SUPREME COURT OF NOVA SCOTIA

Citation: Olympic International Realty Ltd. v. Halifax (Regional Municipality), 2009 NSSC 335

Date: 20091112
Docket: Hfx No. 288957
Registry: Halifax

Between:

Olympic International Realty Ltd.

Applicant

v.

Halifax Regional Municipality

Respondent

Judge: The Honourable Justice Charles E. Haliburton

Heard: April 6, 7, 8, 9, May 1, July 9, 2009, in Halifax, Nova Scotia

Counsel: Eric K. Slone and Nicholas Plourde
Solicitors for the Applicant

Randolph Kinghorne and Karen Brown
Solicitors for the Respondent

By the Court:

[1] The Applicant seeks to have the court issue a Writ of Mandamus which would effectively order the Halifax Regional Municipality (HRM) to design and build a roadway connecting the Hammonds Plains Road with the property of the Applicant. This access road was mandated by the Development Agreement (DA) which has been "breached". Of necessity, HRM would be obliged to expropriate the necessary property. The Applicant proposes that the cost could be recovered from the present owner of the land over which it would be built. United Gulf Developments Limited is the successor to the DA and to that obligation. The undertaking would cost several millions of dollars.

[2] The Originating Notice sets forth the plea in the following terms:

> "The issuance of a Mandamus ordering the Respondent Halifax Regional Municipality (HRM) to enter the United Gulf parcel and build the collector road thereon (as these terms are defined in the affidavit...)"

MANDAMUS

[3] A Writ, or an Order of Mandamus, is an ancient equitable remedy whereby courts have assisted private litigants by requiring governmental authorities to discharge their obligations. It is a discretionary remedy granted in an effort to promote equity and fairness where some public authority, or an inferior administrative authority, has failed or refused to perform its duty. The case *Apotex Inc. v Canada (Attorney General) (F.C.A.)*, [1994] 1 F.C. 742, sets out these requirements: There must be a public legal duty to act. The duty must be owed to the Applicant. There must be a clear right to the performance of the duty. No other adequate remedy is available to the Applicant.

[4] In Nova Scotia, Rogers, J., writing in *Burlock v. Dispensing Opticians of Nova Scotia*, [1989] N.S.J. No. 45, 227 APR 82 (citing earlier authority), included among the relevant requirements that the duty sought to be enforced must be purely ministerial in nature "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which ***he possesses no discretionary powers***." A further principle was expressed in *R v. Cartier (Rural Municipality*) (1922), 68 D.L.R. 741 (Man.K.B.), Galt, J. states at pp. 742 and 743 as follows:

> "... The rule that the Court will not question by mandamus the honest decision of the tribunal, even though erroneous, in matters within its jurisdiction, and in regard to which it has been intrusted with a discretion applies to all tribunals and not only to those of a judicial character. ***Accordingly, the writ of mandamus will not issue to command a local authority having power to approve or disapprove of building plans, to approve plans which they have in good faith rejected***... The applicant for a writ of mandamus must shew that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought... It is only in respect of a legal right that mandamus will lie..."
> ***[Emphasis Added]***

[5] The decision of HRM and its officials to alter a DA is a discretionary one. On an earlier application in this matter, Hood, J. noted that exercising their powers under s. 264 of the ***Municipal Government Act, supra***, to enter upon the property of United Gulf and build the collector road would be discretionary. I agree. I agree, as well, with her that the *"cases are limited where the court might over ride that* ***discretion***. *It would require proof of bias, bad faith or fraud"*.

[6] It is this issue of bad faith which has been most forcefully advanced by the Applicant. While I find myself in sympathy with the goals of Olympic and the predicament of Mr. Ahmadi, who finds himself unable to enforce rights which he thought he had under his contract with United Gulf, I have not found any objective evidence of bad faith on the part of HRM and its staff.

ISSUES/QUESTIONS TO BE DECIDED

[7] To dispose of this application by Olympic, three questions must be answered:

(A) Has HRM permitted a breach of the DA?

(B) If breach is established, does it entitle Olympic to the remedy sought?

(C) Has HRM refused to vary the terms of the DA because of bias against Mr. Roshani or as a result of bad faith?

