1958
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THE TOWNSHIP OF SCARBOROUGH (*Defendant*) ..... APPELLANT;

AND

FRANK S. BONDI (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Restrictive building by-laws—Amendment to by-law affecting one lot only—Whether discriminatory—Consent of Municipal Board to amendment given after passing—Whether by-law invalid—The Municipal Act, R.S.O. 1950, c. 243, s. 390.

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The defendant township passed a by-law by which it imposed building restrictions in a certain area, and later, in 1956, amended the by-law by adding to it the following clause: "Notwithstanding the provisions of this by-law, two single family detached dwellings only may be erected on the whole of lot 98, registered plan 1734." This amendment was subsequently approved by the Municipal Board. The trial judge ruled the by-law valid, but the Court of Appeal quashed it as being discriminatory. The township appealed to this Court.

Held: The amending by-law was invalid.

The amending by-law resulted from a valid exercise of the Council's legislative power as given by s. 390(1)4 of The *Municipal Act,* and it was not in fact discriminatory against the plaintiff. The municipality acted in good faith and in the interest generally of the area covered by the by-law and did not legislate with a view to promoting some private interest. The amending by-law was reasonable and in keeping with the general character of the neighbourhood. It was nothing more than an attempt to enforce conformity with the standards established by the original by-law, and could not be characterized as discriminatory merely because it pointed to one particular person or lot.

However, the amending by-law was invalid because it was finally passed without the approval of the Municipal Board having been first obtained. Section 390(9) of *The Municipal Act* imperatively forbids the passing of a by-law to amend or repeal a by-law such as the original one in this case without the approval of the Municipal Board obtained prior to or contemporaneously with such passing. The council exercised a power to the exercise of which the approval of the Municipal Board was necessary and, by s. 43 of *The Municipal Act,* it was expressly forbidden to exercise that power until the approval of the Board had been obtained. The amending by-law was therefore a nullity.

This case should be decided on the law as it existed when the matter was dealt with by the Court of Appeal, and this Court could take no account of the amendment to s. 390(9) made in 1958.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McRuer C.J.H.C. Appeal dismissed.

H. Beckett, Q.C., and *J. A. Taylor,* for the defendant, appellant.

J. J. Robinette, Q.C., for the plaintiff, respondent.

TASCHEREAU J.:—For the reasons given by my brothers Cartwright and Judson, I would dismiss the appeal with costs.

The judgment of Locke and Cartwright JJ. was delivered by

[1] [1957] O.R. 643, O.W.N. 536, (1958), 11 D.L.R. (2d) 358.

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CARTWRIGHT J.:—The questions raised on this appeal are stated in the reasons of my brother Judson which I have had the advantage of reading. On the main question, for the reasons given by him, I agree with his conclusion that by-law no. 7023 is valid, unless on the second ground urged by Mr. Robinette it must be held void for failure on the part of the council of the appellant to follow the course prescribed by the relevant statutory provisions, in that it was finally passed without the approval of the Municipal Board having been first obtained.

By-law no. 7023 amends by-law no. 2041 which was passed under the powers conferred on the council of the appellant by the predecessor of what is now s. 390 of *The Municipal Act*, R.S.O. 1950, c. 243. We were informed by counsel that by-law no. 2041 was duly approved by the Municipal Board.

By-law no. 7023 was given its first reading on September 17, 1956, and on September 24, 1956, was given its second and third reading and passed. On the last-mentioned date subs. (9) of s. 390 of *The Municipal Act* read as follows:

(9) No part of any by-law passed under this section and approved by the Municipal Board shall be repealed or amended without the approval of the Municipal Board.

An application for approval was heard by the Municipal Board on November 1, 1956, and on November 12, 1956, a formal order of the Board approving by-law no. 7023 was issued.

The wording of subs. (9) of s. 390 may be constrasted with that of subs. (8) of the same section which reads:

(8) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.

Reading these two subsections together, it appears to me that subs. (8) contemplates the final passing of a by-law by the council and a subsequent application for its approval by the Board, while subs. (9) imperatively forbids the passing of a by-law to amend or repeal a by-law such as no. 2041 without the approval of the Board obtained prior to or contemporaneously with such passing.

A somewhat similar question came before the Appellate Division of the Supreme Court of Ontario in *Re Butterworth and City of Ottawa*[1]. The legislation there under consideration provided that by-laws might be passed by the councils of urban municipalities for certain purposes one of which was:

> 13. With the approval of the Municipal Board, and within the limitations and restrictions, and under the conditions prescribed by order of the Board, for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality, by a vehicle, from any coal-yard, store-house, coal-chute, gas-house or other place:—
>
> (*a*) To have the weight of such vehicle and of such coal or coke ascertained prior to delivery, by a weighing machine established as provided by paragraph 11.

The city council passed a by-law in pursuance of this power which was not before its final passing approved by the Board but was so approved after it had been passed and after a motion to quash it had been launched. A motion to quash was dismissed by Falconbridge C.J.K.B. and his decision was confirmed by a unanimous judgment of the Appellate Division delivered by Hodgins J.A.

