

Date: 20130410
Docket: 11/66
Citation: *Friends of Ragged Beach Inc. v.*
Witless Bay (Town), 2013 NLCA 25

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

FRIENDS OF RAGGED BEACH INC. FIRST APPELLANT

AND:

ED VICKERS SECOND APPELLANT

AND:

TOWN COUNCIL OF THE TOWN OF
WITLESS BAY RESPONDENT

Coram: Green C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
 Trial Division (G) 201101G3683

Appeal Heard: March 15, 2013
Judgment Rendered: April 10, 2013

Reasons for Judgment by Welsh J.A.
Concurred in by Green C.J.N.L. and White JJ.A.

Counsel for the First Appellant: No Appearance
Counsel for the Second Appellant: Self Represented
Counsel for the Respondent: Peter Shea

Welsh J.A.:

[1] Edward Vickers has a passionate interest in opposing a proposed development at Ragged Beach, an area that falls within the Municipal Plan over which the Witless Bay town council has authority. Mr. Vickers, a resident of Witless Bay, brought an interlocutory application in the Trial Division seeking an injunction enjoining the town council from proceeding with amendments to the Municipal Plan and zoning regulations relevant to the proposed development. The applications judge dismissed the application, concluding that it was premature and that there was no serious issue to be tried. Mr. Vickers appeals that decision.

Leave to Appeal

[2] Being an interlocutory application, Mr. Vickers requires leave to appeal the Trial Division decision (rule 57.02 of the *Rules of the Supreme Court, 1986*). However, representing himself, Mr. Vickers was unaware of, and did not address, this requirement. Counsel for the town, in responding to Mr. Vickers' notice of appeal, submitted that leave should be refused. At the hearing it was agreed that the panel would hear submissions on the merits of the appeal which, as appropriate, could be applied to the question of leave.

[3] Rule 57.02(4) enumerates factors to be taken into account when considering whether leave to appeal should be granted. One of those factors, set out in paragraph (b), is that "the Court doubts the correctness of the order in question". For the reasons that follow, it cannot be said that this Court doubts the correctness of the applications judge's decision. None of the other factors listed in the rule would justify granting leave.

Premature, No Serious Issue to be Tried

[4] It is not disputed that the development of the Ragged Beach area in the manner proposed by the developer would require changes to the Municipal Plan and zoning regulations. In his decision, the applications judge reviewed the statutory mechanisms in place that would permit the town council to proceed with any necessary amendments. The process provides for the opportunity for public input into the decision and allows for the appropriate government minister to become involved. (See: *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8 (the "Act").) Following is a

consideration of the bases on which Mr. Vickers challenges the applications judge's decision.

[5] Mr. Vickers applied for a declaration that the town council was required to make an application to the minister under section 48 of the Act. Pursuant to section 48(1), the minister "may direct that an application submitted to council ... be referred to him or her instead of being dealt with by that council". Such a direction may only be given where, in the minister's opinion, "it is in the special interest of an area of the province or the province as a whole to do so" (section 48(2)). The applications judge rejected Mr. Vickers' submission and correctly concluded (2011 NLTD(G) 108, 311 Nfld. & P.E.I.R. 249):

[15] Thus, it can be seen that any initiative for an application submitted to a municipal council to be considered by the Minister of Municipal Affairs must come from the Minister himself and not from the Town Council. Therefore, this court has no jurisdiction whatsoever to interfere with the discretion of the Minister as to whether or not any of the subject applications for land development within the Town of Witless Bay, which are the subject of this matter, [should] be referred directly to him for consideration.

[6] In assessing whether injunctive relief should be granted, the applications judge applied a three-pronged test: (1) is there a serious issue to be tried in the sense that the claim is not frivolous or vexatious; (2) has the claimant shown that irreparable harm, which cannot be addressed by a monetary award of damages, will be suffered if the injunction is not granted; and (3) does the balance of convenience favour granting the injunction? (See: *Hurley v. Slate Ventures Inc.* (1996), 136 Nfld. & P.E.I.R. 341 (NLTD); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.)

