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*June 23
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KALMEN MAPA and ISADORE GOLDIST (*Applicants*) ..... APPELLANTS;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF NORTH YORK and S. G. BECKETT, Building Commissioner (*Respondents*) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Application for separate building permits for foundation and superstructure of apartment hotel—Permit issued for foundation—Subsequent passage of amendment to zoning by-law to prevent construction of apartment hotels in area—Whether building plans approved by inspector prior to passage of amending by-law—The Planning Act, R.S.O. 1960, c. 296, s. 30(7)(b).

The appellants were builders who intended to build an apartment hotel on a lot which they purchased, conditional upon their ability to obtain a building permit. Later, having been informed by the respondent municipality that a permit would be issued, they waived the condition and became bound to purchase the land. On March 2, 1964, they applied for two permits, one for the foundation and one for the superstructure. This was in accordance with the established practice which allowed the applicant to commence work sooner and avoided the delay which would ensue if all plans and drawings had to be examined in complete detail before work could commence. The deficiencies, if any, with relation to the superstructure would normally be worked out between the parties as the work progressed.

A permit for the foundations was issued on April 2, 1964, and as a result the appellants entered into construction contracts. An endorsement on the plans indicated that they were approved on or about March 18, 1964. On April 6, 1964, the township passed an amending zoning by-law, the object of which was to prevent the appellants and others from building apartment hotels on sites already chosen by them.

An application for mandamus to compel the issue of the building permit was dismissed as to the permit for the superstructure. On consent of the parties, the judge who heard the application was asked to enlarge it to include a prayer for a declaration that the plans for the building had been approved by the building inspector prior to the date of the passing of the amending by-law and that the plans were therefore approved within the meaning of s. 30(7)(*b*) of *The Planning Act*, R.S.O. 1960, c. 296. This declaration was granted.

The Court of Appeal allowed the appeal of the municipality and held that the proposed building was not an apartment hotel within the meaning of that term as defined in the zoning by-law prior to its amendment, and that consequently, its erection was prohibited by the provisions of the by-law even before amendment. On appeal to this Court, the appellants sought restoration of the declaratory judgment given by the trial judge.

*PRESENT: Taschereau C.J. and Martland, Judson, Hall and Spence JJ.

Held (Martland and Hall JJ. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Judson and Spence JJ.: The application for the building permit was in conformity with the by-law prior to its amendment.

As submitted by the appellants, the approval contemplated by s. 30(7)(*b*) of *The Planning Act* was approval with relation to zoning questions. The plans for the proposed apartment hotel were approved by the building inspector prior to the date of the passing of the amending by-law. The plans were therefore approved within the meaning of s. 30(7)(*b*) of the Act.

Per Martland and Hall JJ., *dissenting:* Approval of the plans of a building, within the meaning of s. 30(7) of *The Planning Act,* meant that kind of approval by the building inspector which would be requisite for the issuance of a building permit. No such approval was ever given in this case, nor were the appellants ever in a position to demand that it be given.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Brooke J. Appeal allowed, Martland and Hall JJ. dissenting.

B. J. MacKinnon, Q.C., and *J. E. Sexton,* for the appellants.

J. T. Weir, Q.C., and *M. McQuaid,* for the respondents.

The judgment of Taschereau C.J. and Judson and Spence JJ. was delivered by

JUDSON J.:—The appellants are builders who intended to build an apartment hotel on a lot which they purchased for $199,500, conditional upon their ability to obtain a building permit. They brought an application for mandamus to compel the issue of the permit. Brooke J., who heard the application, dismissed it as to the permit for the superstructure of the building. A permit had already been granted for the foundations. On consent of the parties, the judge was asked to enlarge the application to include a prayer for a declaration that the plans for the building had been approved by the building inspector prior to the date of the passing of an amending by-law No. 18758 and that the plans were therefore approved within the meaning of s. 30(7)(*b*) of *The Planning Act.* The judge made this declaration.

The Court of Appeal allowed the appeal of the municipality and held that the proposed building was not an apartment hotel within the meaning of that term as defined in the zoning by-law No. 7625, and that consequently, its erection was prohibited by the provisions of the by-law even

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as it stood before an attempted amendment which I will deal with later.

