1985 CarswellMan 202, [1985] 6 W.W.R. 147, [1985] 2 S.C.R. 164, 37 R.P.R. 101, 31 M.P.L.R. 1, 18 Admin. L.R. 59, 61 N.R. 321, 20 D.L.R. (4th) 641, 36 Man. R. (2d) 215, J.E. 85-899

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Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)

OAKWOOD DEVELOPMENT LTD. v. ST. FRANÇOIS XAVIER

Supreme Court of Canada

McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

Heard: November 6, 1984
Judgment: September 19, 1985
Docket: No. 17017

Counsel: S. Green, Q.C., for appellant.

R. Scott, Q.C., and R. Adkins, for respondent.

Subject: Property; Public

Municipal Law --- Subdivision control — Jurisdiction to approve subdivision applications — Approving authority of first instance — Judicial review

Municipal Law --- Subdivision control — Jurisdiction to approve subdivision applications — Approval by provincial planning appeal board — Judicial review

Administrative law — Judicial review — Grounds for review — Taking into account wrong considerations in exercising discretion — Municipal council denying approval of subdivision plan because of fear of flooding — Council refusing to hear proposals to remedy problem — In failing to take relevant information into account, council failing to exercise its discretion properly — Council ordered to rehear matter.

The plaintiff was a development company which sought approval of a subdivision plan from the defendant municipality. The council of the defendant municipality informed the plaintiff that it would not entertain the application because it considered the land to be in a flood-prone area, and advised further that it would not consider proposals to remedy the drainage problem. The council subsequently passed a formal resolution denying approval of the application. The plaintiff brought an action against the municipality and obtained an order of mandamus requiring the municipality to rehear the matter. The Manitoba Court of Appeal allowed the municipality's appeal. The plaintiff appealed.

1985 CarswellMan 202, [1985] 6 W.W.R. 147, [1985] 2 S.C.R. 164, 37 R.P.R. 101, 31 M.P.L.R. 1, 18 Admin. L.R. 59, 61 N.R. 321, 20 D.L.R. (4th) 641, 36 Man. R. (2d) 215, J.E. 85-899

Held:

Appeal allowed.

Any discretionary administrative decision must be based upon a weighing of considerations pertinent to the object of the administration. The failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. Although pursuant to the regulations under the Manitoba Planning Act the municipal council was entitled, and even required, to take into account the flooding problem, the council appeared to have consciously refused to consider any factors relevant to the perceived drainage and flooding problem and possible solutions to it. In refusing to hear any information about the problem, the council failed to take proper account of factors relevant to its statutory mandate and therefore failed to exercise its discretion in accordance with proper principles.

Cases considered:

Baldwin & Francis Ltd. v. Patents App. Tribunal, [1959] A.C. 663, [1959] 2 W.L.R. 826, [1959] 2 All E.R. 433 (H.L.) — considered

By-Law 1665 of Surrey, Re (1959), 28 W.W.R. 428, (sub nom. Re Surrey) 20 D.L.R. (2d) 174 (B.C.S.C.) — considered

Padfield v. Min. of Agriculture, Fisheries & Food, [1968] A.C. 997, [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694 (H.L.) — referred to

R. v. Paddington Valuation Officer; Ex parte Peachey Property Corp., [1965] 3 W.L.R. 426, [1965] 2 All E.R. 836 (C.A.) — applied

Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 — referred to

Smith & Rhuland Ltd. v. R., [1953] 2 S.C.R. 95, 107 C.C.C. 43, [1953] 3 D.L.R. 690 — considered

Vancouver v. Simpson, [1977] 1 S.C.R. 71, [1976] 3 W.W.R. 97, 65 D.L.R. (3d) 699, 7 N.R. 550considered

Westminster Corp. v. London & North Western Ry. Co., [1905] A.C. 426 (H.L.) — considered

Statutes considered:

Planning Act, 1975 (Man.), c. 29 (also C.C.S.M., c. P80), ss. 1(a), (q), 60(1) [en. 1978, c. 37, s. 12], 62(1) [en. 1978, c. 37, s. 17; am. 1980, c. 72, s. 12].

Regulations considered:

Planning Act, 1975 (Man.), c. 29 (also C.C.S.M., c. P80) —

Reg. 30/77, ss. 6(1), 7, 11.

Appeal from judgment of Manitoba Court of Appeal, [1982] 2 W.W.R. 508, 17 M.P.L.R. 80, 152 D.L.R. (3d) 119, reversing judgment of Wright J., [1981] 2 W.W.R. 532, directing municipal council to hear plaintiff's ap-

plication for approval of plan of subdivision.

