1957

*Feb. 14, 15
Mar. 27

THE TOWNSHIP OF MARKHAM .....APPELLANT;

AND

LANGSTAFF LAND DEVELOPMENT LIMITED, GEORGE SELKIRK, SAMUEL GOTFRID, DAVID SHER AND ROWLAND FRANCIS MAY ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Town planning—Approval of plan by Minister—Subsequent withdrawal of approval—Application for reinstatement—Jurisdiction of Minister and Ontario Municipal Board—The Planning Act, R.S.O. 1950, c. 277, ss. 26(9), 29(1).

A plan of subdivision which had been approved by the Minister of Planning and Development was not registered within one month and the Minister withdrew his approval under s. 26(9) of *The Planning Act*, 1950. A letter was subsequently written by one T, of the Department of Planning and Development, saying that if the plan was submitted again for approval the applicants must "start *ab initio* and submit a

completely new plan". Application was later made by mortgagees and lienholders for reinstatement of the plan and the Minister referred this application to the Ontario Municipal Board.

Held: The Board had jurisdiction to deal with the application and to approve the plan, subject to the conditions imposed by it.

Per Kerwin C.J.: Although the Minister withdrew his approval of the plan, he did not require that a new application be made and was therefore entitled to refer the matter to the Municipal Board which acquired jurisdiction to approve the plan.

Per Rand and Kellock JJ.: An application for approval of a plan, until expressly or impliedly recalled, remained a request for permission to develop the land for the purposes indicated. The mention of a new application in T's letter was neither a termination of the application nor the exhaustion of the Minister's authority. Its only effect was to prevent the registration of the plan until a new final approval had been given. The Minister was entitled to form opinions, which might be reversed, modified or changed, so long as they did not become fixed, temporarily or permanently, by the statute or by the action of others.

Per Locke and Cartwright JJ.: For the reasons given by the Court of Appeal, it should be held that, although the Minister withdrew his approval of the final plan, he did not require the making of a new application. It was unnecessary to determine whether the Minister, if he had required a new application, would thereby have become *functus officio* and without authority to refer the matter to the Municipal Board. That question should, therefore, be left open.

APPEAL from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from the Ontario Municipal Board. Appeal dismissed.

The facts are fully stated in the reasons for judgment of the Court of Appeal. For the purposes of this report, they may be summarized as follows:

One Selkirk, owner of all except qualifying shares in Langstaff Land Development Limited, applied, in the name of the company, for approval of a plan of subdivision. This application was made in 1954 under the provisions of *The Planning Act,* R.S.O. 1950, c. 277. After consultations and negotiations, the Minister approved the plan on October 6, 1954. Selkirk had proceeded with the construction of houses before approval of the formal plan.

The plan was not registered within one month and on December 13, 1954, the Minister's approval of the plan was withdrawn under s. 26(9) of *The Planning Act* (now s. 26(12) of 1955 (Ont.), c. 61). On February 10, 1955, one Tyrrell, of the Department of Planning and Development

(1) 1956 O.R. 164, 2 D.L.R. (2d) 84.

1957

TOWNSHIP OF MARKHAM v. LANGSTAFF LAND DEVT. LTD. *et al.*

(who had signed both the letter setting out the Minister's approval of the plan and that announcing that the approval had been withdrawn) wrote the following letter:

> As you are aware, the Minister withdrew this plan of subdivision on December 13, 1954.
>
> In the event that the applicants, the Langstaff Development Co., should decide to submit the plan again it will be necessary for them to start ab initio and submit a completely new plan.
>
> We are sending carbon copies of this letter to everyone concerned in order that there may be no mistake.

In the spring of 1955, Selkirk and his creditors sought to have the plan reinstated as approved. The council of the municipality declined to approve the plan except on conditions which were not acceptable to Selkirk and the trustees for his creditors. The trustees thereupon appealed to the Minister under s. 29 of the Act and the Minister referred the matter to the Ontario Municipal Board.

Before the Board, and in the Court of Appeal, it was argued that the Board lacked jurisdiction to approve the plan on two grounds:

(1) The Minister, having exercised his powers under s. 26(9) by withdrawing his approval of the plan, had no power under s. 29(1) to refer to the Board a subsequent application for reinstatement of his earlier approval.

(2) If the Minister had the power, he could exercise it only on the application of the original applicant or the owner for the time being, and not, as in this case, on the application of a mortgagee or a lienholder.