On this appeal the appellants seek the restoration of the declaratory judgment given by Brooke J. Mandamus has disappeared from the litigation.

Before making the conditional contract for the purchase of the land, the appellants had ascertained that it was zoned "General Commercial" according to zoning by-law No. 7625 of the municipality and that apartment hotels were a permitted use. On March 2, 1964, they applied for permits for the foundation and excavation and for the superstructure. They delivered at the same time two sets of architectural and structural plans, together with a sketch of survey. The plans were for a 231-suite apartment hotel.

Before waiving the condition in their agreement of purchase and thereby binding themselves to complete, the appellants, wishing to be satisfied that a permit for the apartment hotel would be issued, made enquiries of the municipality and were informed on the 28th and 30th days of March, 1964, that a permit would be issued. Relying upon this information, they immediately waived the condition and became bound to purchase the land.

The practice of applying for two permits, one for the foundation and one for the superstructure, requires explanation. It had become well established and was based on convenience. It allowed an applicant to commence work sooner and avoided the delay which would ensue if all plans and drawings had to be examined in complete detail and approved in their entirety before work could commence. The deficiencies, if any, with relation to the superstructure would normally be worked out between the architect and engineer on one side and the corporation on the other as construction went along.

On April 2, 1964, permit No. 60133 was issued to the appellants to excavate and erect the foundation for the proposed building. The endorsement on the plans indicated that they were approved on or about March 18, 1964. The plans, as filed, did not offend the zoning by-law prior to its amendment. As a result of the issue of the permit on April 2, 1964, the appellants entered into construction contracts for amounts exceeding $350,000. They had also already entered into engineering and architectural contracts.

On April 13, 1964, the council of the respondent instructed the building commissioner not to "process any applications for building permits for apartment hotels which have been or may hereafter be submitted to the Building Department". On April 15, the building commissioner wrote the appellants that the plans did not comply with the zoning by-law No. 7625, as amended by by-law No. 18758, which amendment was purportedly passed by the township on April 6, 1964, four days after the granting of the permit to the appellants. The object of the amending by-law was to prevent the appellants and others from building apartment hotels on sites already chosen by them.

The submission of the appellants is that they were entitled to build a high-rise apartment hotel under by-law No. 7625. The Court of Appeal has found that they were not so entitled for reasons that counsel for the municipality is not prepared to support. I will set out the relevant definitions in the zoning by-law:

> "Apartment Hotel" shall mean a building or portion of a building used mainly for the purpose of furnishing living quarters for families by the month or more than a month, and not for any period of less than a month, and having at least six suites of rooms for rent, and having a restaurant or dining room, but shall not include an hotel or ordinary lodging house.
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> "Dwelling Apartment House" shall mean a building containing more than four (4) dwelling units each unit having access only from an internal corridor system.
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> "Dwelling Unit" shall mean a separate set of living quarters designed or intended for use or used by an individual or one family alone, and which shall include at least one room and separate kitchen and sanitary conveniences, with a private entrance from outside the building or from a common hallway or stairway inside.
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> "Hotel" shall mean a building or part of a building in which a minimum of six rooms is provided for renting as dwellings, usually on a temporary or transient basis, with no facilities for cooking or housekeeping therein; but with a public dining room.

The ratio of the Court of Appeal is that the intended building was not an apartment hotel but a "dwelling apartment house"; that such a building even on a site within a C1 Zone could not be erected under by-law No. 7625 unless it conformed to the provisions applicable for a building in an RM zone. This is expressed in the following passage from its reasons for judgment:

> Having concluded that the projected building is a "dwelling, apartment house", and that as such it clearly does not conform to the

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provisions applicable to such a building in a RM5 zone, its erection on a site within a C1 zone was not permissible under By-law 7625 as it stood at the date of the application for the building permit.

At the time of the applications for building permits the municipal officers thought that they were in conformity with the zoning by-law; that the proposed buildings were apartment hotels within the terms of the by-law and that they could be built on land which was zoned (C-1)—General Commercial Zone—as this land was. No one thought of classifying these buildings as Dwelling Apartment Houses restricted to a height of three stories, and counsel for the municipality, in this Court, made no attempt to argue this. I think that it is clear that when these excavation and foundation permits were granted, the applications were in conformity with the by-law prior to its amendment.

