

ORIOLE LUMBER LIMITED .....

APPELLANT;

1968

AND

\*Feb. 27, 28  
Apr. 29THE CORPORATION OF THE  
TOWNSHIP OF MARKHAM and  
F. J. FUDGE .....

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Municipal corporations—Planning legislation—Subsidiary land use by-law—“Industrial” and “accessory” uses—Whether lumber warehouse and wholesale and retail outlet a permitted use.*

The appellant carried on a wholesale and retail lumber business and having lost its premises through expropriation planned to continue the business at a new location. The appellant filed an application for the issuance of a permit for the erection of a building having a total floor area of approximately 16,000 square feet of which 3,000 square feet or approximately 18½ per cent was to consist of “floor space to be used as a showroom and retail sales space”. The respondent building inspector refused the application for a permit being of the opinion that the erection of the building was prevented by the provisions of a subsidiary land use by-law of the respondent township. The appellant then moved for an order by way of *mandamus* and the motion resulted in the granting of an order requiring the respondents to issue a building permit in the terms of the application made by the appellant. An appeal by the respondents from the order of the judge of first instance was allowed by the Court of Appeal. The appellant then appealed to this Court from the judgment of the Court of Appeal.

*Held:* The appeal should be dismissed.

The question to be determined was whether a lumber warehouse and wholesale and retail business came within the extended definition of the words “industrial” or “industrial use” in the by-law in question. It was significant that neither wholesaling nor retailing was mentioned in that extended definition so that the only way in which a wholesale or retail lumber outlet could come within the permitted use would be that it was an “accessory” use to “warehousing and storage within enclosed buildings”. What was decisive, was that the wholesale and/or retail selling was not accessory to the warehousing or storage but, in fact, the warehousing or storage was incidental to the wholesale and retail selling. There could be no other purpose for the building than to sell lumber therefrom at either wholesale or retail, and for that purpose and that purpose only to store the lumber which was to be sold.

APPEAL from a judgment of the Court of Appeal for Ontario, whereby that Court allowed an appeal by the respondents from an order of Moorhouse J. granting the appellant a *mandamus* requiring the respondents to issue a building permit. Appeal dismissed.

\*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

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*Peter deC. Cory, Q.C.*, for the appellant.

*W. B. Williston, Q.C.*, and *W. A. Kelly*, for the respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on October 17, 1966, whereby that Court allowed an appeal by the respondents from the order of Moorhouse J. pronounced on May 7, 1966. By the latter order, the learned judge of first instance had granted a *mandamus* requiring the respondents to issue a building permit upon an application made by the appellant.

The Corporation of the Township of Markham had enacted an official land use by-law with attached to and forming part thereof an official land use plan. This land use plan covered the whole of the Township of Markham except certain incorporated municipalities and was intended to be an over-all plan from which more detailed plans would be involved for the various areas and communities. One of those areas was subsequently covered by the enactment on October 9, 1962, of By-law 1957. That by-law affected, *inter alia*, lands on Woodbine Avenue in the said Township of Markham, a short distance north of Steeles Avenue, being part of lot 2, concession 4 in the Township of Markham. These lands were subsequently purchased by the appellant and the appellant proposed to erect thereon the building the subject of the application for permit.

The appellant had engaged in a wholesale and retail lumber business with premises on the north side of Sheppard Avenue at Leslie Street, and having lost those premises through expropriation planned to continue the business at the premises in question.

The appellant filed an application for the issuance of a permit for the erection of a building having a total floor area of approximately 16,000 square feet of which 3,000 square feet or approximately 18½ per cent was to consist of "floor space to be used as a showroom and retail sales space". In the letter accompanying this application, the solicitors for the appellant stated:

The proposed uses of the building comply with your By-law under Clause 8(ii)(a) as to the major portion of the building. However, you will see on the Plans that the building is to include a part at the front for retailing products of Oriole Lumber Limited.

The respondent Fudge, as building inspector of the respondent Corporation of the Township of Markham, refused the application for a permit being of the opinion that the erection of the building was prevented by the provisions of By-law 1957. The relevant portions of the said By-law 1957 are as follows:

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#### DEFINITIONS

2. (i) "Accessory" when used to describe a use shall mean a use naturally and normally incidental, subordinate and exclusively devoted to a main use and located on the same lot.
- (xxvi) "Use" shall mean the purpose for which land or a building is arranged, designed or intended or for which either land or a building or structure is, or may be, occupied or maintained.