THE FACTS

[8] Several hundred residential properties around Paper Mill Lake, as well as an industrial or commercial development, were contemplated by the DA entered into between the Town of Bedford and the then owners, the Annapolis Basin Group Incorporated (Annapolis). In the intervening years, the Town of Bedford has been succeeded by the HRM and the interests of Annapolis have devolved on other

corporate entities including at least United Gulf Developments Limited (United Gulf), Paper Mill Lake Developments (Ahmadi), CASA Developments Limited (CASA) and Olympic International Realty Limited (Olympic). It appears Annapolis retains some limited interest in the development.

[9] Olympic, which derives its' interest from Ahmadi, claims that HRM has breached the DA by granting permits for the development/construction and occupation of a "seniors" condominium on a portion of the lands which lies north of Kearny Run, and in fact, adjacent to the Hammonds Plains Road. They argue that it was breached in two ways. Firstly, it permitted the construction of more than the 100 units specified in the DA. Secondly, it allowed a building containing 60 units rather than the 40 specified. This breach, it is said, permits HRM to exercise its' powers under s. 284 of the ***Municipal Government Act***, 1998, c. 18, as amended. Olympic proposes that HRM is therefore bound to expropriate the necessary land and construct the roadway it claims as the remedy on this application and recover the cost of doing so from United Gulf.

[10] Annapolis entered into an arrangement with United Gulf which would see the latter become the developer of all the lands subject to the DA. United Gulf had

two principals, Mr. Saberi and Mr. Ahmadi, respectively the secretary and president of the company. The DA required the construction of an access road, the primary purpose of which would be to remove traffic from the Bedford Highway by providing access to the Hammonds Plains Road and Highway 102. This access road was never constructed by the developers as required. When Mr. Saberi and Mr. Ahmadi later parted company in late 1997, title to the property was divided between them. Mr. Ahmadi (in the name of his new company, Paper Mill Lake Developments) was left with some 74 acres of prime development land but no access road. United Gulf (Saberi) retained the remainder. One of the obligations undertaken by Mr. Saberi was that he would complete the road.

[11] In 2005, Olympic arranged to acquire this property for the purpose of development, but has found itself stymied by the lack of any acceptable access. The road, as contemplated by the DA, was the *sine qua non* of that approval.

[12] Alireza Roshanimeydan (Roshani) is the principal of Olympic. He has an arrangement with Ahmadi authorizing him to proceed with the development of this 74 acres. He initiated the process in May of 2005 to obtain a change in the DA which would permit its development without the completion of the road. That

process failed to gain public or municipal approval. Olympic then sought to have HRM involved; either to build the road, or by offering financial incentives through HRM to United Gulf. There were discussions but they did not lead to a successful result.

WAS THERE A BREACH ?

[13] The DA covered 221 acres of land at the junction of the Hammonds Plains Road and Highway 102. It included a number of islands in Paper Mill Lake. It specified the land use which was to apply making provision for private dwellings, park land, provision for a school, a walkway system, etc. Of the 921 dwelling units contemplated, 120 were planned as "two senior citizens project sites" but among the special provisions appears the clause "that buildings containing the multiple unit dwellings shall not exceed 40 such dwellings per building".

[14] Paragraph 14 of the DA is the focus of the contention that there has been a **breach** which should entitle **Ahmadi/**Olympic to the remedy sought. This clause has been referred to as the "phasing provision". It reads:

> *(1) Development of the 20 acre parcel south of Kearney Run, as referred to in the Development Agreement #94-04 and as shown on the plans, shall not proceed unless and until the Development Officer advises the Developer in writing that the Mill Cove Sewage Treatment Plant has been expanded sufficient to handle development of the said 20 acre parcel;*
>
> *(2) The Developer shall be allowed to create no more than 100 residential units prior to the completion of collector road N/1 which is to run from Moirs Mill Road to Hammonds Plains Road.*

No other reference appears in the document which would limit the discretion of the developer as to what area of the property will be developed first or last.

[15] At para. 18, under the heading "**Off Site Development**", the developers were obligated to meet "Department of Transportation Standards" for the intersection at Hammonds Plains Road and "contribute 25% of the cost of upgrading the Hammonds Plains Road to the Highway 102 intersection..."