After pointing out the practical impossibility of requiring concurrent consent to the act of passage of the by-law and certain inconveniences in obtaining a prior approval, Hodgins J.A. says at p. 90:

> These considerations, while rendering it probable that a reasonable course has been pursued in the present instance, cannot control the construction of the statute, if the words clearly point to an opposite conclusion.
>
> But they add force to the contention that where the approval has been given and no conditions etc. have been laid down, the statute has been complied with in fact and in law as well.

Having decided that as a matter of discretion the by-law should not be quashed the learned Justice of Appeal concluded his reasons, at p. 93, as follows:

> I think the Court should not be astute to quash a by-law passed by the municipal council and approved by the Board, just because the method adopted is open to some criticism due to the peculiar wording of the legislation giving authority to make the by-law effective. The only consequence would be to require the parties to try it again in a slightly different way so as to produce a result exactly the same.
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> In the words of Meredith, J., in *Cartwright v. Town of Napanee* (1905) 11 O.L.R. 69, 72, there is every reason for "declining to exercise a jurisdiction which would compel the respondents to march up the hill merely to march down again at their will."

[1] (1918), 44 O.L.R. 84.

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If subss. (8) and (9) quoted above were the only statutory provisions requiring consideration I would incline to follow *re Butterworth* but since the date of that decision s. 43 of *The Ontario Municipal Board Act* has been passed. This reads as follows:

> 43. Where by this or any other general or special Act the permission, approval or sanction of the Board is necessary to the exercise of any power or the doing, or the abstention from doing or continuing to do any act, matter, deed or thing, such power shall not be exercised or act, matter, deed or thing be done or abstained from being done or be continued until such permission, approval or sanction has been obtained.

The predecessor of this section was first enacted in 1932 by s. 47 of 22 Geo. V, c. 27. Its terms appear to me to be free from any ambiguity and to be fatal to the appellant's case. The council in passing by-law no. 7203 was exercising a power to the exercise of which the approval of the Board was necessary by the provisions of s. 390(9) of *The Municipal Act;* and, by s. 43, just quoted, it was expressly forbidden to exercise that power until the approval of the Board had been obtained. It results that by-law no. 7203 is a nullity.

It can scacely be denied that this construction, which I think we are compelled by the plain words of the statute to adopt, may result in great inconvenience, but we must decide the case on the law as it existed when the matter was dealt with by the Court of Appeal and can take no account of the amendment to s. 309(9) made by 1958 6-7 Elizabeth II, c. 64, s. 31(2), as a result of which the subsection now reads:

> No part of any by-law that repeals or amends a by-law passed under this section and approved by the Municipal Board shall come into force without the approval of the Municipal Board.

For the above reasons, all of which are based upon a ground which was raised before the Court of Appeal but with which that Court found it unnecessary to deal, I would dismiss the appeal with costs.

ABBOTT J.:—For the reasons given by my brothers Cartwright and Judson, I would dismiss the appeal with costs.

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for the Province of Ontario[1] which quashed an amendment to a zoning by-law of the Township of Scarborough. The original by-law, no. 2041, was

[1] [1957] O.R. 643, O.W.N. 536, (1958), 11 D.L.R. (2d) 358.

passed on March 21, 1938, under authority of s. 406 of *The Municipal Act,* R.S.O. 1937, c. 266, now R.S.O. 1950, c. 243, s. 390, subs. (1)4. It imposed residential restrictions on certain lands in registered plans 2763 and 1734 and permitted the erection of only one dwelling per 100 feet of frontage on a public street.

Before the present dispute the by-law had been amended on at least three occasions on the petition of individual property owners so as to permit the erection of dwellings on parcels of land having a frontage of less than 100 feet on a public street but having large areas. The lands of the respondent comprise the westerly portion of lot 98 and are approximately 20,000 square feet in area. Lot 98 is a triangular shaped corner lot which has a frontage of 221 feet on Annis Road and 333 feet on Hill Crescent. Before the passing of the amending by-law 7203 (the by-law under attack) it would have been possible to erect at least four dwellings because of the frontages on the two streets. The by-law in question here, passed on September 17, 1956, amended by-law 2041 by providing that

> Nothwithstanding the provisions of this by-law, two single family detached dwellings only may be erected on the whole of lot 98, registered plan 1734.

The easterly portion of lot 98 fronting entirely on Hill Crescent already had a house built on it. The respondent's property, the westerly portion of lot 98, is still vacant land. It has a frontage of 221 feet on Annis Road by approximately 100 feet on Hill Crescent. The perpendicular depth throughout is 100 feet. If, therefore, one looks at the by-law before amendment, it would be possible to put two houses on this vacant lot, each having a frontage of 110 feet, 6 inches on Annis Road by a depth of 100 feet. This would give each house an area of approximately 11,000 square feet.