The next branch of the appeal is the submission of the appellants that their plans were approved within the meaning of that word as found in s. 30(7)(*b*) of *The Planning Act*, R.S.O. 1960, c. 296, prior to the passing of the amending by-law 18758. Section 30(7)(*b*) of *The Planning Act* reads as follows:

> No by-law passed under this section applies,
> (*b*) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure the plans for which have, prior to the day of the passing of the by-law, been approved by the municipal architect or building inspector...

The appellants say that the approval contemplated by s. 30(7)(*b*) is approval with relation to zoning questions. On the other hand, the municipality says that the approval of plans contemplated by s. 30(7)(*b*) is the issue of the building permit. In other words, if a builder cannot get a mandamus for the issue of a building permit, then he must lack the necessary approval under s. 30(7)(*b*). The judge favoured the submission of the appellants. I think that he was right in making this declaration. The building permit for the foundations and excavation was actually issued. The plans for the superstructure were in the hands of the municipality. The very issue of the excavation and foundation permit indicates that whatever objections there might be to the plans of the superstructure were of such a character, being deficiencies with respect to the building by-law alone, that they would normally be worked out

between the parties as the work progressed. I think that these appellants had the approval of the municipality and that the judgment of Brooke J. should be restored.

The appeal should be allowed with costs and para. 1 of the order of Brooke J. to the following effect should be restored:

IT IS DECLARED AND FOUND that the plans as submitted by the Applicants for the proposed apartment hotel were approved by the Building Inspector prior to the date of the passing of the amending by-law, being By-law 18758 of the Respondent Municipality, and that the plans were therefore approved within the meaning of Section 30(7)(*b*) of the Planning Act.

The judgment of Martland and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—This case relates to one of three applications which were disposed of at the same time by Brooke J., each seeking an order by way of mandamus, directed to the respondent corporation and to the respondent Beckett, its building commissioner, to issue a building permit to permit the applicant to build an apartment hotel. The other two applicants were Ample Investments Limited and Tashan Limited. Reasons were delivered in respect of the application of Ample Investments Limited, which also applied to the other two applications. Brooke J. refused to make the order requested, but, on consent of the parties, enlarged the application to include a prayer for a declaration that the plans for the building had been approved by the respondent Beckett before passage of amending by-law No. 18758. This declaration was granted. His decision was reversed on appeal. The appeals from the judgments of the Court of Appeal for Ontario in respect of all three applications were argued at the same time before us.

The facts are stated in the reasons of my brother Judson. In each case the applicant had obtained a permit limited to the excavation and erection of the foundation of a building. These were issued, in the case of the appellants, on April 2, 1964, in the case of Tashan, on April 3, 1964, and in the case of Ample, on April 6, 1964. By-law No. 18758 was enacted on April 6, 1964, and its effect was to prevent the construction in each case of a building of the type contemplated in the area where it was proposed to be erected, in that, *inter alia*, a limitation as to height was imposed.

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The respondents contend that this amending by-law was applicable in each case. The appellants contend that it did not apply because of the provisions of s. 30(7) of *The Planning Act*, R.S.O. 1960, c. 296, which provides as follows:

> 30. (7) No by-law passed under this section applies,
>
> (*a*) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose; or
>
> (*b*) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure the plans for which have, prior to the day of the passing of the by-law, been approved by the municipal architect or building inspector, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the erection of such building or structure is commenced within two years after the day of the passing of the by-law and such building or structure is completed within a reasonable time after the erection thereof is commenced.

The application of that subsection depends upon whether or not the respondent Beckett had, prior to the enactment of by-law No. 18758, approved the plans of the appellants' proposed building.