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#### PERMITTED LAND USE

8. No person shall hereafter use any building, structure or land and no person shall erect any building or structure in the area defined as shown on Schedule "A", for any purpose other than one or more of the following uses, namely:

- (i) A dwelling for a caretaker of a manufacturing or industrial undertaking permitted under Sub-section (ii) provided that the requirements of By-law Number 1442 of the Township of Markham are complied with or an apartment for a caretaker of a manufacturing or industrial undertaking permitted under Sub-section (ii), provided that the total ground floor area of the said manufacturing or industrial undertaking is not less than 30,000 square feet.
- (ii) Industrial Uses which shall include:
- (a) Warehousing and storage within enclosed buildings, and the assembly of manufactured products, such as textiles, wood, paper, light metal sections, radio and television equipment and other similar products, and also the manufacture within enclosed buildings of radio and television equipment, drugs, cosmetics, jewellery, and watches, toys, publishing and book-binding, office equipment, sanitation products and any other light manufacturing operations which are not obnoxious by reason of the erosion or emittance of any noise, smoke, odour, dust, gas fumes, refuse or water carried waste;
- (b) Shops for the repair or manufacturing within enclosed buildings, of small goods and wares, laundries and dry-cleaning plants, bakeries, printers, dyers, storage warehouses, chemical products, paper and paper boxes, electrical products, canning and food plants, aluminum products, and any other manufacturing or industrial establishment within an enclosed building

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which is not obnoxious by reason of the emission of odour, dust, smoke, noise, gas fumes, cinders, vibration, refuse matter, water carried waste, or unsightly open storage;

Public  
 Utilities

(iii) All public utilities and essential public services including railway trackage, industrial spurs and supporting tracks, but not including schools.

The learned judge of first instance granted the application for the *mandamus* without written reasons. Schroeder J.A., giving the judgment for the Court of Appeal, was of the opinion that the word "industrial" by ordinary definition intended a use which was primarily one involving the art of production or manufacture of some item, and that it involved activity or labour whereby a saleable commodity was created or produced. Of course, it is not intended that in this warehouse and wholesale and retail lumber outlet there should be activity or labour resulting in the creation of a product but merely the storing of such products and their sale at wholesale or retail. Schroeder J.A. continued to point out that the ordinary meaning of "industrial use" had been expanded by By-law 1957 in para. 8(ii)(a) to include matters well beyond the ordinary definitions of "industrial" or "industrial use" by including warehousing and storage "within enclosed buildings". He dealt with the proposition of the appellant that wholesaling and retailing of lumber was "an accessory use" of warehousing premises so as to bring it within para. 2(i) of the said by-law quoted above by pointing out that although the respondent had, without conceding, refrained from urging that a wholesale lumber business was not "an accessory" to a warehouse and storage business, nevertheless, a retail business could only be characterized as an accessory to a wholesale and that therefore to permit the building proposed was to engraft an accessory upon an accessory.

It was the basis of the official plan that there should be a series of categories of use of premises and to those categories the municipal council assigned various designations. It is these designations which are the vocabulary of the legislative scheme for use of lands within the township and which should govern the primary determination of whether a proposed building is in accordance with the various subsidiary land use by-laws such as By-law 1957. There was

produced as ex. "E" to the affidavit of Hein Cats filed upon the application for permit, a copy of the official plan of the township. That plan shows a designation of all lands within the township under various designations, *i.e.*, urban residential, rural residential, rural, major open space, institutional and transportation, highway frontage, industrial, and community commercial (the order of the naming is not significant). That such designations do not always accurately reflect ordinary definitions may be illustrated by noting that there are shown on the final plan several golf and country clubs which all bear the hatch marking indicating that they are for "institutional and transportation use". Therefore, without having to refer to the dictionary definitions of the word "industrial" it is sufficient to note that the legislators intended to distinguish between "industrial use" and "commercial use".

In my view, much of the argument before this Court as to whether a lumber warehouse and wholesale and retail business was industrial has become academic. That type of business would certainly have been commercial in the allocation of it to either a "commercial" or "industrial" classification. So it matters not whether it could ordinarily have been termed "industrial" as well as "commercial". The question therefore to be determined is whether this business comes within the extended definition of the words "industrial" or "industrial use" in s. 8, para. (ii) of the by-law. It is significant that neither wholesaling nor retailing is mentioned in that extended definition so that the only way in which a wholesale or retail lumber outlet could come within the permitted use in the said 8(ii)(a) would be that it was an accessory to "warehousing and storage within enclosed buildings".

Whether warehousing should be confined, as was argued by the respondent, to providing a building for the storage of goods of others consigned to one's care and custody for a fee, or whether it has a much wider connotation, need not, in my opinion, be decided, although the additional words "and storage within enclosed buildings" would seem to indicate the wider definition. What is decisive, is that the wholesale and/or retail selling is not accessory to the warehousing or storage but, in fact, the warehousing or storage is incidental to the wholesale and retail selling. There can be no other purpose for the building as illustrated graphi-

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cally by the plan filed by the appellant than to sell lumber therefrom at either wholesale or retail, and for that purpose and that purpose only to store the lumber which is to be sold. It is the place where the stock-in-trade of the business is kept to be sold just as much as it is in the case of a retail hardware store. I am, therefore, of the opinion that there can be no inclusion within the permitted use of a wholesale and retail lumber outlet by any allegation that it is accessory to a warehousing business.

For these reasons, I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Rohmer, Cory & Haley,  
Toronto.*

*Solicitors for the respondents: Mingay & Shibley,  
Toronto.*

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