IN THE SUPREME COURT OF NOVA SCOTIA

Citation: APM Landmark Inc. v. Halifax (Regional Municipality), 2005 NSSC 232

Date: 20050815
Docket: S.H. 247206
Registry: Halifax

Between:

APM LANDMARK INC.

Applicant

v.

HALIFAX REGIONAL MUNICIPALITY

Respondent

DECISION

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	June 28, 2005 in Halifax, Nova Scotia
Decision:	August 15, 2005.
Counsel:	Daniel W. Ingersoll & Katrine Giroux, for the Applicant Peter D. Darling, for the Respondent

[1] This is an application for "a hearing and appeal" by APM Landmark Inc. pursuant to s. 16(1) of the **Building Code Act**, R.S.N.S. 1989, c. 46 from a decision of the Nova Scotia Building Advisory Committee (Committee) dated May 1, 2005 that held in order to be in compliance with Nova Scotia Building Code Regulations (N.S. Reg) 209/03 Schedule "C" provision 3.8.2.1(1)(e), a barrier-free path of travel must be provided to the raised and only office space to be found within the planned construction of the rental facility to be occupied by the Nova Scotia Liquor Commission, (Commission) in the new addition to Bedford's Real Atlantic Store.

[2] For the reasons stated by Martland, J. in **Lamb v. Canadian Reserve Oil & Gas Ltd.** (1976), 70 D.L.R. (3d) 201 (S.C.C.) at p. 208, the broad right of appeal conferred on the Judge, under s. 16(1) and (2) of the **Building Code Act**, supra to rescind or affirm the decision of the inspector or the Committee or to take such action as the Judge considers the inspector ought to take in accordance with the Act and the Regulations, by substituting her opinion for that of the inspector or the Committee, does not transform the "hearing and appeal" of the decision into a *trial*

de novo rather than a judicial review. This is strengthened by the fact that, unlike **Lamb**, supra where it was held to be inappropriate to conduct a "new" hearing even when the legislation involved noted the appeal was to be in "the form of a new hearing", there is reference only to a hearing and not a new hearing in S. 16(1). Similarly, although Justice MacDonald (as he then was) in **MacDonald v. Halifax (Regional Municipality)** [1997] N.S.J. No. 376 recognized a judge's authority under the **Building Code Act**, supra is broad in that his opinion could be substituted for the Committee's, he still dealt with it in the context of "the scope of my judicial review".

[3] The Applicant, APM Landmark Inc. admits that the burden is upon it to bring itself within some exemption within the **Building Code Act** and **Regulations** such that the raised office at the rental facility need not be made barrier-free.

[4] APM Landmark Inc. partially before the Committee and now raises:

1. The absolute necessity for management of the Commission to monitor the sales floor and checkout from a raised perspective, since security is a major

concern in the facility and the major purpose of the raised office area. This necessity is challenged by the Respondent, since as recently as last summer, the Commission was confident enough with security issues to erect a barrier-free retail premise, with all aspects of the facility on ground level.

2. No member of the public has access to the secure office area which maintains the cash, confidential security information, security cameras for monitoring, all best conducted above the eye level of the public.

3. Their position that if the office area was in a mezzanine, at costly building modifications and too far a distance from the sales floor, there would be no barrier-free requirements.

4. Given the job criteria and promotion policy within the commission, there is no wheelchair disabled employee requiring access and if circumstances arose, they would make adjustments as required to accommodate mobility challenged staff members on a store to store basis.

5. All areas of the retail facility are barrier-free with the exception of the raised office. Thus, there is clearly barrier-free paths of travel available into the general work area.

[5] APM Landmark Inc. submits the Committee erred in holding the raised office constituted a general work area requiring barrier-free access, erred in not giving proper weight to the intended purpose of the raised office area as well as to the Appendix "A" in the National Building Code (NBC) which suggests raised office areas need not be barrier-free and erred in not going beyond its holding that the office area was not a mezzanine.

[6] The Committee's decision supported and confirmed the ruling of HRM's Building Official, Mark Jamieson, who, on reviewing the interim building drawings, noted a retail construction with a floor area of 650 m² and determined that the only office space shown was raised some 21 inches and accessible only by stairs and thus, not in compliance with the **Building Code Act**, supra and Schedule "C" of the NS Reg 209/03, as it did not provide barrier-free access to the office. The Committee, having reviewed both the specific requirements of the NS Reg 209/03, Section 3.8.2.1 (1)(e) which mandated a barrier-free path of travel being provided into general work areas, including office areas, and excerpts from the appendix notes to National Building Code 1995 (NBC), A - 3.8.2.1, which excludes small raised office areas in retail from requiring barrier-free access

as well as the definition and height criteria of mezzanines, inclusive of requiring floor space below it, determined:

1) the raised floor area is not a mezzanine so as to fit within the exemption of not requiring barrier-free access;

2) the NS Reg 209/03 takes a more stringent stance than that of the NBC 1995. It is the intention of the Regulation that employees are to be considered as likely of need for barrier-free access, as the general public and therefore where the staff require access to the office, the barrier-free provision applies.