The learned trial judge summarizes the evidence of Beckett on this point as follows:

> Mr. Beckett in his evidence stated that the plans of the superstructure were considered prior to the issue of the permit for excavation and foundation, but only in so far as they related to excavation and foundation. The plans for the excavation and foundation, which are some of the plans filed, are clearly stamped over the signature of Mr. Beckett "approved for building permit for excavation and foundation only." There is no stamp of approval marked on the rest of the plans filed. As to the application for the building permit for the superstructure, Mr. Beckett states that there was a preliminary examination made of these plans but that they were returned to the owner with a notice endorsed on them, "Need further lay-out plans for superstructure permit" to advise that there were deficiencies in the documents submitted for this purpose. It appears from the cross-examination that this objection relates to one of the plans which is entitled a typical floor plan and on which it is noted that on alternate floors this plan would be reversed. For clarity, the building inspector has required a separate plan for the alternate floors. Mr. Beckett stated that at the time of the launching of this application further examinations were made of the plans and they revealed a number of deficiencies, some of which were touched upon in his cross-examination. In addition he stated, on cross-examination, that no specifications for the superstructure had been filed and as a result certain aspects of the construction were not clear, e.g., while the plans called for brick, there were no specifications as to the type of brick.

The learned trial judge found that the building plans had been examined and approved as to their compliance with the zoning by-law No. 7625 as it then stood. He further stated that:

> The plans in so far as they related to the superstructure had received consideration and had undergone preliminary examination prior to the issuing of the permit for excavation and foundation.

He concluded that there had been approval within the meaning of s. 30(7) of *The Planning Act*.

It was contended by counsel for the appellants that approval of the plans as to compliance with the zoning by-law was an approval within the meaning of subs. (7). I do not accept this submission. Paragraph (*b*) of the subsection refers to approval of the plans of a building or structure. In my opinion this means the approval of the plans in relation to the issuance of a building permit. Subsection (7) was intended to remove from the application of a zoning by-law a building already constructed and in use, and a proposed building which, in the absence of the by-law, the owner of the land was legally entitled to construct on the day the by-law was passed. An opinion by the building inspector that a building of the kind proposed in a set of plans would not offend an existing zoning by-law is not an approval of the plans of the building in this context.

The requirements to be met before the approval of plans of a building and the issuance of a building permit are described in Chapter 1, Section 6, of By-Law No. 6110 of the respondent. It provides, in part:

> 6. DUTIES OF THE BUILDING COMMISSIONER
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> The Building Commissioner shall:
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> (*a*) Examine all applications for permission to do work in connection with building;
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> (*b*) When the prescribed fee has been paid, and the application, drawings, specifications and block plan or survey conform to the requirements of this By-law, and all other applicable governmental regulations, stamp the drawings and specifications with the approval stamp of the Building Department, issue the permit together with one set of the approved drawings and specifications to the applicant, and retain the other set. . .
>
> (*c*) If the matters mentioned in any application for a permit or if the drawings, specifications or block plan or survey submitted with the application indicate to the Building Commissioner that the work proposed to be done will not comply in all respects with the provisions of this By-law and all applicable governmental regulations, refuse to issue a permit therefor and no permit shall be

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> issued until the application, drawings, specifications and the block plan are made to conform to the requirements of this By-law and all applicable governmental regulations.

Section 6(*b*) clearly contemplates the submission of both drawings and specifications before the drawings can be approved, and the approval of both, at the same time, before a building permit may be issued. The respondent Beckett, on the date of the enactment of by-law No. 18758, had no authority to approve the building plans, because on that date not only were there deficiencies in the plans filed, but, in addition, no specifications had been filed.

It is clear that on that date the appellants were not in a position to demand the issuance of a building permit because the learned trial judge expressly refused to grant an order by way of mandamus to require the issuance of such permit, and no appeal was taken from that decision. He said:

> Accepting the statements made by Mr. Beckett as to the deficiencies in the material and having considered the provisions of the building by-law, particularly as to the need for filing specifications, I cannot in these circumstances at this time require the respondent municipality to issue the building permit sought.

In my opinion, approval of the plans of a building, within the meaning of s. 30(7) of *The Planning Act*, means that kind of approval by the building inspector which would be requisite for the issuance of a building permit. No such approval was ever given in this case, nor, in view of the decision of the learned trial judge, were the appellants ever in a position to demand that it be given.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal allowed with costs, MARTLAND *and* HALL JJ. *dissenting.*

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondents: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.