CV 06626

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

AND IN THE MATTER OF the *Planning Act*, R.S.N.W.T. 1988, c. P-7, as amended

BETWEEN:

**THE MUNICIPAL CORPORATION OF THE TOWN OF FORT SMITH**

Applicant

- and -

**902906 N.W.T. LTD. and ARMANDO BERTON**

Respondents

## REASONS FOR JUDGMENT

1 The respondent 902906 N.W.T. Ltd. is the owner of three lots in the Town of Fort Smith. These lots are designated as "R-2 Multi-Family Residential" by the Town's Zoning By-Law. The lots have been used for several years for the storage of what the respondents contend are chattels and what the applicant says is debris. The respondent Berton, a director of the owner company, has ignored the Town's demands to clean up the properties and has refused entry on to the property to Town officials.

2 The Town applied to this court for an order allowing its officials to enter on to the lots for the purpose of enforcing the Zoning By-Law. Specifically, they intend to bring the properties into compliance by demolishing the non-conforming structures and removing all items stored on the lots. The Town relies on s.32 of the *Planning Act* in bringing this application.

3 There is no dispute that, pursuant to the By-Law, the storage of equipment, lumber, or other items is neither a permitted nor a conditional use for these properties. There is also no dispute that the respondent did not possess a development permit authorizing the development or use of these properties. There is disagreement as to whether the items stored on the lots have some value, and whether the presence of these items on these lots adversely affect the amenities or value of surrounding property, but I do not, in the circumstances of this case, have to resolve these factual disputes.

4 The respondents have advanced two arguments in response to the Town's application. First, they argue that the statutory definition of "development" in the Zoning By-Law is void for uncertainty and vagueness. Second, they submit that s.32 of the *Planning Act* does not entitle the Town to the relief sought in this application.

**Uncertainty and Vagueness**

**5** The respondents gave notice to the Territorial government of its intention to challenge the validity of the definition of development (as required by s.59 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1). The government chose not to take part in these proceedings.

6 The concepts of "uncertainty" and "vagueness", as they are applied to municipal by-laws, were succinctly explained by Lawton J. in *Yorkton v. Markborough Properties Investments Inc.* (1991), 7 M.P.L.R. (2d) 289 (Sask. Q.B.), at pages 293-294:

It is well established that there is an obligation on the municipal council to express its intention in the by-law with such clarity as to enable every reasonably intelligent citizen to understand the law in order to comply with it:

> "**1329. Byelaws must be certain**. A byelaw must provide a clear statement of the course of action which it requires to be followed or avoided, and must contain adequate information as to the duties and identity of those who are to obey, although all the information need not be apparent on the face of the byelaw."
> (28 *Hals*., 4th ed., p. 731, para. 1329).

The by-law must be written specifically enough to enable a citizen to perceive his obligations in advance so that he can govern his actions accordingly. In this regard, the issue is the validity or invalidity of the by-law, not the status of the challenger.

It is the law that by-laws are to be benevolently interpreted and, if possible, supported. It is clear, however, that if one is found to be too vague, it can be annulled. The question, then, is: what kind or degree of vagueness is necessary to annul a bylaw? In *Arcade Amusements Inc. v. Montreal (City)*, [1985] 1 S.C.R. 368, 29 M.P.L.R. 220, 14 D.L.R. (4th) 161, 58 N.R. 339, Beetz J. [at p. 185 D.L.R.] approved of texts which said it is vagueness:

> " 'such that a reasonable effort at interpretation is unable to determine the meaning of the council ...'"

and

> " 'so serious that the judge concludes that a reasonably intelligent man ... is unable to determine the meaning of the by-law and govern his actions accordingly.' "

He went on to say that "mere uncertainty" as to its scope will not be enough to make it void. At p. 185 he said:

> "the courts have to determine each time whether the true meaning of the by-law in question can be understood by the person to whom it applies."

7 Respondents' counsel, in his submission that the definition of "development" in the Town's Zoning By-Law is vague and uncertain, confined his

argument to one subsection, subsection (f), of a long and detailed definition section:

> DEVELOPMENT means the carrying out of any construction, excavation, demolition, or other operations in, on, over or under land, or the making of any change in the use or in the intensity of use of any land, building or premises and without restricting the generality of the foregoing includes:
>
> ...
>
> (f) the use or more intensive use for storage purposes, or the repair of motor vehicles or other types of machinery, of land that was either not used at all or not used so intensely for those purposes.