[7] In considering these factors, the applications judge reviewed the relevant procedural provisions of the Act. Regarding the extent of the town council's authority to amend the Municipal Plan and zoning regulations, he concluded:

[40] I am satisfied that possible amendments to municipal plans are not limited to mere zoning changes. There is nothing in the language of the amending section of the **Urban and Rural Planning Act, 2000**, s. 25, which restricts the nature or type of amendment which can be made to the Municipal Plan. Thus, I am satisfied that, as collateral to an amendment of zoning, the Town Council can also effect changes to the Municipal Plan which are collateral to the development applications for which the zoning change is sought. These could include changes

to plan policies insofar as they relate to environmental matters, including development of various areas which may be marshy or adjacent to marshes or waterways. Similarly, those changes could relate to usages in or adjacent to Park areas.

[8] The applications judge was correct in his interpretation of the Act in this regard. Accordingly, Mr. Vickers' submission that an amendment to a specific zoning provision could not be made if it conflicted with broader plan policies cannot be sustained.

[9] In considering whether there was a serious issue to be tried, the applications judge concluded that Mr. Vickers' request is premature:

[42] ... The decisions to be made by the municipal council are not legal decisions; they are political decisions. Whether, in the face of opposition, the Town Council ultimately decides not to proceed with changes to the Municipal Plan or not, that is their prerogative. Any decision to deny or permit the development ultimately is the result of a series of political decisions and not legal ones. The legislature of the Province has entrusted the municipality with the authority to make these decisions. The Court has no jurisdiction to second guess the political decisions made by municipal councils or by the responsible Minister of the Provincial Government in reviewing such proposed amendments. When, after the process is completed in its entirety and if there have been errors in law made by the municipality or the Minister or any other responsible official, there may be a role for the Court to rectify such legal errors. At this present stage of the process, it is impossible to foresee what those issues may be and I make no further comment upon that.

[43] Therefore, I have come to the conclusion that because there is an adequate process which would permit public input into the political decision-making of the municipal council and the Minister, there is no serious issue to be tried by this Court as the Court has no jurisdiction to interfere in what is essentially a political process. Therefore, on this basis alone I would deny [Mr. Vickers'] application for an injunction on the basis that at this juncture there is no serious issue to be tried.

[10] The applications judge was correct in his analysis and conclusion. Before the court can become involved, the municipal council and the Minister must first fulfill their functions under the Act. It is only if the proper procedure has not been followed or if other legal errors have occurred that require rectification, that judicial intervention may be appropriate. The municipal council must be given the opportunity to do its job in accordance with the legislation and to make a determination. Until such a determination is made, Mr. Vickers cannot know whether he has a valid complaint.

[11] The applications judge's analysis and conclusion in this case are consistent with the decision of this Court in *Citizens for a Southern Bypass Committee v. Pasadena (Town Council)* (1995), 135 Nfld. & P.E.I.R. 307 (NLCA).

Notice of Public Consultation

[12] In his submissions, Mr. Vickers also stressed that the notice of public consultation issued by the town council, inviting the public to "provide any comments or concerns" on the proposed development, did not include reference to a Park area. However, the map describing the Ragged Beach area does not refer to any area as a Park. While the map refers only to rural and residential areas and an open space, the area in question was shown on the map, and was ascertainable by anyone interested in responding to the notice of public consultation.

[13] Further, Mr. Vickers did not suggest that he or other town residents would have been misled as to the location of the proposed development by the failure to refer to a Park. As required, the town council had available for public viewing a copy of a map along with a draft copy of amendments to the Municipal Plan and zoning regulations. The conclusion follows that the failure to include reference to a Park in the materials would not engage judicial intervention.

Meetings and Minutes of the Town Council

[14] Mr. Vickers also raises the issue of privileged or closed meetings of the town council. Section 213 of the *Municipalities Act, 1999*, SNL 1999, c. M-24, provides:

- (1) A meeting of a council shall be open to the public unless it is held as a privileged meeting or declared by vote of the councillors present at the meeting to be a privileged meeting.
- (2) Where a meeting is held as a privileged meeting or declared to be a privileged meeting, all members of the public present at the meeting shall leave.
- (3) A decision of the councillors made at a privileged meeting shall not be valid until that decision has been ratified by a vote of the councillors at a public meeting.

