S.C.C. No. 02689

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Jones, JJ.A.

Cite as: R. v. Diab, 1993 NSCA 35

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - LENA DIAB and MAROUN DIAB Respondents	)	M. E. Donovan for the Appellant Lena Diab for the Respondents Appeal Heard: January 12, 1993 Judgment Delivered: February 19, 1993

THE COURT: Appeal by respondents dismissed from conviction on a charge of permitting the occupancy of a building prior to obtaining a permit contrary to the City of Halifax Building Code Ordinance, per reasons for judgment of Jones, J.A., Clarke, C.J.N.S. and Hart, J.A. concurring.

Appeal by the appellant dismissed from the acquittal of the respondents on a charge of violating the City of Halifax Land Use By-Law, per reasons for judgment of Clarke, C.J.N.S., Hart, J.A., concurring and Jones, J.A. dissenting on the ground that the wrong test was applied at trial.

CLARKE, C.J.N.S.:

The circumstances underlying this appeal are set forth in the decision of Mr. Justice Jones.

I agree with his conclusion on the first count that the application for leave to appeal by the respondents from their conviction should be dismissed. With respect, I do not agree with his conclusion on the second count which is the subject of the appeal by the Crown.

To repeat, the second charge is as follows:

> "**AND FURTHER** being the owners of a building situate at 6380-6382 Young Street, Halifax, did unlawfully suffer or permit the use of the said building as a four-unit apartment building contrary to section 35(3) of City of Halifax Land Use By-law, Peninsula Area, in violation of section 122(1)(D) of the Planning Act.' "

The offence is described in subsection 35(3) of the City of Halifax Land Use By-Law:

> "No person shall in any R-2 Zone use or permit to be used any land or building in whole or in part for any purpose other than one or more of the uses set out in subsection (1)."

Second 35(1) describes the uses permitted in any R-2 Zone and provides in part:

> "The following uses shall be permitted in any R-2 Zone:
>
> (a) R-1 uses as hereinbefore set out;
>
> (b) semi-detached or duplex dwelling;
>
> (c) buildings containing not more than four apartments;
>
> ... "

The permitted uses are further defined by section 37 of the By-law which sets out certain minimum lot-size requirements. The lot upon which the Appellant's building was located exceeds the requirements for a duplex but does not meet the minimum requirements for a four-unit dwelling. If it were found that the building was being used as a four-unit apartment building, a violation of s. 35(3) may be made out. However, on the evidence before the Court, the trial judge found otherwise.

The respondents, having been charged with a violation of "the use of the said building as a four-unit apartment building ...", the definition of "use" is relevant. This is set forth in section 1 of the by-law, subsection (t) in the following words:

> " 'use' **shall mean** the purpose for which a building, structure or premises or part thereof is used or occupied, or intended to be or designed to be used or occupied. 'Used' **shall include** 'arranged to be used', ' designed to be used', and 'intended to be used'."
> (emphasis added)

In the decision of the trial judge, Judge Oxner concluded that the meaning of "use" included the combination of the definitions as described in subsection (t); that is to say "actually used", "arranged to be used", "designed to be used", and "intended to be used". In my opinion she did not err in coming to that conclusion. She stated:

> As Miss Smillie has pointed out to me use shall mean the purpose for which a building structure or premises or part thereof is used or occupied or intended to be designed or used or occupied. I think the best evidence of intention is the purpose to which the building is presently put and since it is presently being used as a duplex, I find that the intention was to use it as a duplex at the date in question. Used shall include arranged to be used, designed to be used and intended to be used. I think that this is a decision that must be based on the facts of each case and the facts of this case, there were still some work that had to be done to make the building capable of being used and I refer again to the definition of dwelling unit which uses the words, "capable of being used". So I would find that the premises, I would have a reasonable doubt as to whether the premises were arranged to be used, designed to be used, intended to be used or capable of being occupied as a separate and independent housekeeping establishment because of the fact that there was still outstanding work that had to be done to make them into that.

The above passage from the trial judge's decision discloses that she based her acquittal on certain findings of fact. In particular, she found that the building was presently being used as a duplex and not as a four-unit apartment building. Therefore, the Crown would have to prove beyond a reasonable doubt that it was "intended, arranged or designed to be used" as a four-unit building. The actual use to which the building was being put disclosed, in Judge Oxner's view, that it was not the intention of the Diabs to use it as a four-unit apartment. Further, she found that there was

outstanding work to be done in order to arrange the building as a four-unit dwelling. This evidence left her with a reasonable doubt as to whether the building was arranged or designed to be used as a four-unit structure.

