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*Feb. 16, 17
Mar. 18

THE CORPORATION OF THE CITY OF OTTAWA and MICHAEL C. INSTANCE, Acting Building Inspector for the said City of Ottawa and MAXWELL C. TAYLOR, Building Inspector for the said City of Ottawa (*Respondents*) ..... APPELLANTS;

AND

BOYD BUILDERS LIMITED (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Application for building permit refused—Prima facie right to have permit granted—Municipality seeking to defeat prima facie right by enactment of rezoning by-law—Application for mandamus—Municipality failing to manifest that it was proceeding on a pre-existing clear intention to restrict lands in question and was acting in good faith in so doing.

The respondent company having been assured by officers of the appellant municipality that certain lands were zoned to permit apartment houses purchased the said lands and then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects submitted an application for a building permit. The property had stood unaffected by building restrictions from July 1936 until March 1963, when, as a result of the enactment of a general zoning by-law, the lands were zoned in a category permitting the erection of apartments. Apart from certain minor modifications, the plans submitted were such as would justify the granting of a building permit and the acting building inspector admitted that if he had not been instructed by the Board of Control to refuse the permit he would have granted one.

Upon it becoming known that an application had been made a clamour was raised by surrounding residents. The Ottawa Planning Area Board met on September 18, 1963, considered the objections of the surrounding residents and recommended that the lands in question be rezoned so as to prohibit the building of apartment houses. At a meeting of Council on the following day the report of the Planning Board was considered and approved and a by-law (No. 311/63) making the recommended variations in zoning was passed. The respondent was given no notice of either the meeting of the Planning Board or of Council.

The city applied to the Ontario Municipal Board for approval of by-law 311/63 and shortly thereafter the respondent made application for a mandatory order requiring the issue of a building permit. That application was adjourned pending the hearing of the city's application to the Municipal Board. On appeal, the Court of Appeal held that the application for the mandatory order should not have been adjourned and that upon the facts the respondent had a *prima facie* right to be granted a building permit and that the municipality was

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

not acting in good faith and impartially when it enacted by-law 311/63 thus defeating the respondent's *prima facie* right. The appellants appealed to this Court.

Held: The appeal should be dismissed.

Under the provisions of s. 30(9) of *The Planning Act,* R.S.O. 1960, c. 296, by-law 311/63 was not in effect unless and until approved by the Municipal Board. Therefore, when the respondent made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, the respondent had a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right might only be defeated if the municipality demonstrated that it had in existence a clear plan for zoning the neighbourhood with which it was proceeding in good faith and with dispatch.

The argument that the Courts in Ontario lacked power to grant the mandatory order on the ground that there was an alternative legal remedy, *i.e.,* the right to move to quash the by-law, or to be heard before the Board, was not accepted. Despite the provisions of s. 277(1) of *The Municipal Act,* R.S.O. 1960, c. 249, which provided a procedure for an application by way of originating motion to quash a by-law, and s. 30(9) of *The Planning Act,* the respondent having, at the date when it filed its application for a building permit, the *prima facie* right to have that permit granted, could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In the circumstances, the appellant had failed to manifest that it was proceeding on a pre-existing clear intention to restrict the lands in question and was acting in good faith in so doing.

Hammond v. City of Hamilton, [1954] O.R. 209; *Sun Oil Co. Ltd. v. Town of Whitby,* [1957] O.W.N. 362; *Re Markham Developments Ltd. and Township of Scarborough,* [1954] O.W.N. 81; *Bolton v. Munro et al.,* [1953] O.W.N. 53, referred to. *Kuchma v. Rural Municipality of Tache,* [1945] S.C.R. 234; *Re Howard and City of Toronto* (1928), 61 O.L.R. 563, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an order of Schatz J. adjourning respondent's application for a mandatory order requiring the issue of a building permit.

R. D. Jennings, Q.C., for the appellants.

G. F. Henderson, Q.C., and *K. Radnoff,* for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] dated April 23, 1964, which allowed an appeal from the order of Mr. Justice Schatz. By

[1] [1964] 2 O.R. 269, 45 D.L.R. (2d) 211.

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that latter order, Mr. Justice Schatz had adjourned, pending the hearing of the appellants' application for approval by the Ontario Municipal Board, an application by Boyd Builders Limited for a mandatory order requiring the City of Ottawa and its building inspector to issue a building permit as to certain lands on Sherwood Drive in the city upon which it was proposed to erect an apartment house.

