CANADIAN PETROFINA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

P. R. MARTIN & CITY OF ST. LAMBERT (*Defendants*) ..... RESPONDENTS.

1958
*Nov. 26, 27
1959
Mar. 25

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Municipal corporations—Zoning by-laws—Demand for gasoline station building permit—Permit refused—By-law amended subsequently—Mandamus—Whether accrued rights of owner of land—Effect and purpose of zoning statutory power.

The plaintiff company applied to the City of St. Lambert for a gasoline station building permit required under by-law 392, then in force, and was told that the by-law did not allow the erection of a gasoline station in district "D", where its property was situated. A few weeks later, the city passed by-law 405 which amended by-law 392 and which by art. 87C provided: "Gasoline filling stations are prohibited . . . except in District F." The company applied for a writ of mandamus contending that by-law 392 was ineffective to prohibit the erection in district "D" and that the adoption of by-law 405 could not defeat the rights already acquired under by-law 392. The trial judge allowed the writ of mandamus. This judgment was reversed by the Court of Appeal. The company appealed to this Court.

Held: The appeal should be dismissed.

In passing by-law 405, the city did not act in bad faith and in a manner oppressive and unjust to the company. The by-law was not adopted to defeat the company's application for a permit but for general application.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Martland JJ.

1959

CDN. PETROFINA LTD. v. MARTIN et al.

The company's contention that it had an accrued right which could not be defeated by the subsequent enactment of art. 87C of by-law 405 could not be maintained. The whole object and purpose of a zoning statutory power is to empower the municipality to put restrictions, in the general public interest, upon the right which a land-owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of land-owners cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land-owner are then insecure in the sense that they are exposed to any restrictions which the municipality, acting within its statutory power, may impose. If the insecurity attending this incidental right to erect has not yet been removed by the granting of the permit, by the municipality acting in good faith, as in the present case, such right cannot become an accrued right effective to defeat a subsequently adopted zoning by-law prohibiting the erection of the proposed building in the area affected. *City of Toronto v. Trustees of Roman Catholic Separate Schools of Toronto,* [1926] A.C. 81, referred to.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Montpetit J. Appeal dismissed.

P. Dessaulles and *A. Forget, Q.C.,* for the plaintiff, appellant.

C. H. MacNaughten, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal from a unanimous decision of the Court of Queen's Bench[1] setting aside a judgment of the Superior Court maintaining appellant's petition of mandamus, for the issuance of a building permit for the erection of a gasoline filling station on the south-west corner of Victoria and Woodstock streets in the city of St. Lambert.

The events leading to this litigation may be summarized as follows:

The appellant company, a vendor of motor fuels and motor oils and operator of service stations, obtained on November 12, 1954, and accepted on July 27, 1955, an option to purchase, at the location and for the purpose above indicated, a parcel of land, conditional upon it obtaining from the city respondent all necessary permits

[1] [1958] Que. Q.B. 801.

and approvals. By a letter, dated May 30, 1955, and supported by a plot plan, construction plans and specifications, appellant applied for a gasoline filling station building permit, required under building by-law no. 392 then in force in the city. Acknowledging receipt of this application in a letter of June 10, 1955, respondent Martin, city manager and building inspector, advised appellant that the building by-law of the city did not allow the erection of a gasoline filling station in that area which, it may be added, was within what is described in the by-law as district "D". Some ten days later, *i.e.*, in a letter dated June 20, addressed to the Mayor and Councillors of the city respondent, appellant asked what specific provisions of the by-law prevented the granting of its application, in answer to which respondent, in a letter of June 29, referred appellant to by-law 392, s. 5, arts. 87 and 89. On the very date of appellant's letter of June 20, notice of motion having been duly given, the Council of the City passed by-law 405 reading as follows:

BY-LAW NO. 405

AMENDING BY-LAW NO. 392

WHEREAS it is a matter of public interest in view of the continued development of the City according to the policy followed by past Councils, to interprete and clarify Article 87 of By-Law No. 392.

WHEREAS, by the Charter of the City of St. Lambert, 25-26 GEO. V. Chapter 125, section 24, the Council may make, amend and repeal by-laws to determine the kind of building to be erected on certain streets and to prevent the erection thereon of any buildings of a different class.

WHEREAS, the Council for the City of St. Lambert has taken the stand that it should refuse and in fact, has refused permits for the construction of gasoline filling stations in District D, such being the interpretation of the By-Law.

WHEREAS, Notice of Motion has been duly given.

THEREFORE It is proposed by Alderman Oughtred L.W. Seconded by Alderman King R. and resolved that a By-Law bearing No. 405 be and is adopted and that it be enacted and decreed by the said By-Law as follows:—

1. THAT Article 87 is amended by adding the following paragraphs:

"87A.—Article 87 was never meant to authorize gasoline filling stations, the erection of which was and is prohibited in District D.

87B.—The provisions of section 87A of this By-Law are interpretative and shall take effect as from the first of January 1950.

1959

CDN. PETROFINA LTD. v. MARTIN et al.

Fauteux J.

87C.—Gasoline filling stations are prohibited in all Districts within the limits of the City of St. Lambert, except in District F."

2. This present By-Law shall come into force according to law."

A month later, on July 20, appellant's solicitors being seized of the matter, informed the city by letter that they had advised their client that art. 87 of by-law 392, properly interpreted, was ineffective to prohibit the erection of gasoline filling stations in district "D", that the adoption of by-law 405, of which they alleged having been recently apprised, could not defeat the rights already acquired by the company under by-law 392, and that, unless the city was prepared to grant the permit, appropriate judicial proceedings would ensue. This was followed by a letter from the city, dated July 21, advising that the matter would receive the immediate attention of its legal advisor upon the return of the latter from vacation, and by a further letter, on September 14, from appellant's solicitors to the city, insisting upon a decision in the matter.