[15] The legislation clearly contemplates the option for council to declare a meeting to be privileged. Nonetheless, while such a declaration would preclude the public from hearing some or all of the discussion, subsection (3) ensures that the public may witness the ratification vote, establishing the opportunity for the public to ascertain the position taken by various councillors.

[16] In addition, Mr. Vickers complains that it was not always possible to ascertain how councillors voted because the minutes of meetings did not include that information. Section 212(1) of the *Municipalities Act, 1999*, requires that a vote be carried by a majority of the councillors attending the meeting except where a two-thirds vote is required. Section 212(4) requires the minutes of the meeting to “indicate the names of the councillors who vote for and against and who abstain from voting on a motion or resolution”.

[17] Only one sample of the minutes of a town council meeting was provided for purposes of the application. Four councillors were in attendance at that meeting. When a vote was held, the minutes record only “Motion carried”. However, the nature of the issues on which votes were held suggests that what was meant was that the motion was carried unanimously. Three motions were purely procedural: the motions to adopt the agenda, to adopt the minutes of the previous meeting and to adjourn. There was a motion declaring one of the councillors to be mayor. This was after one of the other councillors had declined her nomination. There was also a motion regarding an application for construction of a home for Wayne Tibbs, and a resolution to donate \$750 to the recreation budget. There is no indication that any of these items was controversial.

[18] In the circumstances, in the absence of evidence to the contrary, reliance may be placed on the presumption of regularity; in this case, the presumption of regularity applies in respect of administrative procedures (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at paragraph 33). The inference to be drawn is that, had there been dissenting voters, names would have been identified as voting for or against the motion.

[19] Based on the sample minutes, there is no evidence here that would rebut the presumption of regularity. The inference follows that the town council was carrying on its affairs in accordance with the legislation. Mr. Vickers’ complaint that the minutes of meetings do not identify which

councillors voted for or against a motion, and that the business of the council is thereby impugned, was not established.

[20] In addition, with reference to the sample minutes of the town council meeting, Mr. Vickers submits that one of the councillors present was a developer who should not have participated in any discussion about the proposed development. However, the minutes show that, in fact, that individual “declared herself in conflict of interest due to her being a subdivision developer and left the chamber.” There was a recognition that, for that time, the town council had “lost quorum and held discussions among themselves.” The councillors indicated that matters discussed during that time would be brought back when council had all its members.

[21] In the result, there is nothing in the sample town council minutes before this Court to indicate that council acted inappropriately or failed to comply with the legislation. While Mr. Vickers is correct in submitting that privileged meetings should be the exception, there was no evidence to indicate that the town council had acted improperly.

Conflict of Interest

[22] Mr. Vickers submits that the town was in a conflict of interest because the town planner was also the director of lands management for the provincial Department of the Environment. However, the fact that one person held both those positions would not constitute a conflict of interest for the town insofar as decisions of the council are at issue. The town planner has no decision-making authority. While he may provide information to members of the council, it is those members who have authority and ultimate responsibility in considering proposed developments and, where necessary, amendments to the Municipal Plan and zoning regulations. Accordingly, the additional employment of the town planner in a government department cannot be used as a basis for impugning the actions of the town council.

Conclusion

[23] In the result, Mr. Vickers has failed to establish any error by the applications judge. The judge was correct in his conclusion that there was no serious issue to be tried and, on that basis alone, was justified in exercising his discretion to refuse the application for an interlocutory injunction. Given the manner in which this matter was argued, the above

discussion leads to the conclusion that there is no basis on which leave to appeal should be granted.

Costs

[24] Regarding costs, I would reiterate the comments of the applications judge:

[55] I am satisfied that the application of the Plaintiffs in this matter, while unfounded, is well intended. Vigilant supervision of the actions of elected representatives is one of the ways to guarantee that the collective interests of the community are neither ignored nor trampled. ...

[25] In the circumstances, given the public interest foundation for Mr. Vickers' application and appeal, the parties should bear their own costs both in this Court and in the Court below.

Summary and Disposition

[26] The applications judge did not err in dismissing Mr. Vickers' application for an interlocutory injunction. For the above reasons, I would dismiss the application for leave to appeal. I would order the parties to bear their own costs both in this Court and in the Court below.

B. G. Welsh J.A.

I concur: _____

J. D. Green C.J.N.L.

I concur: _____

C. W. White J.A.