Roach J.A., giving judgment in the Court of Appeal, upon recital of the facts some of which will be referred to hereafter, held that the application for the mandatory order should not have been adjourned and that upon the facts the applicant Boyd Builders Limited had a *prima facie* right to be granted a building permit and that the municipality was not acting in good faith and impartially when it enacted by-law 311/63 thus defeating the applicant's *prima facie* right.

An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, *e.g.*, nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.

Counsel for the appellants in this Court advanced a proposition which he states was fully argued in the Court of Appeal but which is not reflected in any way in the reasons of Roach J.A. giving the judgment of that Court. This argument is that the Courts in Ontario lack power to grant the mandatory order and for the following reasons. The *Municipal Act,* in s. 277(1) provided a definite procedure for an application by way of originating motion to quash a by-law. The *Planning Act* in s. 30 provides in subs. (9) for approval of a zoning by-law by the Municipal Board and that the by-law would only be effective upon such approval. Mr. Jennings argued that the by-law was not illegal on its face and it could only be quashed because of bad faith or discrimination *established in an application to quash.* Mr. Jennings further submitted that the applicant had two courses available to it. It could make an application to the Court to quash or it could allow the application for approval required by s. 30(9) of *The Planning Act* to go before the

Municipal Board and there appear to oppose. Counsel pointed out the provisions of *The Ontario Municipal Board Act,* particularly ss. 33 to 37, 53, 56, and 92 to 95, submitted that the Legislature had selected the Municipal Board to determine exclusively whether the by-law should be brought into effect and, *inter alia,* to decide all questions of fact including good faith.

I am of the opinion that the approach of the Court of Appeal for Ontario is a sound one. Under the provisions of s. 30(9) of *The Planning Act* the by-law is not in effect unless and until approved by the Municipal Board. Therefore, when Boyd Builders Limited made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, Boyd Builders Limited had a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right may only be defeated if the municipality demonstrates that it has in existence a clear plan for zoning the neighbourhood with which it is proceeding in good faith and with dispatch.

I see no necessity for the applicant for the permit taking on itself the task of proceeding to quash the by-law. It may well be that the by-law applies to a very large area and, of course, the building permit would apply to only a part thereof. It may be that in so far as the balance of the area is concerned, there is a valid plan of rezoning and that so far as the owners of such balance of the area are concerned council is proceeding in good faith and with dispatch.

What the applicant seeks in these proceedings is the enforcement of his common law right, and that common law right should be viewed as of the date of the filing of its application for a permit subject to the common law right being superseded in the fashion I have outlined by events which may occur even after the date of the filing of the application for a permit and before the application for a mandatory order.

The series of cases in Ontario included examples both where the by-law, although non-existent at the time of the application for the permit was in existence at the time of the hearing of the application for a *mandamus,* and others where the by-laws were not in existence at such later date.

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Some of the applications for *mandamus* had been granted and some have been refused. Some have been refused and the matter adjourned even when no by-law existed at the time of the hearing of the application for *mandamus: Re Marckity et al. and the Town of Fort Erie and Burger*[1]. There are other cases and frequent cases where the by-law had been enacted between the date of the application for a building permit and the date of the hearing of the application for *mandamus* which followed the refusal of the permit, and where the *mandamus* had been granted. It is true that most of these cases are decisions of single judges, *e.g., Re Bridgman and City of Toronto et al.*[2], *Re Greene and City of Ottawa*[3], *Re Beaver Lumber Co. Ltd. and Township of London*[4], *Re Skyway Drive-In Theatres Ltd. and Township of London*[5], *Re Cooksville Co. Ltd. and Township of York et al.*[6] There were, however, several in the Court of Appeal. Although *Hammond v. City of Hamilton*[7] is a case where there had not yet been a by-law enacted at the time of hearing the application for *mandamus,* the proposition there enunciated and particularly that set out by Roach J. A. at p. 221, has been adopted both by single court judges and by the Court of Appeal in cases where a by-law was enacted during the intervening period: *Sun Oil Co. Ltd. v. Town of Whitby*[8], *Re Markham Developments Ltd. and Township of Scarborough*[9]. These are cases where the *prima facie* right of the applicant to have a building permit has been held by the Court not to have been superseded because the municipality has not fulfilled the three requirements outlined by Roach J. A. in *Hammond v. Hamilton, supra.*