Judge Oxner held that the Crown had not discharged its burden beyond a reasonable doubt and Judge Anderson, on appeal, agreed.

In dismissing the appeal, Judge Anderson relied upon the direction of the Supreme Court of Canada in **Yebes** at page 430, which is also quoted in the decision of Mr. Justice Jones. The test in **Yebes** has been restated by the Supreme Court of Canada in **R. v. W.(R.),** [1992] 2 S.C.R. 122, by McLachlin, J. at p. 131:

> "It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. ..."

Judge Oxner saw the witnesses, heard and weighed the evidence and examined the exhibits. She did this with reference to the applicable provisions in the Land Use By-Law. She made findings of fact on the evidence before her for which there was some evidence in support. In re-examining, reweighing and considering the effect of the evidence, it is my opinion, again with respect, that she arrived at a conclusion which could be reasonably reached. In the circumstances it is not for this Court to reassess the evidence or retry the case and substitute her verdict of acquittal with a conviction.

I would dismiss the appeal and thereby confirm the acquittal of the respondents on the second charge.

C.J.N.S.

Concurred in:

Hart, J.A.

JONES, J.A.: (Dissenting, in part)

The respondents were charged as follows:

> "That they at or near Halifax, in the County of Halifax, and Province of Nova Scotia, between the 1st day of March, 1990 and the 26th day of March, 1990 being the owners of a building situate at 6380-6382 Young Street, Halifax, did unlawfully suffer or permit the occupancy of the aforesaid building prior to obtaining an occupancy permit therefor contrary to section 8 of the City of Halifax Ordinance 131, the Building Code Ordinance.
>
> AND FURTHER being the owners of a building situate at 6380-6382 Young Street, Halifax, did unlawfully suffer or permit the use of the said building as a four-unit apartment building contrary to section 35(3) of City of Halifax Land Use By-law, Peninsula Area, in violation of section 122(1)(D) of the Planning Act."

In 1989 Maroun Diab discussed with the city's staff the requirements for the construction of a four unit building on the Young Street property. He was informed that a four unit building could not be constructed on the site without the approval of a minor variance or the acquisition of additional property because of the deficient lot area. Because of those difficulties Mr. Diab abandoned the proposal and applied for a development permit to construct a semi-detached house which was permissible on the property which is located in an R-2 zone.

In reviewing the plans city staff were concerned that the building was to be used as a four unit building because of its design. The building consisted of two units side by side which were identical. However there were three levels above ground and except for common hallways the lower floors appeared to be self-contained. As the original building plans described a two unit building and the plans called for enclosed garages and laundry rooms on the first floor a building permit was issued.

During the construction the garages were altered to family rooms. These changes were subsequently approved. Mr. Diab was also granted permission to install

fire separations which were required under the National Building Code for four units. On October 17, 1989, Mr. Diab applied for a minor variance to allow for four units. The application was refused as the City had advertised proposed amendments to the zoning by-law which would increase the lot area requirements for three and four unit buildings. There was no appeal to Council from the refusal to grant the minor variance application.

The building was completed and subsequently occupied. The city refused to issue occupancy permits as it took the position that the building was constructed and occupied as four units without the requisite permits. When completed the bottom units contained a living room, two bedrooms, a bathroom and a kitchen. The kitchens contained a fridge, stove, sink and kitchen cupboards. There were two separate entrances to the ground floor units. The upper units were self-contained with a separate kitchen, two bathrooms, a living room, a dining room and three or four bedrooms. There were four water heaters and the electrical services could be simply converted to accommodate four units. One side was occupied by the respondents and their children. The other side was leased to four people, two of whom were husband and wife, and occupied the upper unit. The single persons occupied the lower unit. Permission to install the wiring and plumbing for the extra water tanks and stoves was granted by the city during the course of the construction.

The charges were tried before Her Honour Judge Oxner in the Provincial Court.

The city planner, Michael Hanusiak, testified for the city and outlined the procedures followed by the respondents in applying for necessary permits as I have outlined them above. He testified as follows:

> "Q. After the rejection of this application for minor variance, what, if anything else, happened with this property that you were involved with?
>
> A. A few months later it became - it came to the attention of Development Control Division, myself, my superior and other members of staff, that, in fact, the

> ground level which was to have been used for the laundry area had been, in fact, constructed into a kitchen, having fridge, stove, counters, kitchen cupboards and a sink. That was, as far as we were concerned, in complete violation of the City's Land Use By-law. In fact, what we were looking at now is four units within the building. Again, the ground floor being one unit, self contained with livingroom, bedroom, kitchen facilities, washroom facilities. The second and third floor combining to the other units, again having all of those type of features, and at that point in time correspondence went back to Building Inspection indicating that work should be halted. The matter should be turned over to our Legal Department because what we were seeing there is four units."