8 Respondents' counsel argued that there was no way to analyze the term "storage". It could be said to cover almost anything stored. It was vague and uncertain because of its broad sweep.

9 In my opinion, the word "storage" is neither vague nor uncertain. The point of its inclusion as a form of "development" is that it is a use to which land can be put. What may be stored and whether the objects stored have some use or value are immaterial considerations; it is the fact of storage that triggers the need for development approval under the by-law. While the parties may argue over the unsightliness of the lots or the adverse affect on the district's amenities, those being two by-law criteria for prohibiting objects in yards, the use of the word "storage" should make Town Council's intent clear to everyone.

10 Therefore, I dismiss the respondents' motion for a declaration that the definition of "development" in the Town's Zoning By-Law is void for uncertainty and

vagueness.

**Scope of Relief under Section 32**

11 The applicant's motion is specifically for an order under s.32 of the *Planning Act*:

> 32. (1) In this section, "occupier" means the person in possession of or having control over the property or that part of the property into which or on which the entrance was refused.
>
> (2) A council or any of its authorized officers has the right to enter into or on any property within a municipality for the purpose of making any inspection required in connection with the preparation of a general plan, development scheme or zoning by-law or the carrying out or enforcement of the provisions of them.
>
> (3) Where entrance into or on any property referred to in subsection (2) is refused, a judge of the Supreme Court may, on application made on behalf of the council, by order require the occupier to admit an officer of the council into or on the property for the purpose of making an inspection under subsection (2).

12 Applicant's counsel submitted that ss. (3) empowers this Court to issue an order authorizing entry onto the properties and carrying out the work necessary to bring the properties into compliance with the requirements of the Zoning By-Law. Respondents' counsel argued that the power under s.32(3) was merely to authorize an inspection, not the remedial work. The issue here is the effect of the phrase found at the end of ss. (3): "for the purpose of making an inspection under subsection (2)". To answer this one must break down and analyze ss. (2).

13 Subsection (2) can be read as conferring the right to enter on property for the purpose of making (a) any inspection required in connection with the preparation of a general plan, development scheme or zoning by-law; or (b) the carrying out or

enforcement of the provisions of them. Or, subsection (2) could be read as conferring the right of entry for the purpose of making any inspection in connection with (a) the preparation of a plan, scheme or by-law; or (b) the carrying out or enforcement of same. In my opinion, the true meaning is the second version.

14 The intent of s.32(2) is to authorize entry for the sole purpose of "inspection". The subsection reads "for the purpose of inspection" not "for the purpose of inspection ... and for the purpose of carrying out or enforcement." This is reinforced by the marginal note to ss. (2): "Right of entry for inspections". While this heading is not binding in any way, it provides a guidepost to the legislative intent. Furthermore, ss. (3) expressly refers to "inspection" only.

15 Applicant's counsel argued that s.32 would provide a "hollow" power if it were limited to only inspections. I do not agree. Section 32 is but one of several mechanisms available to enforce compliance with by-laws.

16 Section 20 of the Act provides for the issuance of a written notice to cease work or use of land in contravention of a zoning by-law. If the owner fails to comply with the notice, the municipality may enter on the property and carry out or effect whatever was necessary and charge the costs back to the owner. No order is required under this provision. In this case, the Town issued the notice as contemplated under s.20 but, instead of following through with that procedure, they chose to seek an order under s.32. While it may seem anomalous to have to do so, the scheme of the legislation could be understood if one perceives s.32 as providing the right to inspect and then, after the

inspection, s.20 providing the process for direct action by the municipality (after notice). The inspection enables the municipality to formulate the requirements to be stipulated in the notice. I need not discuss here the further question of whether what the owner is doing in this case comes within the activities stipulated in s.20.

17 Section 34 of the Act provides for the prosecution of owners who fail to comply with the by-law or permit requirements. The applicant here may have thought such a prosecution futile (since the only penalty is a fine and there is no power to order remedial work). But, it is another enforcement mechanism.