On October 18, appellant, with the authorization of Challies J., caused a writ of mandamus to issue. In the declaration, served with the writ upon respondents, appellant prays that *arts. 87 A and B* of by-law 405 be declared null and void and of no force or effect as *ultra vires* and, demanding act of its readiness to pay, on the issue of the permit, such amount as, pursuant to the provisions of the city by-law, might be indicated by the building inspector, that respondent Martin be enjoined to grant appellant the building permit requested.

The trial Judge, having formed the view that art. 87 of by-law 392 allows "business places" in district "D" to the sole and specific exception of manufacturing establishments; that *art. 87 B* of by-law 405 violated appellant's accrued right to the permit under art. 87 of by-law 392, and that it was, because of retroactivity, illegal, *ultra vires* and, in any event, unjust and oppressive to the appellant, maintained the latter's petition for mandamus, declared *art. 87 B* of by-law 405 null and void and of no force or effect as against the appellant; gave act to the latter of its readiness to comply with the provisions of the city by-laws as to the payment for the building permit applied for; ordered respondent Martin, as building inspector of the

city respondent, to receive and consider appellant's application for the permit sought for and to grant it in accordance with the plans and specifications left with respondent on appellant's application or as same could be amended in compliance with the by-laws of the city.

On respondent's appeal to the Court of Queen's Bench[1], Bissonnette J.A. held that, properly interpreted, art. 87 of by-law 392 was effective to prohibit the building of gasoline filling stations in any of the city districts except in district "F"; Rinfret and Choquette JJ.A., concurring in this interpretation, held further that, by reason of *art. 87 C* of by-law 405 and of the decision of the Judicial Committee in *City of Toronto v. Trustees of the Roman Catholic Separate Schools of Toronto*[2], as interpreted and applied *In re Upper Estates v. MacNicol*[3] and *Spiers v. Toronto Township*[4], appellant had no accrued right to a permit when the latter article was adopted since, at that time, the gasoline filling station was neither erected nor in the process of being erected, nor had its erection been authorized by the municipal authorities under by-law 392 as the latter stood prior to the adoption of art. *87 C* of by-law 405. The appeal of respondents was consequently allowed, the judgment of first instance set aside and the petition for mandamus dismissed. Hence the present appeal.

It should immediately be said that appellant's submission that, in passing by-law 405, the city acted in bad faith and in a manner oppressive and unjust to the company, is not supported. The declared purpose of the by-law is to remove any possible ambiguity as to its interpretation as invariably given in the past by the city. While the declared purpose of a legislation is not always conclusive of its true purpose, in the present case, the fact that the city's interpretation is identical to that of the Court of Appeal supports the sincerity of the purpose indicated in the by-law and that the latter was not adopted to defeat appellant's application for a permit, but for general application.

[1] [1958] Que. Q.B. 801.
[2] [1926] A.C. 81, [1925] 3 D.L.R. 880.
[3] [1931] O.R. 465, 4 D.L.R. 459.
[4] [1956] O.W.N. 427, 4 D.L.R. (2d) 330.

1959

CDN. PETROFINA LTD. v. MARTIN et al.

Fauteux J.

It should also be noted that, under the statutory powers of the city, the provisions of *art. 87 C* of by-law 405 are admittedly unassailable and, in fact, in no way assailed by appellant. These provisions constitute a part of the subject matter of the by-law, which the municipal council manifested its intention to enact irrespective of the rest of the subject matter and hence a part subject to severance if other parts were invalid.

In this situation, assuming that on any ground raised, it should be held that art. 87 of by-law 392 and arts. 87 A and B of by-law 405 in no way affect its rights to erect, in district "D", a gasoline filling station, appellant cannot succeed unless it appears that, contrary to what is the case for any land owner in the district, its rights are not subject to the restrictive provisions of *art. 87 C.*

Appellant's contention must be that, having made the application for a permit and deposited the plans at a time when its right to use the land for the proposed purpose was in no way affected by a by-law, it had an accrued right which could not be defeated by the subsequent enactment of art. 87 C of by-law 405.

The merit of this proposition is, I think, implicitly negatived on the reasoning of the Judicial Committee in the *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto, supra.* While the statutory powers of the city of Toronto differ from those of the respondent city, in that any by-law passed pursuant thereto is restricted in its operation, and while the questions of fact arising in that case are, in some respect, at variance with the admitted facts of this case, the basic principle governing in the matter is the same. What was then said by Lord Cave may be stated concisely as follows, for the purpose of this case. The whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a land owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of land owner cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land owner

are then insecure in the sense that they are exposed to any restrictions which the city, acting within its statutory power, may impose.

From this it follows that, while the right to erect includes the right to receive the necessary permit for the erection of the building proposed to be erected in conformity with the law in force for the time being, the latter right is not any more secure than the former to which it is incidental. And if the insecurity attending this incidental right has not yet been removed by the granting of the permit, by the municipal authority acting in good faith, as in the present case, such right cannot become an accrued right effective to defeat a subsequently adopted zoning by-law prohibiting the erection of the proposed building in the area affected.

In these views, I find it unnecessary to pursue the matter further.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: McDonald, Dessaules & Joyal, Montreal.

Attorney for the defendants, respondents: Cecil H. MacNaughten, Montreal.