Ontario Court (General Division)

Citation: Loblaws Inc. v. Ancaster (Town), Chief Building Official
Court File: 316/92
Date: 1992-09-10

Feldman J.

Counsel:
Richard R. Arblaster and *D. Miller*, for applicants.
Harry B. Radomski and *T. Friedland*, for respondents, Price Club Canada Inc. and Price Club Real Estate Inc.
Lee A. Pinelli, for respondent, Corporation of the Town of Ancaster.

[1] FELDMAN J.:—This matter is an application by the applicants under s. 15 of the *Building Code Act*, R.S.O. 1990, c. B.13, for a hearing and appeal of the order of the chief building official of the Town of Ancaster granting a building permit to the respondents, known as Price Club.

[2] The respondents have raised the preliminary issue that the applicants lack standing to appeal under s. 15, and all parties have requested that the court decide the issue as a preliminary matter before the parties take any further steps to complete the record and to set a new date to argue the main application.

[3] Section 15 of the *Building Code Act* currently provides:

> 15 (1) *Any person who wishes to appeal an order* given or decision made by an inspector or chief official under this Act or the regulations may, within twenty days after the order or decision is made, apply to the judge of the Ontario Court (General Division) for a hearing and appeal.

(Emphasis added.)

[4] The section formerly provided that *"[a]ny person who considers himself aggrieved by an order* given or decision made by an inspector or chief official under this Act" may appeal (emphasis added) [R.S.O. 1980, c. 51]. The change was made in the 1990 statute revision pursuant to the *Statutes Revision Act, 1989*, S.O. 1989, c. 81, which authorizes certain commissioners to omit obsolete statutes, to alter numbering, to make changes in language to achieve greater uniformity, and to make changes necessary to bring out more clearly what is considered to be the legislature's intention, to reconcile apparently inconsistent provisions, or to correct clerical, grammatical or typographical errors (s. 3).

[5] The changes were incorporated into the revised statutes which were then passed into law by the legislature, while the old *Building Code Act* was repealed (s. 6).

[6] The respondents argue that the commissioners do not have the authority to make any substantive changes in legislation, so that the change in wording cannot broaden any right of

appeal where the change was made by the statute revision: *Foster v. Johnsen* (1983), 34 C.P.C. 228, 41 O.R. (2d) 498 (H.C.J.). However, as pointed out by Lerner J. in *Fernandes v. Melo* (1974), 6 O.R. (2d) 185 (H.C.J.) at p. 187, dealing with a similarly effected wording change to the *Judicature Act*, the operative word is the new word, since the old Act was repealed from the day when the revised statutes took effect.

[7] Although the commissioners clearly do not have authority to make any changes beyond those authorized by the *Statutes Revision Act, 1989*, the legislature itself does have that authority, which it exercised by passing the new wording.

[8] If the effect of the new wording is that literally "*any* person" may appeal a decision to issue a building permit, then there is no dispute that the applicants have standing to appeal.

[9] The respondents argue that the change of wording effects no substantive change, and therefore must be interpreted to mean "*any* person who considers himself aggrieved", as that phraseology has been interpreted by the courts.

[10] In my opinion, this is the better view, and is supported by the wording change. The phrase "who considers himself aggrieved" is not only old-fashioned in its form, but also, for example, in the fact that it is not gender neutral nor easily made so. Its purpose is to put a subjective element into the determination of who may appeal. The revised version does not give the right of appeal to "any person" without qualification, but to "any person who wishes to appeal". Arguably, this is merely a modern way to express the same subjective qualification of the right to appeal. The commissioners therefore acted within their mandate to change the language to more clearly bring out the meaning intended by the legislature, using a more modern construction.

[11] In my view, the meaning is even clearer when it is read and interpreted in accordance with the interpretation given to the old language by judicial interpretation. In the decision of the Divisional Court in *Friends of Toronto Parkland v. Toronto (City)* (1991), 86 D.L.R. (4th) 669, 8 M.P.L.R. (2d) 127, 6 O.R. (3d) 196, the court held that the test for standing to appeal, although subjective, was not completely open-ended, and the correct approach was that the section should be read as though it stated: "Any person who *reasonably* considers himself aggrieved" (emphasis added). This qualification would allow a court to exclude a person whose reason for feeling aggrieved was unfounded or fanciful.

[12] The same word can conveniently be read into the revised wording of s. 15: "Any person who *reasonably* wishes to appeal", and with the same effect.

[13] The Divisional Court points out in the *Friends of Toronto* case, that "the legislature clearly intended some threshold test be applied and it would be inappropriate to leave the whole matter either to the subjective whim of the appellant or solely to the discretion of the court" (p. 678). I respectfully agree with this view of the wording of s. 15 in its old form, and I am satisfied that the intent of the new wording was to achieve the same balance but in more modern, and hopefully, therefore, clearer language.

[14] The position of the applicants is that the building permit that was issued should be revoked, on the ground that the proposed building will contravene the applicable zoning by-law

and therefore the building permit does not conform to other applicable law as required by s. 6 of the Act. The applicants say that the Price Club outlet to be constructed there is not a "wholesale establishment", which is allowed by the by-law, but rather its operation is primarily retail which the applicants assert is not permitted by the zoning.

[15] The reason the applicants wish to appeal and consider that it has standing to appeal, is because the Price Club will directly compete with the two major retail grocery stores in the Ancaster and Hamilton area which the applicants now operate, and will have "a significant negative effect on their sales volumes".