18 Section 35 of the Act provides that, for the purpose of enforcement, a municipality may exercise any of the powers conferred on it by the *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8. That Act provides, in s.177, that "a municipal corporation may enforce a by-law by applying to the Supreme Court for an injunction". The Town does not seek an injunction in these proceedings so it is not necessary or desirable to decide whether the relief sought now would be available in some type of injunctive relief. I merely point out that this is an additional enforcement mechanism.

19 Respondents' counsel made reference to s.33 of the *Planning Act*. He submitted that s.33 provided the only enforcement mechanism by way of court order.

20 I must confess that s.33 leaves me somewhat puzzled. It reads:

> 33. A general plan, a development scheme or a zoning by-law may be enforced, and anything done in contravention of any provision contained in it, may be restrained by order of a judge of the Supreme Court on an action brought by a council whether or not any punishment has been imposed for the contravention.

21 The predecessor s.33, found in the *Planning Act*, R.S.N.W.T. 1974, c. P-8 (as amended by 1985 (1st Sess.), c.1, s.9), appears similar:

> 33. A general plan, a development scheme or a zoning by-law may be enforced, and anything done in contravention of any provisions contained therein may be restrained by order of a judge upon action brought by a council whether or not any penalty has been imposed for the contravention.

22 One will readily note that the current s.33 contains two significant commas, one after "enforced" and one after "contained in it", while the previous version of the section only contained one such comma after "enforced". This one comma was given some significance when de Weerdt J. interpreted the 1974 version in *Fort Smith v. Burke*, [1986] N.W.T.R. 1 (S.C.), at pages 7-8:

> That this general meaning of the words "may be enforced" was intended by the legislature is also shown by the presence of a comma after the word "enforced" in s.33. To give the meaning for which counsel for the applicant contended, that comma would have to be ignored. I do not think it was meant to be disregarded in that way, however. It serves to separate the words which precede it from those which follow. The effect of this separation is to set apart the words "may be enforced" from the following phrases, making it clear that those words are not intended to be qualified or restricted in consequence of the later expression "by order of a judge".
>
> Punctuation marks are part of the text of the enacted law. They
> 23 cannot escape notice when the text is read, for they form part of it ...

The conclusion in *Burke* was that s.33 authorizes a judge only to issue restraining orders.

24 What is the significance of the additional comma in the present version of s.33? It changes the meaning but not in a comprehensible way. If one deletes the clause "and anything done in contravention of any provision contained in it" as contained within the two commas, the section would read: "A general plan, a development scheme or a zoning by-law may be enforced ... may be restrained by order of a judge". This is nonsense. My best guess is that the comma after "contained in it" should be moved to after the word "restrained". That way, the section would encompass orders both enforcing a by-law and restraining contraventions of a by-law.

25 While there is a somewhat limited power in judges to correct obvious legislative drafting errors, one should be hesitant to do so. In this case the point about the interpretation of s.33 was not argued, so my comments are made simply in passing. But, if I am correct, then this also strengthens my view that s.32 applies only to inspections since s.33 provides the power to order compliance. This point, however, also highlights the confusion evident in many sections of this particular Act.

26 The Town chose s.32 of the *Planning Act* as the provision by which to seek an order authorizing entry on to the lots for the purpose of bringing the properties into compliance with its Zoning By-Law. I have concluded that s.32 does not encompass the relief sought. There is evidence, however, to support the issuance of an order pursuant to s.32(3) requiring the owner to admit the Town's officials for the purpose of making an inspection. This alternative relief was not argued, so I will make no order respecting it, but the Town should be free to apply further, if so advised, for that or other appropriate

relief.

27 Accordingly, the Town's application is dismissed, but with leave to the Town to apply further for alternative relief.

28 Since success has been divided, I will entertain submissions on costs should counsel be unable to agree.

John Z. Vertes
J . S . C .

Dated at Yellowknife, Northwest Territories
this 29th day of November, 1996

Counsel for the Applicant: Scott Duke

Counsel for the Respondents: Michael D. Triggs

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Application for order pursuant to s.32 of the *Planning Act*; cross-application for declaration that a by-law provision is void for uncertainty and vagueness. Both applications dismissed.

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife: November 13, 1996.

Reasons filed: November 29, 1996

Counsel for the Applicant: Scott Duke

Counsel for the Respondents: Michael D. Triggs

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**REASONS FOR JUDGMENT**
HONOURABLE JUSTICE J.Z. VERTES