CITATION: Russell v. The Corporation of the Township of Georgian Bay, 2016 ONSC 1153
COURT FILE NO.: CV-14-518939
DATE: 20160216

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Robert Samuel Russell, Applicant

AND:

The Corporation of the Township of Georgian Bay and Len Leitch in his capacity as Chief Building Official of the Corporation of the Township of Georgian Bay, Respondents

BEFORE: S. F. Dunphy J.

COUNSEL: *R. Shaban and Z. Derwa* for the Applicant

K. Mullin for the Respondents

HEARD: February 08, 2016

ENDORSEMENT

[1] Mr. Russell has a cottage on Georgian Bay. He would like to make some minor improvements to his property – in this case, to build a small accessory building beside his cottage. The Township of Georgian Bay has refused to issue him a building permit. The By-law permits him to build such a structure in his side yard or in his back yard but not on his front yard. The Township says that the accessory building he seeks to build, although conceded to be in his side yard, is nevertheless prohibited as lying within the area where his front yard *would be* if his cottage were newly-built instead of being built before the zoning By-law came into force.

[2] Mr. Russell claims, and I agree, that the Township and its Chief Building Officer have made an error of law in applying the zoning By-law. I ruled in favour of the applicant at the hearing with reasons to follow. These are those reasons.

[3] While the zoning by-law stipulates cottages must now be built far enough back of the water's edge as to leave a minimum front yard of 20 metres, Mr. Russell's cottage is closer to the water's edge (15 feet or 4.57 metres) and is a grandfathered construction. The front yard is a defined term under the zoning by-law and is measured from where the residential dwelling actually is – not from where it would be required to be in the case of a new construction. The by-law expressly permits accessory buildings of the sort proposed by Mr. Russell to be built in the "interior side yard" beside his cottage. The side yard does not cease to exist in Mr. Russell's case merely because his grandfathered cottage is closer to the water's edge than current standards would allow. The Township's interpretation would entirely strip Mr. Russell of the right the

By-law grants him to build an accessory building in his side yard and is simply contrary to the plain meaning of the By-law.

[4] I have found that the respondents were in error in declining to issue Mr. Russell's permit by reason of their erroneous interpretation of the by-law. Mr. Russell's application for a building permit has not yet been reviewed for compliance with the other requirements of the Building Code so I am not in a position to direct the permit to be issued to him forthwith as he requests. Rather, I directed the permit to be issued subject to compliance with the other requirements of the Code but having regard to my declared interpretation of the By-law. I am confident in the professionalism of the Township's officials who will be able to process his application fairly and without regard to matters that have now been settled.

Overview of Facts

[5] The history of this matter has been somewhat clouded by the fact that the parties have been down the litigation road together already in recent history and do not appear to have retained fond memories of their time together. In 2012 Mr. Russell received a permit to build a boathouse at the front of his cottage (a construction permitted within the front yard of a cottage lot under the By-law). There appears to have been some confusion on Mr. Russell's part as to where the west side lot line ran since Mr. Russell started construction of the boat house only a few inches from the western edge of his lot instead of the minimum five metres required (and the 28 feet he had proposed). Following the neighbour's complaint in July 2013, the Township inspected the project and halted construction. Unsuccessful attempts to obtain Committee of Adjustments approval to the variance or to appeal that negative decision to the Ontario Municipal Board and the Divisional Court resulted in significant legal fees being incurred on all sides.

[6] The Applicant's request for the building permit at issue in this case was made in September, 2015 while his application for leave to appeal the OMB decision in relation to the boathouse was still pending before the Divisional Court. It is perhaps understandable but nevertheless unfortunate that the Township has allowed itself to confuse these two quite separate applications. That confusion of issues shines through loud and clear in the affidavit of Mr. Fedoriw (the Chief Building Official of the Township) filed by the Township in its Responding Application Record. Mr. Fedoriw felt compelled to relate the boathouse history in great detail (although it has absolutely no relevance to this application) on the theory that Mr. Russell had not told me the "whole story" in his application. He went so far as to assert (quite incorrectly as it turns out) that the proposed accessory building was "in approximately the same location as the boathouse".

[7] That (mis)-statement by the Chief Building Official of the Township suggests something of a departure from the ideal of detached professionalism may have occurred in this case. The boathouse that gave rise to their first dispute extended back from the water's edge (as it was permitted to do) but was only inches from the west side lot line (as it was not permitted to be). The accessory building proposed by Mr. Russell was to be built entirely beside the cottage (and thus 4.57 metres back from the water's edge) and more than 2 metres east of the lot line.