The judgment of the court was delivered by Wilson J.:

I. The Facts

1 The appellant is a development company which purchased approximately 40 acres of land in the respondent municipality in 1973. At the time the lands were purchased they were designated under an existing town planning scheme for subdivision and residential development. "Flood plain areas" were marked on the plan but the appellant's lands were not in a flood plain area. In 1975, after extensive negotiations, the appellant obtained approval from the municipal council for a plan of subdivision permitting it to have six one-acre lots on the northern portion of the 40 acres but was denied approval for subdivision of the balance of the lands pending the respondent's giving further consideration to flooding and erosion problems.

2 On 1st December 1977 the appellant submitted an application for subdivision of the southerly portion of its lands to the Municipal Planning Branch of the provincial government. This application was sent on to the respondent's municipal council for consideration. On 2nd June 1978 the solicitors for the municipality wrote to the solicitors for the appellant informing them that the council was not prepared to entertain the appellant's application because it considered the lands in question to be in a flood-prone area, making the lands inappropriate for residential development. The appellant was also advised that any proposals aimed at remedying the drainage problems on its land would not be considered, since the municipality had no intention of allowing any development on lands prone to periodic flooding. The key portion of the letter reads as follows:

> This property is in a flood-prone area, said flooding being obvious to all Councillors concerned and for this reason, they are not prepared to entertain application for subdivision in respect to this property.
>
> The fact that you may obtain engineer's reports in respect to such development will not affect the decision of the Council as the original Plan of Subdivision was granted clearly on the understanding that no further development would be allowed in the lower area.

This communication was followed nine months later, in March 1979, by the passing of a formal resolution by council denying approval of the subdivision application. The appellant was notified of this resolution by letter dated 27th March 1979 from the province's Municipal Planning Branch. It is this rejection, which the appellant alleges was arbitrary and without lawful authority, that has given rise to the present litigation.

II. The Courts Below

3 The appellant brought an action against the municipality in the Manitoba Court of Queen's Bench. In its statement of claim the appellant sought two distinct remedies for the abuse of discretion which it alleged against the council: (a) a declaration that its lands are entitled to be developed; and (b) an order of mandamus requiring the council to entertain an application for subdivision approval and to impose only those conditions which will facilitate development of the lands in accordance with the existing town planning scheme. As the alternative remedies tend to indicate, the appellant challenged the council's exercise of discretion on several different levels, including the factors which it took into account in reaching the decision as well as the way in which the decision was actually made.

4 At trial the appellant was successful in obtaining an order requiring the municipality to hear and determ-

ine the application for subdivision approval that was originally submitted by the appellant on 1st December 1977. Wright J. [[1981] 2 W.W.R. 532] found that the council's refusal to entertain the application had been based on its perception of potential flooding problems on the appellant's land and that the council had thereby exceeded the statutory scope of its discretion. As counsel for the municipality could not point him to any reference to flooding problems in the relevant sections of the Planning Act, 1975 (Man.), c. 29, he concluded that this was an improper consideration for the municipality to take into account. Accordingly, the mandatory order was issued, although it was not accompanied by the declaratory relief sought by the appellant. The respondent was ordered to entertain the application and to premise its decision only on those considerations specified as appropriate by the governing legislation. The council was still free to decline to grant its approval.

5 The Manitoba Court of Appeal allowed the municipality's appeal [[1982] 2 W.W.R. 508, 17 M.P.L.R. 80, 152 D.L.R. (3d) 119]. Hall J.A. (with whom Freedman C.J.M. concurred) indicated that the pertinent sections of the Planning Act and regulations thereunder made it clear that, provided the municipality acted in good faith, concern over flooding could properly be a consideration on which disapproval of an application was premised. The decision of this court in Vancouver v. Simpson, [1977] 1 S.C.R. 71, [1976] 3 W.W.R. 97, 65 D.L.R. (3d) 699, 7 N.R. 550, was cited for the proposition that there are a variety of reasons why municipalities should have control over the planning of local subdivisions and that the courts should not lightly interfere with decisions of the responsible city officials. Since the municipality was not seen by Hall J.A. as having exceeded or abused its jurisdiction or authority in taking the flooding problem into consideration and since there was no evidence that the resolution was passed in other than good faith, the trial judge's order was reversed.

6 O'Sullivan J.A. concurred in this result but wrote separate reasons, in which he drew a distinction between the respondent's solicitors' initial letter to the appellant and its eventual resolution denying the application for subdivision. He reasoned that the respondent's initial refusal to entertain the application no matter what proposal or evidence such an application might contain might well have justified an order of mandamus. Although the Planning Act was seen as giving the council a wide discretion in refusing subdivision approval, it probably made mandatory the consideration of each application. However, subsequent to this initial response the respondent had actually heard and considered the appellant's application and the resolution denying approval represented a determination of the application which was within the scope of the respondent's discretion. Accordingly, O'Sullivan J.A. joined in the court's reversal of the trial judge's order that the application be entertained by the municipality.