The respondent purchased his property in May of 1951. In July of 1956 he agreed to sell to a third party, who proposed to put two houses on the property, each having a frontage of 100 feet on Annis Road. It was a condition of the agreement that the purchaser should be able to obtain permission from the municipality to erect these two houses. The agreement came to nothing because property owners in the vicinity petitioned the township

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council to amend the by-law. Their petition pointed out that the average ground area for the houses in this neighborhood was in excess of 45,000 square feet, whereas the two new houses would each have a ground area of approximately 10,000 square feet. The objection to the proposed buildings on comparatively small lots in a neighborhood such as this is apparent and needs no further comment. The amending by-law was first read on September 17, 1956, and received its second and third readings on September 24, 1956. It came before the Ontario Municipal Board for approval on November 1, 1956. An oral hearing was held at which the respondent was represented and heard. The Board reserved judgment and gave its decision approving the amendment on November 22 after an inspection of the area. The Board stated that the restriction imposed by the amending by-law was reasonable and in keeping with the general character of the neighborhood.

The respondent then moved for an order quashing the by-law. The application was dismissed by order dated April 12, 1957. This order was reversed on appeal[1] and it is from this reversal that the present appeal is taken. The Court of Appeal held that even if the amending by-law was passed in good faith, it was discriminatory in scope, application and effect and consequently invalid, being aimed at and applying only to one lot within the defined area.

I do not think that one can characterize this by-law as discriminatory merely because it points to one particular person or lot. The task of the municipality in enacting the original by-law was to impose building restrictions over a fairly wide area. Lot 98, out of which the respondent's property came, was originally triangular in shape at the intersection of Annis Road and Hill Crescent. There was at that time no indication that it would be divided into two parcels so as to leave the respondent with a 221 foot frontage on Annis Road with a depth of only 100 feet. No other lot in the immediate vicinity has a depth of less than 150 feet. If the municipality had foreseen this subdivision at the time of the enactment of the original by-law, can it be doubted that it could have provided that the 100 foot frontage should be taken to refer to the frontage on Hill Crescent and not to a division of the 221 foot

[1] [1957] O.R. 643, O.W.N. 536, (1958), 11 D.L.R. (2d) 358.

frontage on Annis Road? This is all that the amending by-law does, although it does not say so in so many words. The intent and effect of the amending by-law are clear— to compel the respondent to fall in with the general standards of the neighborhood and prevent him from taking advantage of the district amenities, the creation of the by-law, to the detriment of other owners. Far from being discriminatory, the amending by-law is nothing more than an attempt to enforce conformity with the standards established by the original by-law and which have been observed by all owners in the subdivision with this one exception.

The classic definition of discrimination in the Province of Ontario is that of Middleton J.A. in *Forst v. Toronto*[1]:

> When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another; . . .

Although I have a firm opinion that the original and amending by-laws do not infringe this principle, I share the doubt expressed by the learned Chief Justice whether it can ever afford a guide in dealing with a restrictive or zoning by-law. The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do. Moreover, within the area itself, mathematical identity of conditions does not always exist. All lots are not necessarily of the same frontage or depth. The configuration of the land and the shape of the lots may vary. Some lots may have frontages on two streets. These are only some of the considerations which may justify a municipality in enacting these by-laws in exercising a certain amount of discretion.

The power to pass the by-law is contained in s. 390 (1) 4 of *The Municipal Act,* now R.S.O. 1950, c. 243. It reads:

> 390. (1) By-laws may be passed by the councils of local municipalities:
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> 4. For regulating the cost or type of construction and the height, bulk, location, spacing, external design, character and use of buildings or structures to be erected within any defined area or areas or upon land

[1] (1923), 54 O.L.R. 256.

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abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof which any building or structure may occupy.

I think that this by-law may be justified under "spacing" and "minimum frontage and depth of the parcel of land". Although the original by-law refers only to minimum frontage and says nothing about the depth of the parcel, the facts are that at that time, long before lot 98 had been subdivided, there were no lots in the immediate vicinity of the land in question with a depth of less than 150 feet and in most cases the lots were considerably deeper. Therefore, when the by-law said that a lot should have a minimum frontage of 100 feet, the facts made it mean 100 feet frontage by a depth of not less than 150 feet. It was at that time impossible to foresee how lot 98, with its peculiar shape as compared with the rest of the lots, would eventually be subdivided. The municipality dealt with the problem after the subdivision had actually been made and when the owner of the westerly portion proposed to make a use of the lot which was not in keeping with the character of the neighborhood.

I have no doubt concerning the finding of the learned Chief Justice that the municipality in enacting this amending by-law was acting in good faith and in the interest generally of the area covered by the by-law and that it was not legislating with a view to promoting some private interest, and I am equally satisfied with the finding of the Municipal Board that the amending by-law was reasonable and in keeping with the general character of the neighborhood. I am therefore of the opinion that it resulted from a valid exercise of the legislative power and that it was not in fact discriminatory against the respondent.

I have thought it necessary to consider the application to this problem of the principles stated in the reasons of the learned Chief Justice and the Court of Appeal but there still remains the question whether the prior approval of the Municipal Board under s. 43 of *The Municipal Board Act* is a condition precedent to the validity of the amending by-law. This was an alternative ground of appeal in the Court of Appeal but the court found it unnecessary to deal with it. On this point I am in agreement with my

brother Cartwright that the by-law must be held to be a nullity for lack of prior approval. Consequently, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: James A. Taylor, Toronto.

Solicitor for the plaintiff, respondent: Lewis Duncan, Toronto.

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