation cannot generally be recovered as a lien on the property by the Municipality. However, there may be circumstances in which expenses unspecified in the legislation may be necessary and reasonable in order to carry out a duty which the *Act* authorizes.

In this case, I am persuaded that the survey expenses are part of the "work" and can be recovered on this exceptional basis:

(a) The applicants specifically questioned the boundaries of their own property and whether or not the debris in question was located within those boundaries;
(b) Having raised this issue, the applicants did nothing to resolve it;
(c) The Municipality gave the applicants the opportunity to address the issue by conducting a survey themselves which they declined to do.
(d) In order to exercise its authority under the *Act*, the Municipality was required to establish the boundaries of the property owing to the uncertainty created by the applicants.

[33] In the special circumstances of this case, the survey was a necessary part of the "work" which could not have been done without dispelling the doubt raised by the applicants.

[34] It is quite true that the applicants had no obligation to conduct a survey. However, having raised the boundary issue and not resolving it, they potentially frustrated the Municipality's ability - and indeed duty - to enforce the *Act*. To do so, the Municipality had to incur the expense of the survey. The survey was tendered - its expense appears reasonable. In my view, it is reasonable that the survey cost be recoverable. This interpretation is consistent with the purposive approach mandated by the Court of Appeal's decision in *Ed DeWolfe Trucking*, *supra*. The following quotations from ¶72 and ¶73 of the Municipality's brief are apt:

> 72. Looking at the matter from a purposive interpretation of the [Act], should property owners such as the Applicants be able to indefinitely postpone clean up of [dangerous and unsightly premises] properties by claiming that the debris is not on their lands? If HRM had elected to proceed under the [Act] section 347(1) to seek a court declaration that the subject lands were unsightly, the producing of a survey in evidence would be reasonable cost of the proceeding for which the municipality would be entitled to be compensated in its costs of the proceeding.
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> 73. The interpretation submitted by the Applicants would require a court application in boundary disputed [dangerous and unsightly premises] cases if HRM wished to avoid providing the offending property owners with a free survey at the tax payers expense. Why should municipalities have to deal with the delay

> and expense of commencing a court application every time someone tries to avoid [dangerous and unsightly premises] responsibility by alleging boundary issues? It is respectfully submitted that a municipality's entitlement to recovery of survey costs necessitated by a property owner's response to a [dangerous and unsightly premises] designation can be fairly implied into the relevant [Act] cost recovery provisions.

[35] I agree. Survey costs may not always be recoverable. But in this case they should be. The application is dismissed. If the parties cannot agree on costs, I will determine them.

Bryson, J.