[8] In my view, none of that history is remotely relevant. Mr. Russell's application had a right to be considered on its merits and without regard to the prior history between the parties. Ruffled feathers and simmering resentment have no place in the neutral and objective application of the law by public officials. In my view, the plain language of the By-law as well as a common sense and purposive reading of it both strongly favoured his application and the permit should have been processed on its merits rather than being turned down for the reasons given.

[9] There are no *material* facts in dispute. I have ignored as irrelevant the evidence of the history of the parties. Both sides may be suspicious of the motives of the other – I am unencumbered by that and it has no bearing on the narrow legal questions this application raises. I am not concerned with motive but with the objective facts and the law as it applies to them. These may briefly be summarized as follows:

a. Mr. Russell's owns the subject land at 979 Harrison Trail on 12 Mile Bay in the Township of Georgian Bay;

b. The lot occupies approximately 1.4 acres having 171 feet of water frontage with a steep ridge running across the rear of the lot about 115 feet from the shoreline;

c. The property is zoned "SR-1" or "Shoreline Residential Type One" under the Township's 1991 By-law;

d. The lot contains a cottage located approximately 15 feet (or 4.57 metres) back of the high water mark that was built prior to the 1991 By-law and is thus grandfathered;

e. Mr. Russell submitted an application for a building permit to the Township on September 3, 2014 to build a 720 square foot accessory building described as an "art studio/workshop" on his property;

f. The proposed location of the building was in the "interior side yard" of the lot with its front being no closer to the water's edge than the front of his existing dwelling (i.e. 4.57 metres);

g. If follows that the proposed location was *not* in the front yard of the lot;

h. On September 5, 2014, Mr. Russell provided Township officials with an opinion letter from his own counsel explaining why, in their view, the proposed building complied with the Township's Zoning By-law 91-19;

i. The Township's external lawyers responded directly to Mr. Russell's lawyer with their own opinion letter dated October 16, 2014 taking a contrary position;

j. Both lawyers' opinion letters essentially summarize the legal positions taken by the parties before me on this application;

k. On December 9, 2014 Mr. Leitch issued his decision denying Mr. Russell's application on the basis that "this proposal does not comply with the front yard set back requirements for an accessory structure as set out in Zoning By-law 91-19".

[10] Under s. 25 of the *Building Code Act, 1992*, S.O. 1992, c. 23, an appeal to the Superior Court of Justice lies from a decision of the chief building official. The Notice of Application herein was issued on December 29, 2014 to appeal the decision.

Issues

[11] The following issues are raised by this application:

a. What is the appropriate standard of review?

b. Is there a front yard requirement for an accessory building proposed to be built entirely within the side yard under the by-law?

Analysis and Discussion

(i) Standard of Review?

[12] Under s. 25(4) of the *Building Code Act*, I am entitled to "affirm or rescind the order or decision and take any other action that the judge considers the chief building official … ought to take in accordance with this Act and the regulations and, for those purposes, the judge may substitute his or her opinion for that of the official, agency or inspector".

[13] The respondents suggest that notwithstanding the language of s. 25(4) of the *Building Code Act*, I ought to apply a deferential standard of appellate review. They cite the cases of *Rotstein v. Oro-Medonte (Township)*, [2002] O.J. No. 4990 (S.C.), *Runnymede Development Corp. v. 1201262 Ontario Inc.*, 47 O.R. (3d) 374 and *Berjawi v. Ottawa (City)*, 2011 ONSC 236 (CanLII) to support the application of the deferential standard of review to this case.

[14] The cases cited all note that the degree of deference to be accorded will be a function of where on the spectrum the decision appealed from lies between purely legal questions and questions of mixed fact and law. Many decisions under appeal will involve questions of mixed fact and law and a degree of deference to the expertise and experience of the Chief Building Official will be appropriate. Others raise narrow legal issues of interpretation only and the correctness standard may be applied.

[15] In the present case, the history of the boathouse conflict provides me with some added reason to approach the question of deference with caution. Where, as here, there is a risk that a prior history of conflict between the parties may have influenced, however unconsciously, the making of the decision under appeal, the call for deference must be carefully weighed and considered in light of those facts.

[16] I am satisfied in this case that there are no material facts in dispute. The fact finding of the Chief Building Official has not been brought into question. The sole question to be determined is the correct legal interpretation of the By-law to objective agreed facts. There is no particular degree of deference called for in an appeal restricted, as this one is, to such narrow issues of legal interpretation alone.