[16] It is common ground that the applicants' stores and property will not be physically affected by the Price Club outlet. Rather, it is conceded by the applicants that it is only their economic interests and the commercial value of their property which are in potential jeopardy.

[17] The respondents say that the evidence of the applicants supporting their position is not probative as to the alleged negative economic impact of the Price Club without, for example, comparative figures showing the effect of other Price Club outlets on other grocery stores in close proximity. I agree that such evidence might have been more cogent. On the other hand, it is not possible to prove what will happen in the future, and any attempt at proof will necessarily also address a main issue on the application, which is the characterization of the business of the Price Club and the nature of its market. That issue is not to be determined at this preliminary stage. The test remains a subjective one, and the evidence is sufficient for the applicants to claim their right to appeal, if an economic interest is one which falls within the ambit of the section.

[18] The respondents' submission is that economic competition is not a sufficient basis for a person to be aggrieved. I will take the liberty of expressing the proposition in the current language of the section: "economic competition is not a sufficient basis for a person to reasonably wish to appeal". Nothing that the Price Club may do on its lands as a result of the building permit will impede the use that the applicants may make of their own lands. For example, in the case of *Giglio Enterprises Ltd. v. Link*, [1989] O.J. No. 1652 (unreported), the applicant was an owner of abutting lands, who feared that his property would be used by customers of the respondent for parking as a result of a building permit issued to the respondent which did not provide for sufficient parking spaces on its own property. The applicant's use of his own land could be adversely affected.

[19] The respondents say that the real complaint here is that the Price Club use of its land may have an adverse economic impact on the applicants by creating more competition, and this is not the type of basis upon which an appellant can legitimately feel himself aggrieved within the intent of the section.

[20] No Ontario authority was brought to the attention of the court which stands for the proposition asserted by the respondents. The case of *Re Halifax Atlantic Investments Ltd. and City of Halifax* (1978), 90 D.L.R. (3d) 633, 7 M.P.L.R. 10, 28 N.S.R. (2d) 193, a decision of the Nova Scotia Court of Appeal holds that a different phrase, "a person aggrieved", that is, with no subjective element, requires that to have a right to appeal, a person must have a legal grievance, *i.e.*, the person must have been wrongfully deprived of something by the decision,

and therefore increased economic competition was not enough.

[21] However, in the leading Ontario case, *Friends of Toronto*, the Divisional Court specifically holds [at p. 678], that "persons may be aggrieved within the meaning of that term in s. 15 though they have suffered no legal harm".

[22] The other authority upon which the respondents rely is the Federal Court decision in *Pfizer Canada Inc. v. Canada (Minister of National Health & Welfare)* (1986), 12 C.P.R. (3d) 438, 2 A.C.W.S. (3d) 71 (C.A.). The issue was the interpretation of s. 28 (2) of the *Federal Court Act* which allowed "[a]ny party ... directly affected by the decision" of the Minister to apply to set it aside. The court held that a competitor of the drug affected by the decision did not have standing because if its property rights in its product were affected, it was because of competition but not because of the Minister's decision. Again, in my view, the wording of the statute is so different, that no analogy may be drawn.

[23] The best source of analysis for the scope of standing under the section is the *Friends* case itself. In that case, the court allows for the broadest of nexus between the interests of the applicant and the decision to issue the building permit. In that case, the appellant public interest group had no proprietary or pecuniary interest in the decision, but rather felt that the development in question was not in the public interest for various reasons. The court would not have denied them standing on that basis, but because they had already tried to stop the development through several other routes within the planning process, with no success, the court was of the view that the applicant was now trying to use an appeal regarding the alleged non-compliance of the parking component of the permit as another route to accomplish their original purpose and questioned the *bona fides* of their subjective feelings of being aggrieved by the decision to issue the permit.

[24] In my view, the reference by the court to a pecuniary interest (p. 678) suggests that if a person did have such an interest or reasonably believed that they did, then that interest would be sufficient to give standing under s. 15. Furthermore, I can see no reason in principle why a potentially adverse economic impact of an allegedly improperly issued building permit, such as that asserted by the appellant, is any less legitimate or worthy of concern than the interest of a neighbour that its property may be physically affected by an allegedly improperly issued permit.

[25] I am therefore satisfied that the applicants are persons who reasonably wish to appeal within the meaning of s. 15, as interpreted by the Divisional Court in the *Friends of Toronto* case, and therefore they have standing to proceed with this application.

[26] The respondent, the chief building commissioner for Ancaster, has made a second submission, that the application should be quashed at this stage on the ground that on its face, the permit, issued for a warehouse, complies with the zoning by-law which allows warehouses. Therefore, the commissioner was obliged to issue the permit which is regular and discloses no basis for challenge. If it is the future use which the Price Club may make of the premises, about which the applicants are concerned, then their remedy is not under the *Building Code Act*, but rather under s. 328 of the *Municipal Act*, R.S.O. 1990, c. M.45, which allows a ratepayer to restrain the contravention of a by-law. The respondent commissioner says that at

the moment there is no contravention so that this application is premature, and ill-conceived as the complaint is not with the permit but with the intended future use of the premises.

[27] Although this argument is an attractive one at first blush, upon reflection, in my view, it begs the question of the meaning of s. 6 (1) of the *Building Code Act* and in particular the requirement that the building may not contravene any other law. I therefore decline to decide this issue on the preliminary motion but leave it to counsel, if so advised, to raise the issue again and point to appropriate evidence to support it, as part of the main application.

[28] Judgment accordingly.