Watts et al. v. Benvenuti

[Indexed as: Watts v. Benvenuti]

80 O.R. (3d) 721

Court of Appeal for Ontario,
Simmons, Cronk and MacFarland JJ.A.
June 1, 2006

Municipal law -- Zoning -- Non-conforming use -- Application judge reasonably finding that use of respondent's property to buy, sell, exercise and raise horses was legal non-conforming use -- Section 45(2) of Planning Act not applying as that provision applies to non-conforming uses that require variance approval and this case involved legal non-conforming use that came within exemption contemplated by s. 34(9) of Act -- Application judge erring in denying respondent costs -- Planning Act, R.S.O. 1990, c. P.13, ss. 34(9), 45(2).

The application judge found that the use of the respondent's property to buy, sell, board, train, exercise and raise horses was a legal non-conforming use under the applicable municipal zoning by-law. The judge found as a fact that the property in question was continuously used for residential and agricultural purposes, up to and including the time the respondent acquired the property, and that while the type of farming had changed, the use of the property itself and the buildings for farming purposes had not substantially changed. The appellants appealed, arguing that there was a change in use from the historical use of the property that required Committee of Adjustment approval under s. 45(2) of the Planning Act. The respondent cross-appealed on the issue of the application judge's refusal to award costs in his favour.

Held, the appeal should be dismissed and the cross-appeal

allowed.

The application judge's findings were open to him on the record before him. Section 45(2) of the Planning Act was not engaged. That provision pertains to non-conforming uses that require variance approval. This was a legal non-conforming use that came within the exemption contemplated by s. 34(9) of the Act.

The application judge erred in denying the respondent his costs. He misdirected himself by concluding that the respondent's conduct leading up to the agreement of purchase and sale was relevant to the disposition of the costs of the application. There are no special circumstances to warrant departure from the usual rule that costs should follow the event.

Cases referred to

Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898, [2001] S.C.J. No. 54, 2001 SCC 57, 204 D.L.R. (4th) 284, 275 N.R. 1

Statutes referred to

Planning Act, R.S.O. 1990, c. P.13, ss. 34(9), 45(2)

APPEAL from the judgment of Turnbull J. (2005), 77 O.R. (3d) 386, [2005] O.J. No. 3254 (S.C.J.), holding that the respondent's use of property was legal non-conforming use, and cross-appeal on the issue of costs.

Thomas A. Cline, Q.C., for appellant.

David M. Schell, for respondent. [page722]

Endorsement by THE COURT: --

A. Appeal

[1] The appellants argue that the application judge erred in law by concluding that the use of the respondent's property to buy, sell, board, train, exercise and raise horses is a legal non-conforming use under the applicable municipal zoning by-law. The appellants maintain that this use is a change from the historical use of the property that requires Committee of Adjustment approval under s. 45(2) of the Planning Act, R.S.O. 1990, c. P.13. We disagree.

[2] The application judge found as a fact: that the property in question was "continuously used for residential and agricultural purposes, up to and including the time the respondent acquired the property"; that the respondent's lands were being used for agricultural purposes at the date of the enactment of the relevant by-law; that while the type of farming on the property had changed, the use of the property itself and the buildings for farming purposes had not substantially changed; and, finally, that the new use of buying, selling, boarding, training, exercising and raising quarter horses was simply a change of activities within the old use of the property for agricultural purposes, with little community impact. These findings were open to the application judge on the record before him. They, therefore, attract deference from this court.

[3] The appellants submit that these findings are flawed because the application judge failed to consider the import in this case of s. 45(2) of the Planning Act. We reject this argument.

[4] Section 45(2) of the Planning Act pertains to non-conforming uses that require variance approval. But this is a legal non-conforming use that comes within the exemption contemplated by s. 34(9) of the Planning Act. Thus, the application of s. 45(2) does not arise. Put somewhat differently, on the facts here as found by the application judge, s. 45(2) of the Planning Act is not engaged. The

application judge concluded that the use of the property itself did not change. Rather, only the type of activities that together constitute the use were changed. These altered activities are within the category of a "protected use".

[5] Finally, we do not agree with the appellants' submission that Saint-Romuald (City) v. Olivier, [2001] 2 S.C.R. 898, [2001] S.C.J. No. 54 has no application to planning law in Ontario. In Saint Romuald, notwithstanding that the particular facts of the case arose in the context of legislation in Qubec, the Supreme Court of Canada detailed the factors to be taken into account in evaluating whether a land use change is of a quality and kind that operates to terminate a pre-existing legal non-conforming [page723] land use (or its equivalent). These factors are of general import and application: see Olivier at paras. 32-34. We find no fault with the application judge's consideration and application of these factors in this case.

B. Cross-Appeal

[6] The respondent cross-appeals from the application judge's costs disposition on the ground that the application judge erred by denying the respondent costs because, in the application judge's view, the respondent was "somewhat the author of his own misfortune".

[7] Costs awards by application judges attract considerable deference from this court. Appellate intervention is warranted only where the application judge errs in principle, or the costs award is plainly wrong.

[8] In this case, in our opinion, the application judge misdirected himself by concluding that the respondent's conduct leading up to the agreement of purchase and sale was relevant to the disposition of the costs of the application. In the circumstances of this case, this was an irrelevant factor. There is no suggestion that the respondent engaged in any conduct that would disentitle him to costs. Moreover, there are no special circumstances here to warrant a departure from the usual rule that costs should follow the event of both the

application and these proceedings.

C. Disposition

[9] Accordingly, the appeal is dismissed and the cross-appeal is allowed. The respondent is entitled to his costs of the application and of the appeal and the cross-appeal on the partial indemnity scale, fixed in the total amounts of $4,800 and $4,000, respectively, including, in each case, disbursements and Goods and Services Tax.

Appeal dismissed.