[17] I agree with the respondents that the interpretation of municipal by-laws requires an understanding of context and purpose. To that end I have had the advantage of reading the numerous opinion letters exchanged between the parties, the decision of Mr. Leitch itself and of course the factum and oral argument advanced by the Township. However, this is not a case where I am being urged by the appellant to adopt an inflexible, literalist interpretation of words to achieve a result contrary to the general intent of the provision. The By-law authorizes side yard construction of accessory buildings within two metres of the side lot line and that is precisely what Mr. Russell sought to do. It does not allow them to be built in the front yard and he does not propose to do so. The respondents treat the front yard as if it extended into the side yard and beyond for some purposes but not for others. That is both absurd and unreasonable. Mr. Russell's interpretation is entirely consistent with both the words used in the enactment and common sense. The only fault attributed to him is that of having a grandfathered front yard that is smaller than what the Township would currently imposes on new-constructions. That is not relevant to a construction what is admitted to be the side yard.

[18] While I would apply a correctness standard to this case, I would have granted the application under any standard of review, so clear and plain is the legal interpretation issue. This is not a case where the standard of review is decisive or even material.

(ii) Interpretation of By-law 91-19

[19] In my view, the By-law presents a fairly straightforward problem of interpretation.

[20] I start with the definitions in Section 5. These introduce the concept of a "yard", a "front yard", the "side yard" and "interior side yard".

[21] Section 5.169 defines "yard" as "any open unoccupied space appurtenant to a building measured from the closest supporting structure of the building to the lot line or to the normal or controlled watermark"

[22] Section 5.171(b) defines Front Yard as "the area or areas extending across the full width to the lot between the high water mark … at the same distance inland as is the nearest point of the dwelling or main building to that high water mark".

[23] Section 5.176 defines a "side yard" as "a yard extending from the front yard to the rear yard between the side lot line and the nearest wall of any building on the lot" while an "interior side yard" is simply any side yard other than one immediately adjoining a public street or navigable waterway.

[24] In plain English, where a waterfront lot has a dwelling unit on it as Mr. Russell's does, it has a front yard, a side yard on each side of the cottage and a rear yard. These are mutually exclusive divisions of the lot by which I mean that the front yard ends where the side yard begins and the side yard ends where the rear yard begins. There is no part of the lot that is both "front yard" and "side yard" at the same time. Other than the land underneath the principal building or dwelling itself, *every* part of the entire lot is a yard of some sort – be it front yard, side yard or rear yard. The dimensions of each of the yards so defined is measured in relation to the principal dwelling unit and the front, rear and side lot lines. The location of accessory buildings can never affect the dimensions of those yards and is quite simply an irrelevant fact.

[25] In Mr. Russell's case, the nearest point of his dwelling or main building to the high water mark is 4.57 metres (or 15 feet in old-speak) from the high water mark. Accordingly, his "front yard" is 4.57 metres deep across the entire front of his lot, measured from the high water mark. His two side yards thus start at 4.57 metres from the high water mark and proceed to the back point of his dwelling on each side of it (where his rear yard begins).

[26] The only permitted use of Mr. Russell's lot in the SR-1 zone pursuant to s. 4.1.1 is a residential dwelling unit or sleeping cabin. However, s. 3.1.1 extends the permitted use in the zone to accessory buildings "provided the principle (sic) building, structure or use is already in existence on the lot". This permits Mr. Russell to build accessory buildings given that his cottage was already in existence.

[27] Section 4.1.2 stipulates that the "minimum yard requirement" for the front yard on a lot so zoned must be 20 metres. Mr. Russell's front yard, being only 15 feet (or 4.57 metres) deep is obviously below the minimum yard requirement the zoning applicable to this lot. Mr. Russell's cottage however is a grandfathered construction having been erected before the newer, stricter regulation was put in place. His front yard in fact is measured in relation to where the main building *is* and not where it *would be* if newly-constructed (it is not). The front yard is always determined in relation to the location of his principal dwelling on the lot. In Mr. Russell's case, he quite legally has a 4.57 metre deep front yard. That is not in dispute.

[28] The Township treats the concepts of "setback" and "front yard" as if they were the same. They are not. The affidavits of both Mr. Fedoriw and Mr. Weatherell repeat this confusion of concepts and the formal decision rejecting Mr. Russell's application for a building permit does so as well. It is the *actual* location of the principal dwelling, once built, that determines the dimensions of the front yard, side yard and rear yard. The dimensions of the yards have nothing to do with the location of any other building, including, for the purposes of this application, the proposed art studio/workshop. This is perfectly plain and obvious from a consideration of the language used in the definitions of each.