I, therefore, am of the opinion that despite the provisions of *The Municipal Act* and *The Planning Act,* the applicant Boyd Builders Limited having, at the date when it filed its application for a building permit, the *prima facie* right to have that permit granted, could insist upon the hearing of the application for *mandamus* that the municipality manifest that it had a clear zoning plan upon which it was proceeding in good faith and with dispatch. In so far as the previous sentence puts the onus upon the municipality, I agree with counsel for the respondent that such is the effect

[1] [1951] O.W.N. 836.
[2] [1951] O.R. 489.
[3] [1951] O.W.N. 674.
[4] [1951] O.W.N. 23.
[5] [1947] O.W.N. 489.
[6] [1953] O.W.N. 849.
[7] [1954] O.R. 209.
[8] [1957] O.W.N. 362.
[9] [1954] O.W.N. 81.

of *Sun Oil v. Whitby, supra*, and the judgment of LeBel J. in *Bolton v. Munro et al.*[1] The judgment of this Court in *Kuchma v. Rural Municipality of Tache*[2], and that of the Appellate Division in *Re Howard and City of Toronto*[3], fixing the onus upon the applicant should be confined to the situation where the applicant seeks to quash a by-law. There, the applicant is in a position of a plaintiff and has the onus, and particularly has the onus of proving bad faith. On the other hand, where the applicant seeks a *mandamus* to which he has a *prima facie* right and the municipality seeking to defeat that *prima facie* right, alleges, *inter alia,* its good faith the onus should be on it to establish such good faith. However, in the particular case, I am of the opinion that onus is quite unimportant. The facts are not in dispute. For 26 years, these lands stood without building restrictions. They had been restricted by by-law 8214 passed in 1936 and then that restriction was removed by amending by-law 8255 of the same year. The property stood unaffected by building restrictions from July 1936 to March 1963. A general zoning by-law, No. 68/63, was then enacted which provided that the lands in question here should be zoned R-5, a zoning category permitting the erection of apartments. Section 112 of that by-law provided that notwithstanding its enactment, when areas were covered by other by-laws set out in the schedule, the zoning provided by such other by-laws should remain in effect. The aforesaid by-law 8214 was set out in the schedule. That by-law, of course, must be considered in its amended form, *i.e.,* that the lands here in question were excepted therefrom by 8255, so that the result of the general zoning by-law was to zone these lands as R-5. There was produced upon the hearing of the appeal, one of the zoning maps which formed part of the said by-law 68/63 which map indicated in heavy dark print the zoning designation R-5 immediately over the lands in question.

In these circumstances, Boyd Builders Limited inquired carefully as to the restrictions covering the property and were correctly assured by municipal officers that the lands were zoned to permit apartment houses. Acting on that assurance, Boyd Builders Limited took options and have since completed the purchase of two pieces of land at a

[1] [1953] O.W.N. 53. [2] [1945] S.C.R. 234.
[3] (1928), 61 O.L.R. 563.

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total cost of about $60,000 then immediately instructed its architects to draft plans for an apartment house and by the agency of the architects, on Sepember 9, 1963, submitted an application for a building permit. Apart from certain minor modifications, these plans were such as would justify the granting of a building permit and the acting building inspector, the appellant Instance, admitted that if he had not been instructed to refuse the permit he would have granted one on September 19, 1963. He did not do so, however, because upon it becoming known that the application had been made for such permit surrounding residents raised a clamour, the Ottawa Planning Board met on September 18, 1963, considered the objections of these surrounding property owners, and recommended that the lands in question be rezoned in such a fashion as to prohibit the building of apartment houses. No notice of this meeting of the Ottawa Planning Board was given to any representative of Boyd Builders Limited and no officer of that company had knowledge of it.

At the meeting of council on the very next day, September 19, 1963, the report of this Planning Board was considered and approved and by-law 311/63 making the recommended variations in the zoning was given three readings. The meeting took place in the evening and again no notice whatsoever was given to Boyd Builders Limited of the intention to consider and rezone at such meeting, nor did any officer of Boyd Builders have any knowledge of it.