III. The Statutory Framework

7 In assessing the position of a landowner applying to local municipal authorities for subdivision approval one must be conscious of the fact that the requirement of subdivision approval arises only by virtue of statute. The position at common law was succinctly stated by Wilson J. of the Supreme Court of British Columbia to the effect that "The right to subdivide real property, to sell a part rather than the whole, is an ordinary incident of ownership": Re By-Law 1665 of Surrey (1959), 28 W.W.R. 428, at 428, 20 D.L.R. (2d) 174 (sub nom. Re Surrey). The subdivision approval process operates, therefore, as a curtailment of common law rights and must be specifically authorized under the governing legislation.

8 In Manitoba the common law right to subdivide is restricted by s. 60(1) of the Planning Act, which stipulates that any subdivision of a parcel of real estate in order to be valid must be "approved by the approving authority". The authoritative body referred to in s. 60(1) is defined in s. 1 of the Act as follows:

1. In this Act,

(a) 'approving authority' means

(i) the minister, or

(ii) the board of a district that is authorized by an order of the minister to act as an approving authority within the area of jurisdiction of the board, or

(iii) the council of a municipality that is authorized by an order of the minister to act as an approving authority for that municipality ...

(q) 'minister' means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act.

9 In the case of the respondent municipality the provincial government has not exercised its discretion to delegate the function of acting as the ultimate approving authority. Rather, it would appear that this function is carried out by the provincial Department of Municipal Affairs, which receives all applications for subdivision and processes them in accordance with the provisions of the Planning Act and the regulations passed thereunder. The first step in this process entails consultation with an assortment of other provincial authorities in order to ensure that the proposed subdivision is in conformity with land use planning generally in the area. Section 6 of Reg. 30/77 under the Planning Act provides:

6. (1) Before approving an application an approving authority may refer it to and request the comments of

(a) the Department of Highways;

(b) the Department of Agriculture;

(c) the Environmental Management Division and the Water Resources Division of the Department of Mines, Resources and Environmental Management;

(d) the Department of Tourism and Recreation;

(e) the Manitoba Hydro-Electric Board;

(f) the Manitoba Telephone System;

(g) the appropriate School Division;

(h) Central Mortgage and Housing Corporation; or

(i) any other authority, agency, department, council, or board that in the opinion of the approving authority might be affected by the proposed subdivision.

10 The evidence discloses that after receiving the appellant's application on 1st December 1977, the Municipal Planning Branch of the Department of Municipal Affairs did in fact circulate the application among the various provincial departments as authorized by the regulation. Although most of the departments consulted appear to have either approved the subdivision or been disinclined to offer any comment one way or another, the

most significant response was the negative assessment submitted by the province's Water Resources Division. By interdepartmental memo dated 6th April 1978, the Director of Planning of this division indicated to the Municipal Planning Branch that the proposed subdivision site was subject to erosion problems and to potential flooding by the nearby Assiniboine River.

11 The next step in the application assessment and approval process is to forward the application to the council of the municipality in which the lands are situated. Although the consultation process with the other provincial government departments is optional on the part of the approving authority, the referral of the application to the local municipal council for approval is mandatory under the legislation. Section 7 of Reg. 30/77 stipulates:

> 7. (1) The approving authority shall refer the application, together with a summary of comments received under section 6, to the council of the municipality in which the proposed subdivision is situated.
>
> (2) The council may, by resolution, give its approval to the proposed subdivision, with or without conditions, or reject it.
>
> (3) The council shall forthwith submit a copy of such resolution to the approving authority.

The mandatory nature of the approving authority's submission of each application to the local municipal council is made even stronger by the Planning Act itself, which makes municipal approval a prerequisite for subdivision approval. Section 62(1) of the Act provides, inter alia:

> 62. (1) A subdivision of land shall not be approved unless ...
>
> (b) the council of the municipality in which the land proposed for subdivision is located, has by resolution given its approval, with or without conditions.

12 Accordingly, it is clear that, whether or not the province has in a given case delegated the role of ultimate approving authority to the municipal council, the approval by resolution of this council to any application for subdivision of lands located within the municipal boundaries is required. In the case at bar, the provincial government department which received the application and consulted with other branches of the provincial government as to its merits proceeded to refer the matter to the respondent for council's approval. This procedure not only appears to have been appropriate but is precisely the decision-making route stipulated by the governing legislation.