[7] In determining which of the three standards of review- patented unreasonableness, reasonableness and correctness is appropriate, the Supreme Court of Canada most recently in **Voice Construction Ltd. v. Construction and General Workers Union**, Local 92 (2004), 238 D.L.R. (4th) 217 para. 15 & 16 and **A.U.P.E. v. Lethbridge Community College** (2004), 238 D.L.R. (4th) 375 at para. 14 reiterates that any review of decisions taken by administrative bodies is governed by the pragmatic and functional approach, wherein the reviewing court must consider four contextual factors rather than a mechanistic approach. The interplay between a) the presence or absence of a privative clause or statutory right

of appeal b) the relative expertise of the administrative body to that of the reviewing court with respect to the issue in question; c) the purposes of the legislation and of the provision in particular and; d) the nature of the question as one of law, fact or mixed law and fact determines the level of deference owed to the administrative decision itself.

[8] Drawing from counsel for HRM's summary, the following is a partial history of the incorporation of the NBC into the NS Regs relating to the occupancy requirements for areas requiring a barrier-free path of travel, inclusive of mezzanines and raised floor levels.

[9] By way of background, pursuant to the **Building Code Act**, supra the Minister of Municipal Affairs brought into force the Building Code Regulations, as NS Reg 45/87. This called up NBC, 1985, as a minimum regulatory standard for construction of buildings in the province. While the provisions of the NBC were varied to some extent in the Regulations, there were no amendments, concerning barrier-free access. By NS Reg 148/91, the Regulations were amended so that NBC 1990 was called up, as the minimum regulatory standard. Section 8(2) of the regulations varied Article 9.9.2.7 of the NBC so that barrier-free design

was required in all buildings not exempted by section 3.7 of the NBC. (now see NS Reg 209/03, S. 3.1.1.8). With NS Reg 84/93, the barrier-free design provisions of NBC 1990 were varied by replacing Section 3.7 of the 1990 Code with a regulatory regime roughly equivalent to the present Schedule "C" s. 3.8 of NS Reg 209/03. This included, as s. 3.7.2.1 (1)(d), (now identical to present NS Reg 209/03, s. 3.8.2.1(1)(e)), a requirement that there be a barrier-free path of travel "into general work areas, including office areas". Revised Regulations were brought into force with NS Reg 158/96, but the references to the 1990 NBC and the barrier-free access provisions were not revised. With NS Reg 38/97, the NBC 1995 was called up. While the barrier-free access requirements were roughly identical, a new NS Reg s. 3.8.2.1(2) carrying forward part but not all of NBC 1995, s. 3.8.2.1 (2) (a)-(l) addressing specific occupancy/location exemptions for barrier-free path of travel, inclusive of mezzanines (2)(g) was now included. One of the provisions that NS Reg 38/97, excluded under ss. (2) is, NBC 1995 ss. (2) (l) which provides no requirement for a barrier-free path within those parts of a floor area that are not at the same level, provided amenities and uses provided on any raised level are accessible on the entry level by means of a barrier-free path of travel. Regulation 38/97 was repealed and replaced by NS Reg 209/03 with equivalent provisions in all material respects. For example, s. 3.8.2.1(2)(l) of

NBC 1995 is still strikingly missing from the 2003 Regulations, as are the words "see Appendix 'A' " found in the NBC 1995 below the words 3.8.2.1 Areas Requiring a Barrier-Free Path of Travel and preceding ss.(1) and (2). Indeed, NS Reg 209/03, Article 3.1.1.7 which is also noted in the preamble to Schedule "C" of the 2003 Regulations deletes "Section 3.8 Barrier-Free Design" of the NBC 1995 in its entirety and replaces it with Section 3.8 Barrier-Free Design contained in Schedule "C" of NS Reg 209/03.

[10] Section 3.8.2.1 of NBC 1995 provides as follows:

> Section 3.8 Barrier-Free Design
>
> 3.8.1 General
>
> ....
>
> 3.8.2 Occupancy Requirements
>
> 3.8.2.1 Areas Requiring a Barrier-Free Path of Travel
> (see Appendix A)
>
> 1) Except as permitted by Sentence (2), a barrier-free path of travel from the entrances required by Sentences 3.8.1.2(1) and (2) to be barrier-free shall be provided throughout the entrance storey and within all other normally occupied floor areas served by a passenger elevator or other platform equipped passenger elevating device. (See Article 3.3.1.7 for additional requirements for floor areas above or below the first storey to which a barrier-free path of travel is required.)