Immediately thereafter, again, on the next day, September 20, 1963, an application was forwarded to the Municipal Board for the approval of the hastily enacted by-law, 311/63. Although the City Clerk swears that he forwarded notice of such application for approval to "all owners of property in the City of Ottawa within the area affected by by-law 311/63, and within 300 feet of such area", no such notice was received by the officers of Boyd Builders Limited. An officer of Boyd Builders Limited, however, heard of the enactment of this by-law and attending the municipal offices confirmed that fact. Boyd Builders Limited, therefore, prepared its application for the issue of *mandamus*. The application is dated September 30, 1963, and is supported by the affidavits of Joseph Liff sworn on September 27, 1963, and various affidavits of Ernest B. Colbert, the president, some sworn also on that date. On October 2, 1963, both

H. M. MacFarland, an officer in the City Clerk's department, Mr. Hastey, the City Clerk, and W. J. Robertson, the secretary of the Ottawa Planning Board, refused to permit the applicant's representative to scrutinize or take copies of the minutes of either the meeting of the Planning Board or of council.

In my view, a most telling circumstance occurred on September 19, 1963, when Mr. Colbert, the president of the respondent, conferred with the City Solicitor, Mr. Hambling, and delivered to him a letter of that date composed by his solicitor. Mr. Hambling conferred with Mr. McLean of the Building Inspector's office, and advised Mr. McLean that in his opinion a building permit could be issued. Nevertheless, Mr. McLean and Mr. Instance, the acting building inspector, refused to issue a permit because they had been instructed not to do so. Mr. Instance in the course of the cross-examination upon his affidavit, admitted that if by-law 311/63 had not been enacted on September 19th and he had not received instructions from the Board of Control to withhold issuing a building permit he would have done so on that latter date.

The relevant cases may be summarized by stating the most important *indicia* of good faith in these matters are frankness and impartiality.

With respect, upon the circumstances outlined above, I adopt the conclusion of Roach J.A. in the Court of Appeal when he said:

> When on March 22, 1963, the City passed its zoning By-law 68/63 it did not thereby prohibit the erection of an apartment building thereon; indeed it expressly permitted it. Accordingly when the appellant filed its application for the building permit it had a *prima facie* right to it. Up until then the Municipal Council had not manifested any intention of varying the then existing restrictions. In passing By-law 311/63 the Council was not acting in good faith. It passed that by-law for the express purpose of defeating appellant's *prima facie* right to the permit. It yielded to the protests of some of the other owners in the immediate neighbourhood for whom the Planning Board was "sympathetic". It passed that by-law without any opportunity having been given to the appellant, which was so vitally interested, to make any representations concerning it. Everything that was done to defeat the appellant's *prima facie* right was done behind its back for the obvious purpose of avoiding embarrassment that the appellant's protestations on its own behalf might cause. *It is difficult to think of any stronger evidence of bad faith.* (The italicizing is my own.)

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I am, therefore, of the opinion that the appellant failed to manifest that it was proceeding on a pre-existing clear intention to restrict the lands in question and was acting in good faith in so doing.

One further matter should be referred to. The interesting question was proposed that if this appeal were dismissed and therefore the building inspector, in accordance with the judgment of the Court of Appeal, were required to and did issue the necessary building permit, and if hereafter the Ontario Municipal Board approved the by-law, No. 311/63, then such approval would date back to the date of the by-law, *i.e.*, September 19, 1963, and the result would be that the building inspector had been required by the court order to grant a building permit contrary to the provisions of the city by-law and moreover such permit might well be vain as the by-law, by virtue of s. 30(1)(ii) of *The Planning Act*, R.S.O. 1960, c. 296, as amended, would not only prohibit the erection of the building but its use. There are two answers to such a submission. Firstly, it would not be expected that the Ontario Municipal Board would take such a course in light of the fact that on November 8, 1963, that board made an order directing that no further step should be taken in respect to the application for approval of the said by-law pending the final determination of Boyd Builders Limited application for a mandatory order. Therefore, one would expect the said Ontario Municipal Board to make no order approving the by-law in respect of the lands in question after the mandatory order requiring the issue of the building permit had been made by the Court of Appeal and confirmed by this Court. Secondly, the respondent here expresses willingness to stand by the position that once that mandatory order has become final its position is protected by the provisions of s. 30(7)(*b*) of *The Planning Act*.

For these reasons, and for those given by Roach J.A., I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: D. V. Hambling, Ottawa.

Solicitors for the respondent: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.