He also stated:

> "Q. Okay. You have indicated what became apparent was actually being built at that location and you have indicated how that fits into the definition of a dwelling unit as defined by the Development Control Department. What would be required in order to make that building conform with two approved units?
>
> A. As it stands today?
>
> Q. M-hmm.
>
> A. Different options, normally the division keys in on either the removal of the bathroom facilitity or the removal of the kitchen facility. The removal of either one of those would, in fact, eliminate the capability of being occupied as an independent living establishment."

In answer to questions from the trial judge the planner explained in detail the provisions of the by-law and what constituted a separate unit. In June, 1990, the City instructed the respondents that the kitchen area would have to be removed from the lower units and replaced with the laundry facilities.

Mr. Lowe, a building inspector testified as to the construction. It was his duty to ensure that the property complied with the Land Use By-laws and the National Building Code. He inspected the premises on March 1, 1990. He testified as follows:

> "Q. Okay and can you tell the court please what you

observed on that date?

A. I noticed that the, again the kitchens on the ground level had been installed where a laundry room and wet bar were indicated on the approved drawings and there was a revised drawing submitted by Mr. Diab indicating this and it had been refused and therefore not authorized. So therefore, I determined that the basement, the ground levels were capable of being occupied as self contained units.

Q. On March the 1st, 1990, were any of those units occupied?

A. Yes the left hand, actually both units were occupied at that time.

Q. On the 1st of March, 1990, to your knowledge, was there an Occupancy Permit issued for that property?

A. No, there wasn't."

In the course of his evidence Mr. Lowe pointed out that the lower units did not comply in some respects to the National Building Code for occupancy as separate units.

The respondents testified for the defence. They maintained that the units were not completed or occupied as four units. They were being occupied as single units. A number of the changes in construction were approved by the city. The kitchens on the first floor were simply an added convenience. They also stated that additional structural changes would be required before they could be occupied as separate units. Plans were referred to by the witnesses but unfortunately were not marked as exhibits and cannot be located. However, there is no doubt on the evidence as to the layout on the first floor.

Judge Oxner entered a conviction on the first count and acquitted the respondents on the second count. On the first count she found that there was evidence that the premises were occupied and that no occupancy permit was issued. She also

held that she had no jurisdiction to determine whether the permit was improperly withheld and in any event there was no evidence to sustain that contention. Both parties appealed to the County Court. Anderson, J.C.C. dismissed the appeal on the first count and in my view he was correct in doing so. The application for leave to appeal by the respondents from their conviction on the first count is dismissed.

In dismissing the second count Judge Oxner stated:

> "Certainly there is no question that I find as a fact that the premise at 6380-82 Young Street, in Halifax were not used as a four unit apartment building, that they were used as a two unit apartment, or a two unit duplex. As Miss Smillie has pointed out to me use shall mean the purpose for which a building structure or premises or part thereof is used or occupied or intended to be designed or used or occupied. I think the best evidence of intention is the purpose to which the building is presently put and since it is presently being used as a duplex, I find that the intention was to use it as a duplex at the date in question. Used shall include arranged to be used, designed to be used and intended to be used. I think that this is a decision that must be based on the facts of each case and the facts of this case, there were still some work that had to be done to make the building capable of being used and I refer again to the definition of dwelling unit which uses the words, 'capable of being used'. So I would find that the premises, I would have a reasonable doubt as to whether the premises were arranged to be used, designed to be used, intended to be used or capable of being occupied as separate and independent housekeeping establishments because of the fact that there was still outstanding work that had to be done to make them into that. As I recollect it, there were, the doorbells. I believe Mrs. Diab put it forward in her brief. Doorbells had to, separate doorbells were not installed. Separate electrical meters were not installed, which would not be definitive because, of course, rent could be charged including the electricity but there were doorways that would have to be closed off and perhaps some other matters which would not be as obvious to the eye without further investigation."

On appeal to the County Court Judge Anderson found no error on the part of the learned trial judge and dismissed the appeal. He referred to the following passage

in **Yebes v. The Queen**, 36 C.C.C. (3d) 417 where McIntyre, J. stated at p. 430:

> "In **Yebes v. The Queen**, 36 C.C.C. (3d) 417, McIntyre, J. in delivering the judgment of the Supreme Court of Canada stated at p. 430:
>
> 'The function of the Court of Appeal, under s. 613(1)(a) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence.'"