[16] The evidence has focussed on two aspects of the DA. Firstly, all parties are agreed that the phasing provision at para. 14, which permitted the development of 100 lots, was intended to be an accommodation for the developer to generate sufficient revenues to pay for the construction of the required access road. Secondly, while the DA is not specific on the point, it was apparently contemplated by all those concerned that the 100 residential units were to be developed at the

south end of the property. Those lots had ready access to Moirs Mill Road where only the subdivision streets were required. Those lots were developed as soon as United Gulf acquired the property.

[17] Highly contentious and the primary focus of the allegation of “breach” is that a so-called senior citizen’s complex of 60 units was approved for construction adjacent to the Hammonds Plains Road. This was in addition to the development of the 100 lots at the south end. In doing so, the developer created a total of 160 units. The relevant provision in the DA is para. 3. It appears in the introductory portion (paras. 1 and 2) of the DA and outlines the nature of the intended development. Paragraph 3 provides “**Further Detail**”. It specifies that a portion of the lands will be conveyed to the Town of Bedford. It sets out the number of single and semi detached and multiple units to be built and provides detail as to the size of the lots for the various configurations. The last of these “details” is:

> *(g) Two (2) senior citizens project sites which may contain a maximum, taking into account both sites, of 120 units.*

[18] Permitting this 60 unit building at 2 Lake Drive the Applicant says was a breach of the DA for two reasons:

1. It resulted in exceeding the 100 units permitted before construction of the access road (para.14); and

2. The one structure contains 60 units rather than the 40 permitted [para. 3(g)].

[19] The Applicant is seeking a remedy in equity. It is of the essence that he come with "clean hands". Deriving his claim through Ahmadi, as he does, I have concluded that he does not meet that qualification. United Gulf and CASA Developments are/were related corporations. Saberi, and possibly Ahmadi, were involved in both. United Gulf assumed the obligations relating to the road in its' agreement with Annapolis, and acquired the right to the entire 221 acres. While Mr. Ahmadi continued in his role as President, in 1996, the 60 unit building was approved by the municipal authorities. He did not withdraw from United Gulf until December 1997.

[20] The timing of this approval makes it impossible for Mr. Ahmadi, or for someone being his successor, to complain that it was granted. The company of

which he was President was party to it. Olympic, as his successor, cannot credibly claim some special consideration on this basis.

[21] Was there a breach? It is not clear that the development of the "seniors complex" at 2 Lake Drive was not a permitted development under the DA. Within the planning department there were differing views as to whether the 100 unit limitation applied to the entire property, or applied only to restrict development south of Kearny Run. It would seem that the opinions of these witnesses were formed on the basis of their own particular job, that is, whether their involvement was with planning or with building approval.

[22] The development got a building permit because it was to build in a location where it met the established criteria. The area was already serviced with streets and sewers and it had access to the Hammonds Plains Road. The only reason to deny a building permit for that building would have been to force the developer to build the access road, a road that is not in any way connected to this location, nor of interest to its' occupants.

[23] The 100 unit limitation imposed by para. 14 is drafted in the context of concerns about the Mill Cove sewage station. It concerns population density in that “south” area. It is consistent with concerns about roadway capacity there. Lands north of Kearny Run are inaccessible from the south until that road and bridge are built. The evidence is that in 1994 the permission to develop the 100 lots in the south was a plan to enable the developer to generate the profit that would be needed to finance the construction of this access. It was a carrot not a stick.

[24] No documentation is provided to verify the interpretation of this restriction. The DA is ambiguous. I cannot conclude that the CASA development constituted a breach of the plan, or is at odds with the original intent of the DA.

BIAS

[25] I found Mr. Roshani to be an engaging personality but one whom the evidence persuades me is volatile. The evidence is that he has in the past been in confrontation with one or more members of council when representing the taxi drivers licensed to operate in the city. There is evidence he was confrontational with staff members in the initial stages of his application to amend the DA. There

is evidence before me that at least one influential councillor expressed his view that Mr. Roshani had no experience in development, and by implication, would not produce a good quality development. This same councillor is reported to have said words to the effect that, “without the construction of the access road” the project would go ahead “over my dead body”.