[29] The relevance of the dimensions of the front yard is this. Section 3.1.2 of the By-law provides that "except as otherwise provided", any accessory building "shall be erected in compliance with the yard and setback requirements of the Zone in which such building is located".

[30] The Township argues that there is a 20 metre *setback* requirement applicable in this Zone (SR-1) pursuant to s. 4.1.2. Indeed, Mr. Leitch's letter of December 9, 2014 based his decision on this alleged requirement: "it was determined that this proposal does not comply with the front yard set back requirements for an accessory structure".

[31] There is quite simply no such requirement in the By-law. There are numerous other zones where the By-law stipulates a setback requirement. SR-1 is not one of them. Section 4.1 contains the regulations for Zone SR-1 and contains no setback requirements. Section 4.1.2 does contain minimum *yard* requirements, but these are an entirely different matter. The two terms are separately defined in section 5 and mean quite different things. The yard is measured in relation to the principal dwelling only while setback is measured in relation to any structure or building on the lot.

[32] Section 3.1.10 of the By-law provides that "*Notwithstanding the yard and setback provisions of this By-law to the contrary* an attached or detached private garage or other accessory building or structure may be erected and used in an interior side yard…(i) where such accessory building or structure is located in an interior side yard, it shall not be closer than 2 metres to the side lot line" (emphasis added).

[33] This clear and unambiguous language confers upon property owners the right to build accessory buildings in their side yards.

[34] The respondents are undaunted by this express, notwithstanding language. They say that s. 3.1.10 is silent as regards the *front* yard setback requirement thus does not override the general language of s. 3.1.2. There is no application to build anything in the front yard. The application before the Township was to build in the side yard. The Township`s asked the wrong question and unsurprisingly came up with the wrong answer.

[35] Section 3.1.10 does not mention (or override) front yard requirements when dealing with accessory buildings in a side or rear yard because they are completely different areas of the lot that do not overlap each other. Their location is fixed by reference to the principal dwelling. Section 3.1.10 *does* provide a setback requirement for side yard accessory buildings (2 metres) but this does not alter the dimensions of the side yard. Its dimensions and location will be the same before and after the accessory building is built. Section 3.1.10 does not mention the front yard because the side yard is always behind the front yard by definition.

[36] The plain language used in the By-law admits of no other interpretation in my view. There is no ambiguity to be resolved. The Township clearly viewed the "yard" requirement as if it were a separate *setback* requirement applicable to all structures in every yard on the lot. In so doing, they have stripped Mr. Russell of the right to build an accessory building in his side yard when that right was clearly and expressly conferred by s. 3.1.10 of the By-law. They have done so simply because his front yard is – legally – smaller than would be required for a new-build today. They had no authority to do so.

[37] The Township argues that I should give weight to its alleged practice of applying a contrary interpretation. I cannot agree.

[38] Firstly, the evidence of the Township's prior practice is, to put it mildly, equivocal. Mr. Fedoriw's affidavit merely states that "the Township's practice since the [By-law] was enacted in 1991 has not been to issue any permits for non-marine structures proposed to be located within the first 20 metres of the front yard". The permit requested by the Applicant is for a proposed building that will not be located in the front yard at all – Mr. Fedoriw has not stated whether there have been *any* applications since 1991 for buildings in the *side yard* where the side yard is less than 20 metres from the water's edge. Secondly, the Township's practice cannot amend the law when it violates the plain meaning of the By-law. This is not a case where a choice must be made as between a range of reasonable applications of facts to the law. There are *no* disputed facts. The dimensions of the yards on this lot are matters of cold, hard geographic fact capable of being determined with as much accuracy as the surveyor's art and skill permit. The words of the By-law are clear and without ambiguity.

Disposition

Accordingly, I ruled at the hearing that the Applicant Mr. Russell is entitled to a declaration that Section 3.1.10 of the By-Law has no front yard setback requirement in the case of an accessory building located in the interior side yard and directed that the Chief Building Officer of the Township should issue Mr. Russell a building permit in accordance with his application subject to compliance with the other requirements for such a permit but having regard to the foregoing declaration. Costs of the Application were fixed at $2,500 payable to the Applicant by the Respondents forthwith.

S. F. Dunphy J.

Date: February 16, 2016