Both the Board and the Court of Appeal rejected these arguments. The Court of Appeal, in reasons delivered by Roach J.A., held that Tyrrell's letter stating that a new application must be made was not the act of the Minister and that the Minister, although he had withdrawn his approval of the plan, had not required that a new application be submitted. He had not disposed of the original application and it remained pending and in the same state as if the plan had never been approved. The Minister was therefore entitled to refer the application for reinstatement to the Board under s. 29(1) and he was entitled to act on the application of the mortgagees or lienholders.

Donald M. Fleming, Q.C., and *K. D. Finlayson,* for the appellant.

G. F. Henderson, Q.C., for the respondents Langstaff and Selkirk.

R. F. May, Q.C., for the respondents Gotfrid, Sher and May.

THE CHIEF JUSTICE:—I agree with the reasoning of Roach J.A. that, although the Minister withdrew his approval of the plan, he did not require that a new application be submitted. This is sufficient to dispose of the matter, as the Board had jurisdiction to authorize the conditions imposed by its order, and the appeal is, therefore, dismissed with costs.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—By s. 26(9) of *The Planning Act*, R.S.O. 1950, c. 277, and s. 26(12) of 1955 (Ont.), c. 61, when a final plan is approved by the Minister but is not registered within one month, the latter may withdraw his approval and may require a new application to be submitted.

Roach J.A. interpreted this to mean that once the Minister called for the new application, by that fact he became *functus* of the existing application and could not act thereafter upon it except on its being placed again in the course of an application *de novo*. In the circumstances, however, he found the letter of February 10, 1955 from the Department not to have been authorized by and, therefore, not the act of the Minister and that consequently it did not bring to an end the existing application.

I am unable to agree that the circumstances of the letter are to be so found; *prima facie* this correspondence carried on in the manner in which it was is of an official character and as from the Minister himself; but in the view I take of the statutory provisions, that does not affect the result at which Roach J.A. arrived.

What the legislation provides for is an administration of a subject that has become one of importance in municipal government, a matter of planning a structure of sectional allocation of the various conditions and functions of community life, *i.e.*, homes, schools, shops, industries, public places, etc., that will best serve the interests of that life as it grows and develops. By the factual particulars required by s. 26 to be shown on the draft plan, the matters to be

1957

TOWNSHIP OF MARKHAM v. LANGSTAFF LAND DEVT. LTD. et al.

Rand J.

regarded by the Minister, the sources of information to which he may resort, his discretion to withdraw his approval of the draft plan at any time before that of the final plan, and his power to withdraw final approval if the plan is not registered within one month of the date of that approval, a procedure is furnished of a continuing nature until final decision and action taken on it effects a determination.

An application for approval until expressly or impliedly recalled remains a request for permission to develop the land for the purposes indicated. Behind it is the urgency to bring to an end the suspension of the use of the land desired. But the owner remains in control: he is not bound to act even on an approval; he may disregard it or withdraw the application and hold the land for such other use as is not within the statute and for so long as he pleases.

The mention of a new application in the letter in question was not, then, in any technical sense, either a termination of the application or the exhaustion of the Minister's authority; it created a pause in the process: its only effect was to prevent the registration of the plan until a new final approval had been given.

That there was no intention on the part of the owner to withdraw the application is seen by the position taken by him before the Municipal Board; and prior to that hearing communications had been passing between the applicant and the Department. On such a matter the Minister forms opinions which may be reversed, modified or changed so long as they do not become fixed temporarily or permanently by the statute or by the action of others.

The reference to the Board was, then, within the Minister's discretion. The conditions annexed to the approval by the Board were such as were deemed to respect and protect the interests of the Township, the purpose for which the Board has been given administrative jurisdiction.

The appeal must, therefore, be dismissed with costs.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—In this appeal I agree with the decision of Roach J.A. and also with his reasons, subject only to the one following reservation. As, for the reasons given by Roach J.A., I agree with his conclusion that although the

Minister withdrew his approval of the final plan he did not "require that a new application be submitted", I find it unnecessary to determine whether if the Minister had so required he would thereby have become *functus officio* and without authority to refer the matter to the Municipal Board. I wish to reserve my opinion upon that question until it becomes necessary to decide it.

I agree with the Chief Justice that the Board had jurisdiction to impose the conditions contained in its order.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Kingsmill, Mills, Price & Fleming, Toronto.

Solicitors for the respondents Langstaff Land Development Limited and Selkirk: Parkinson, Gardiner, Roberts, Anderson & Conlin, Toronto.

Solicitors for the respondents Gotfrid, Sher and May: McLaughlin, Macaulay, May & Soward, Toronto.

---

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

(1) [1956] O.W.N. 410, 4 D.L.R. (2d) 652.