[26] I conclude from the evidence that in obtaining favourable consideration from HRM and its staff, Mr. Roshani did have a hill to climb that set him apart from other possible developers. The evidence is he does not have experience in the type and magnitude of development that he proposes to undertake and he has not endeared himself to certain interests. On the other hand, all the evidence I have heard persuades me that no one is going to develop that 75 acre parcel until the access road is completed. The construction of that road was an essential consideration of the general public when Annapolis came for approval of the original DA. The failure to complete the road was an important factor when the application by United Gulf for an amendment to the DA was rejected in 1999; it is the same problem with the planning process initiated by Mr. Roshani and by Olympic. The public and the planning department continued to insist on the construction of the road.

[27] The history of this DA and the property covered by it and the planning process mandated by the ***Municipal Government Act, supra***, are necessary references in determining whether the Applicant's right to fair treatment has been breached, whether his assertion of bias on the part of officials is established and whether the court ought to intervene.

[28] With respect to the assertion of bias, such a factor would be relevant only if it were established that the bias affected the ultimate refusal of the municipal authorities to amend the DA in the manner requested by the Applicant. The ***Municipal Government Act, supra***, at s. 190 and following legislates a complex planning process. Municipalities are enabled "*to assume the principle authority for planning within their respective jurisdictions*". The ***Act*** provides a *"consultative process to ensure the right of the public to have access to information and to participate in the formulation of planning strategies..."*

[29] The statutory scheme includes a provision for the municipality to establish a planning advisory committee and an area advisory committee. The meetings of these are to be open to the public. A further requirement is that notice of such

meetings be publicized so that the public may participate. Indeed, while the appointment of two committees does not appear to be mandatory, s. 204 does require the council to *"adopt by policy a public participation program concerning the preparation and planning documents."* This process, when completed, is subject to review at public meetings before the proposed plan can be adopted. Before implementing the plan (s. 205), the council must "*consider any submissions made or received at the public hearing.*"

[30] The application by Olympic to have the DA changed to permit development as proposed by Roshani followed this statutory program. The "public" was involved. It was considered by both the Planning Advisory Committee and an Area Advisory Committee (Paper Mill Lake Public Participation Committee). Public meetings were held, the various committee meetings were held and the proposal was rejected both by the public and the committees. It is not clear to me whether the decision actually came before council or not.

[31] Olympic's application was not rejected unfairly nor as a result of bias. To permit the development of an additional 340 homes, before the construction of adequate access roads, would be irresponsible on the part of the planning

authorities and contrary to the will of the public as expressed time and again over the past 12 years. It cannot be said that the authority (HRM), has exercised its discretion improperly nor for reasons of bias.

CONCLUSIONS

[32] It would seem to me perverse if, after the complex process which is required, a DA providing an integrated plan for a specific parcel of property could be severed. The property subject to the DA could be, and in this case has been, divided among various property owners but each and all of them continue to be bound by the integrated plan. An effective and meaningful planning process mandates that the entire development proceed as one integrated whole.

[33] The evidence before me makes it clear that in negotiating the DA, the developer, the planning authorities and the public were all particularly aware of population densities, traffic patterns, construction traffic and provisions that were desired for education, recreation, parks and roadways. Access to means of egress were highlighted as essential in case of emergency. The whole planning process would be subverted if the land area in question when divided among several

developers, could then be changed by each of them. The result of that would be to nullify the original plan and institute instead numerous new development agreements for smaller areas. The fact that ownership has changed then is not a relevant consideration on any application for an amendment to the DA.

[34] This DA provides for a whole development and is not severable.

[35] The application by Olympic would have resulted in significant changes. It required the Applicant and the municipal authorities to “start from scratch”. Effectively, it would lead to a new development plan and a new DA. To reach that end, the review would necessarily take place in the context of the fact that the remainder of the original development would be completed in the normal course by other owners.

[36] There was in the course of this hearing an implication that Saberi, unlike Roshani, is a preferred developer, and that he, or some other well known developer would have been granted approval for changes. The evidence is to the contrary. Saberi did apply for a variation of the DA and was turned down. That application

was denied in 1999 on the basis of “unresolved issues” which included the absence of the “collector road”.

[37] It is not clear that “bias” against Roshani was the cause for denying his variation application.

[38] A decision of the planning authority to amend or alter the Development Agreement is one within its’ discretion. This court might intervene by way of an order of mandamus where that decision resulted from bias, bad faith or fraud. I do not find any satisfactory evidence of any such motivation here.

[39] The application for mandamus is dismissed.

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Haliburton, J.