The city has applied for leave to appeal from Judge Anderson's decision. The appellant contends in its submission:

> "The difficulty with the court's analysis is that the issue before it was not whether there was any entitlement to an occupancy permit for four units but whether the building had been designed for and was capable of being used as four separate and independent housekeeping establishments.
>
> Therefore the court erred in considering solely what work had to be done to permit the acquisition of an occupancy permit for four units. Instead the court was required to examine the design of the building as is. From this perspective the lack of doorbells is of interest only in so far as that evidence is not available to support the use of the building as four units. As indicated by the building inspector, doorbells are not a requirement and their absence does not indicate that the building is not designed as four units."

Section 35(1) of the City of Halifax Land Use By-law provides as follows:

> "35(1) The following uses shall be permitted in any R-2 Zone:
>
> (a) R-1 uses as hereinbefore set out;
>
> (b) semi-detached or duplex dwelling;"

Section 35(2) and 35(3) provides:

> "35(2) No person shall in any R-2 Zone carry out, or cause or permit to be carried out, any development for any purpose other than one or more of the uses

> set out in subsection (1).
>
> (3) No person shall in any R-2 Zone use or permit to be used any land or building in whole or in part for any purpose other than one or more of the uses set out in subsection (1).

Section 1 of the By-law states:

> "(m) 'Dwelling' shall mean any building or portion thereof which is designed or used for residential purposes.
>
> (a) 'Dwelling unit' means a room or suite of rooms occupied or capable of being occupied as an independent and separate housekeeping establishment.
>
> (b) 'One family dwelling house' means the whole of a dwelling house occupied by not more than one family.
>
> (d) 'Semi-detached dwelling' means the whole of a dwelling house that is divided vertically into two separate dwelling units, each of which has an independent entrance. (* Refer to #46 in Amendment Section)
>
> (y) 'Occupied' shall include 'designed to be occupied' or 'intended to be occupied'.
>
> (t) 'Use' shall mean the purpose for which a building, structure, or premises or part thereof is used or occupied, or intended to be or designed to be used or occupied. 'Used' shall include 'arranged to be used', 'designed to be used', and 'intended to be used'."

In view of the definitions in the by-law the issue in this case was not only whether the premises were being used or occupied as four units but also whether they were "designed to be used", "arranged to be used" or capable of being occupied" as four

independent housekeeping units. The purpose of the latter provisions is to prevent units from being constructed in violation of the zoning regulations. This was pointed out by the city planner in his evidence. There was no dispute on the facts. The trial judge simply had to determine whether the units as designed and built were capable of being

occupied as independent housekeeping units under the by-laws. While compliance with the National Building Code is relevant it is not necessarily determinative of that issue. The appropriate test is under the by-law. With respect the trial judge did not direct her mind to the right issue. On the evidence there could be no doubt that the building was capable of being occupied as four units. In reviewing the matter Judge Anderson had to determine whether the verdict was one "that a properly instructed jury, acting judicially, could reasonably have rendered". The answer to that question with respect was no. There is no ambiguity in the regulations. They are clear. The effect of the learned trial judge's decision is to inject uncertainty into the application of the by-law where none existed. It is not desirable that the city should have to prosecute in every case in order to determine whether there has been compliance with the by-law. That is not to suggest that the city is the final arbiter of whether there has been compliance in all cases.

I would grant leave to appeal, allow the appeal and enter a conviction on the second count. The matter should be remitted to the trial judge for sentence.

J.A.

S.C.C. No. 02689

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Jones, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	M. E. Donovan
	)	for the Appellant
Appellant	)	
- and -	)	

	)	Lena Diab
	)	for the Respondent
LENA DIAB and MAROUN DIAB	)	
	)	
Respondents	)	Appeal Heard:
	)	January 12, 1993
	)	
	)	
	)	Judgment Delivered:
	)	February 19, 1993
	)	
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THE COURT: Appeal by respondents dismissed from conviction on a charge of permitting the occupancy of a building prior to obtaining a permit contrary to the City of Halifax Building Code Ordinance, per reasons for judgment of Jones, J.A., Clarke, C.J.N.S. and Hart, J.A. concurring.

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S.C.C. No. 02689

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - LENA DIAB and MAROUN DIAB Respondents	)	R E A S O N S FOR JUDGMENT BY: CLARKE, C.J.N.S.