Balancing Act Municipality Not Negligent in Enforcing

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The Ontario Court of Appeal, in dealing with a messy and prolonged neighbour dispute, has sorted out issues of liability in a manner which clarifies and achieves a reasonable balance between policy and operational decision-making by municipalities in discharging their responsibilities for the enforcement of property standard by-laws.

The Court noted that the trial court, having found that the Town of Parry Sound "acted with admirable fairness and reasonableness throughout", nevertheless, took it upon itself to make a policy decision, imposing upon the Town "a costly and challenging undertaking" to demolish a privately-owned three-storey building which had fallen into disrepair.

The building, 100 years old, was comprised of three units, two owned by the Shamess family, and one by the Foley family.

In the Fall of 1994, the Town issued notices of violation under its property standards by-law against all of the units. Although some repairs were made, further deterioration took place. In 1997, the Town's chief building official declared the entire building unsafe and ordered the owners to undertake short and long-term repairs. When that did not happen, the Town prohibited the use or occupancy of the building.

The Town tried to get the owners to agree on how to deal with the building, but this did not happen. The Shamesses wanted to demolish the entire building. The Foleys wanted the Shamess units demolished and their unit preserved at the expense of the Shamesses or the Town.

When no repairs were done, and no resolution reached between the parties, the Town served notice of its intention to demolish the building, which was carried out in September, 2001.

In an action by the Foleys for negligence and nuisance against the Shamesses and the Town, the trial judge (after 19 days of trial) held the Town liable for 40% of the Foleys' damages, being the deprivation of the use of their unit during the period prior to demolition. He held that, by 1997, either the Town or the Shamesses should have demolished the Shamess units, leaving the Foley unit freestanding. He fixed damages for loss of profit and loss of the building, at $51,000.00. The Shamesses were liable for 40% of the loss, and the Foleys, 20%.

Both the Town and the Shamesses appealed liability.

The Court of Appeal, although not specifically referring to sections 15.1 to 15.8 of the Ontario Building Code Act dealing with propertystandards, nor to the decision of the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R 2, simply summarized the applicable law as follows:

"Once the Town made a policy decision to enact a property standards by-law, it could be liable to property owners for the negligent

enforcement of its by-law. See Oosthoek v. Thunder Bay (City) (1996), 30 O.R. (3d) 323 (C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 577."

The Court's decision demonstrates the progression of circumstances leading to the claim against the municipality for negligent enforcement.

Firstly, the Town made a policy decision to enact the property standards by-law, which, the Court held, created a duty which could render it liable for enforcement to affected property owners.

However, this duty involves practical and policy decision-making in itself, in terms of the manner of enforcement. The decision of the Court of Appeal accepts that in such circumstances, where the municipality acts reasonably and in good faith in decision-making as to the manner of enforcement, the Court will grant it a broad discretion in determining how it will enforce its by-laws.

In such circumstances, the Court is not in a position to make its own policy decision as to how the by-law should be enforced, nor should the manner of enforcement be left to the whims or dictates of adjoining property owners.

In reaching the above conclusion, the Court also noted that it was the duty of the Shamesses, in sharing walls, a roof and a foundation with the Foleys' house, to act reasonably, to comply with the Town's notice of violation, and to not let their units deteriorate to the point of constituting a serious hazard. In such circumstances, there could be liability in either negligence or nuisance. A property owner must not only make reasonable use of his own property, but do so in the context of the fact that he has a neighbour:

"A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or most correctly in a particular society."

The Court held that the Town had no duty to partially demolish the building when the owners, individually or collectively, would not agree to do so. The Court also held that imposing this duty on the Town would be inconsistent with the decision of the trial judge that the Town had acted reasonably throughout.

As a result, the Court of Appeal allowed

the Town's appeal, re-apportioned degrees of fault to make the Shamesses 66 2/3% contributorily negligent and the Foleys 33 1/3% contributorily negligent, and awarded costs to the Town in both the appeal and the trial.

Thus ends 11 years of litigation, including 7 years from the time that the Town first issued the notice of violation until the building was demolished, in circumstances in which the trial judge, based on appraisal evidence, assessed the value of the Foleys' unit at $30,000.00.

The case recognizes the unique circumstances that surround every by-law-related dispute and provides municipalities with the assurance that they have the discretion they need when acting reasonably and in good faith in carrying out their by-law enforcement duties.

Case Citation:

Foley v. Shamess [2008] O.J. No. 3166, 2008 ONCA 588.

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