2) A barrier-free path of travel for persons in wheelchairs is not required:

....

g) to mezzanines not served by a passenger elevator or the equipped passenger elevating device,

....

h) to high hazard industrial occupancies,

....

j) within floor levels of a suite of residential occupancy that are not at the same level as the entry level to the suite,

....

l) within those parts of a floor area that are not at the same level as the entry level, provided amenities and uses provided on any raised or sunken level are accessible on the entry level by means of a barrier-free path of travel.

[11] In NS Reg 2009/03, Schedule "C", this provision of the NBC 1995 is replaced with different wording which provides in part as follows:

Schedule "C"

As amended by Article 3.1.17 of these regulations Section 3.8 Barrier-Free Design of the Code is replaced with the following:

Section 3.8 Barrier-Free Design

3.8.1 General

....

3.8.2 Occupancy Requirements

3.8.2.1 Areas Requiring a Barrier-Free Path of Travel

(1) A barrier-free path of travel shall be provided in the entrance storey, each storey exceeding 600 m² in area and in each storey served by a passenger elevator or passenger elevating device from the entrance described in Article 3.8.1.3.

....

(d) into rooms or areas for student use in assembly occupancies,

(e) into general works areas, including office areas,

....

(2) A barrier-free path of travel for persons in wheelchairs is not required

....

(g) to mezzanines not served by a passenger elevator or other platform equipped passenger elevating device,

(h) to or within high hazard industrial occupancies,

....

(j) to portions exempt under 3.8.1.2 (1).(d).

[12] Subsection (2)(j) of NBC 1995 has been deleted and replaced with a regulatory provision highlighting portions exempt in ss. (1)(d) barrier-free access area and (2)(k) and (l) have been deleted as areas not requiring barrier free access, inclusive of reference to raised or sunken levels.

[13] As Section 3.8 Barrier-Free Design of NBC 1995 is deleted and replaced with Section 3.8 contained in Schedule "C" of NS Reg 209/03, all references to Appendix "A" and thus its references relating to 3.8.2.1 areas requiring a barrier-free path of travel, as found in NBC 1995 have been deleted and replaced. As noted in the Guide to the Use of the Code, Appendix "A" contains additional explanatory information to assist NBC users in understanding the extent of the requirements contained in parts 1-9. It is not a mandatory section of the Code. Elaboration is provided in provision A 3.8.2.1 of Appendix "A" on access to facilities under 3.8.2.1(1) of the Code by noting in part that:

> "Accessibility 'within' a floor area means that in general all normally occupied spaces are to be accessible, except those areas which are deemed not to require barrier free access. Examples of excluded floor areas are small raised office areas in retail and industrial premises and storage platform in industrial and other occupancies."

[14] With the exception of three specific references in s. 3.8.2.1, specifically (1).(b) which deals with barrier-free path of travel into and within sleeping unit suites; (2)(i) which notes a barrier-free path of travel for persons in wheelchairs is now not only not required to high hazard industrial occupancies but is also not required "within"and (2)(I) which continues to note barrier-free travel not being required "within" portions of a floor area with fixed seats in an assembly

occupancy, all references in s. 3.8.2.1 of NS Reg 2003 to the word “within” has been eliminated, as has any reference to floor “levels” or “same level”. There is nothing in the NS Reg 2003 that would suggest that if you have a different level within a floor area, so long as the same amenities and uses are provided in the balance of the floor area, that you do not then have to provide wheelchair access. This is in NBC 1995 but has been specifically deleted from the 2003 Regulations and thus, is not a regulatory standard for construction.

[15] The Applicant, APM Landmark Inc. before the Committee and now raises the nature and function of the clerk’s position at the Commission and the purpose of the raised office. I dismiss the Applicant’s contention that the division of labour between employees is such at the retail facility that the raised office space should not be considered a general work area and subject to barrier-free requirements. All staff requiring cash floats or returning cash register deposits attend at the office. Office staff are responsible for counting cash as well as performing their major task of providing security by monitoring security cameras and surveying the floors. It is an office with staff and central to other staff’s working needs, at least twice a day, on an entrance basis, given the stated need for security.

[16] The history of the Regulations embracing the NBC is revealing. When the 2003 Regulations incorporates NBC 1995, the deletion of both Appendix "A" and some specific provisions such as those dealing with floor levels, while adding new and specific conjunctive words to other provisions, all provides for an inclusive, studied and thorough list for both areas requiring barrier-free access and barrier-free wheelchair exemptions, in a context. The office area does not qualify under any Schedule "C" s. 3.8.2.1.(2) exemptions and nothing in the evidence would suggest otherwise.

[17] Conclusions about employability of disabled persons in order to find an office space not necessitating barrier free access is not a determination for the Committee, given the clear wording of the Regulations. Whether potential clerk employees or raised office employees are not employable by the Commission, if they are mobility challenged, due to physical job requirements and internal promotion policy, even when aspects of the office job appear to lend itself specifically to such an employee or whether they can be accommodated on an as need basis, if the occasion arises are not assessments or determinations for the Committee; but, rather are topics that may at some point be addressed by the **Human Rights Act**, R.S.N.S. 1989 c. 214.

[18] As submitted by counsel for HRM, the Regulations set out barrier-free access requirements for the structures within which the retail/customers and employer/employee relationships are developed and acted upon. The Regulations indicate a clear policy that an artificial, physical environment is not to be an impediment to the accommodation of disabled persons. The Committee recognized the regulatory policy, interpreted the clear wording of the Regulations implementing the policy and issued a decision accordingly.

[19] The Committee found that the Regulations require a barrier-free access to an office. Given that, unlike the NBC itself, that is exactly what the Regulations say, this is correct. The Committee found that the paragraph in Appendix "A" of the NBC suggesting barrier free access was not required to a small raised office area in a retail space was inappropriate. Given that, unlike the Code, Article 3.8.2.1 (1)(e) of Schedule "C" of the existing Regulations directly contradicts the statement in the Appendix and the Regulations specifically now contain no references to Appendix "A" or to floor levels or within floor areas, that, too is correct. The Committee found the raised office area was not a mezzanine. Given the definition in the Regulations, that is correct. Finally, the Committee noted that

the Regulations take a more stringent stance on the issue of office design and construction than the NBC 1995 itself. Given the foregoing, that, too, is correct.

[20] Having determined the interpretation of the Committee was correct, there is no need to decide whether I review the Committee's decision on standards of patently unreasonableness or reasonableness. The highest form of review is correctness and I am satisfied the Committee is correct.

[21] However, if I err, then the following analyses and reasoning sets the standard at reasonableness and flowing from that a determination that the Committee's decision can be rationally explained and supported. The reasons supporting the conclusion are tenable and the effect not unfair.

[22] "The specialization of duties intended by the legislature may warrant deference not withstanding the absence of a privative clause." (**Ryan v. Law Society of New Brunswick** (2003), 223 D.L.R. (4th) 577 at para. 29; see: **Canada (Deputy Minister of Natural Revenue v. Mattel Canada Canada Inc**. [2001] 2 S.C.R. 100 at para. 27). On review, there is no reason to disagree with the conclusion reached by Saunders, J. (as he then was) in **Can-Euro Investments**

Ltd. v. Dartmouth (City) (1995), 146 N.S.R. (2d) 58, affd. (1995), 147 N.S.R. (2d) 296 paras. 28 & 29 that the Committee's decision is owed a fair degree of curial deference, as the Committee is required by the legislation to have specialized expertise. He found;

> [28] ...that the Committee is a specialized committee, not only asked to deal with technical construction requirements under the Code, but also, I think, expected to exercise a considerable degree of discretion in the interpretation of its statute and regulations, the determination of policy and the exercise of its collective judgment.
>
> [29] Support for that view may be found in s. 15(4) of the **Building Code Act,** R.S.N.S. 1989, c. 46, which permits the Committee to confirm, or substitute its own decision for the "interpretation" of the inspector.

[23] While the wording of s. 16(3) of the **Building Code Act**, supra permits the Judge to "substitute his opinion for that of the inspector or the Committee," that does not imply a review of the Committee's decision on a standard of correctness.

[24] The statutory purpose of NS Reg 209/03, Barrier-Free Design Section 3.8 is aimed at making the design and construction requirements of buildings and occupancies accessible to, and usable by, disabled persons (s. 3.8.1.1) through establishing minimum standards. No limitation is placed on the status of the

disabled person; i.e. a member of the public. The Committee with specialized membership ensures consistency (s. 13 (3)). The question as to whether a 21 inch raised floor necessitating steps to the only office area is exempt from barrier-free access requirements of the Regulations which amend the NBC 1995, is a legal issue at the core of the Committee's area of expertise, as incorporated by the statutory purpose. Deference is owed to the Committee. This, as noted by Fichaud, J.A. in **Creager v. Provincial Dental Board (N.S.)** (2005), 230 N.S.R. (2d) 48 (C.A.) despite that the Committee's function includes statutory interpretation such as here, the effect of deletion of specific NBC 1995 provisions and Appendix to specific circumstances.

[25] The decision of the Committee and the inspector is upheld and the appeal dismissed. If necessary, I will hear counsel by way of written submissions on costs.

J.