13 As noted above, the learned trial judge found that the concern over flooding was an improper consideration for the council to take into account. With respect, this conclusion does not appear to be defensible upon an examination of the Act and regulations under which approval is required. First, the very fact that the scheme provides for consultation with provincial departments such as the Water Resources Division, and that their views are then passed on to the municipal council, would seem to indicate that the concerns of such departments (i.e., drainage and flooding, in this case) are meant to be taken into consideration when an application is evaluated by the council. Perhaps even more significant, however, is the fact that specific evaluation standards have been set out in Reg. 30/77 and that soil erosion, drainage, and flooding problems figure prominently in the detailed list of relevant factors. Section 11 of the regulation reads:

> 11. All land proposed to be subdivided shall be capable of being efficiently adapted to the purpose for

which the subdivision is intended, having regard, inter alia, to

(a) topography;

(b) soil characteristics;

(c) surface and sub-surface drainage;

(d) potential flooding, subsidence landslides and erosion;

(e) existing and prospective uses of land in the vicinity;

(f) layout of streets and lanes;

(g) provision of services;

(h) distinction between pedestrian and vehicular traffic;

(i) segregation of traffic flow as between major thoroughfares and minor streets;

(j) convenience of access;

(k) dimensions, shape and orientation of each lot;

(l) view and aspect of each lot;

(m) protection against pollution; and

(n) anticipated need for school sites, recreational facilities and parks.

The first four standards relate directly to the type of flooding and drainage problems with which the Water Resources Division was concerned and which formed the basis of the council's rejection of the appellant's application. Clearly, then, it cannot be said that taking flooding problems into account represented the importation of an improper consideration into the council's decision.

IV. Grounds for Review

14 As the respondent points out, the general rule regarding interference with the discretionary decisions made by administrative bodies acting under statutory authority has been one of deference. Lord Halsbury L.C. stated in Westminster Corp. v. London & North Western Ry. Co., [1905] A.C. 426 at 427 (H.L.):

> Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorized.

More recently, and dealing specifically with applications for subdivision, the Supreme Court of Canada in Vancouver v. Simpson, supra, at p. 76 approved the following statement of Kirke Smith J. in the court below:

> Where, as here, there is direct statutory foundation for the ground given for the decision to approve or dis-

> approve, and where it is not shown that that decision, despite its impact on an individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should, in my opinion, be no interference by the court with municipal officials honestly endeavouring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas.

15 There are no allegations of bad faith or discrimination in this case. The question before the court, in essence, is whether the council exercised its discretion "according to law" and in accordance with proper principles reflected in the "policy and objects of the [governing] Act": per Lord Reid in [1968] 2 W.L.R. 924, [1968] 1 All E.R. 694 (H.L.). More specifically, was it entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in Roncarelli v. Duplessis, [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689, any discretionary administrative decision must "be based upon a weighing of considerations pertinent to the object of the administration". For the reasons already given I am of the view that the council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in Baldwin & Francis Ltd. v. Patents App. Tribunal, [1959] A.C. 663 at 693, [1959] 2 W.L.R. 826, [1959] 2 All E.R. 433 (H.L.), the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. In R. v. Paddington Valuation Officer; Ex parte Peachey Property Corp., [1966] 1 Q.B. 380, [1965] 3 W.L.R. 426, [1969] 2 All E.R. 836 (C.A.), where a property owner applied for a quashing of what was alleged to have been an erroneous municipal tax assessment, Danckwerts L.J. noted at p. 414:

> In order to succeed in their application for an order of mandamus and certiorari, the appellants have to show that the valuation officer of the borough council has gone wrong in law in such a way as to render the valuation list invalid, because he has taken into consideration matters which were not proper to be regarded, or has omitted to consider matters which were of direct importance in ascertaining the values to be put upon the hereditaments.

The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

16 In the Manitoba Court of Appeal, O'Sullivan J.A. highlighted what is really the central concern here when he indicated that the letter which the appellant received from the respondent's solicitors in June 1978 reflected the failure of the municipal council to entertain the appellant's application on its merits. Although from a procedural point of view this defect was later remedied by the council's passing of a formal resolution denying the appellant's application to subdivide his land, in substance the decision does not reflect any consideration of the factors relevant to the subdivision application. Indeed, the evidence would appear to indicate a conscious refusal on the part of the respondent to consider any factors relevant to the drainage and flooding problems perceived to be present on the appellant's lands. At trial, Wright J. found as a fact that the municipality gave no consideration whatsoever to the seriousness of the flooding problem or the extent to which it might be remediable and that it refused to entertain any pertinent information of this nature "due to its belief that the land should not be subdivided under any circumstances" [p. 536].

17 Once flooding became the crucial factor in the council's evaluation of the appellant's application, it was, in my view, incumbent upon it to evaluate the scope of the flooding problem and possible solutions to it. The mere mention of flooding as the decisive factor, accompanied by an obstinate refusal to consider whether or not

it was remediable, cannot be said to satisfy the requirement that all highly relevant considerations be taken into account. More specifically, Wright J. found that the respondent "did not give consideration to ways and means by which the problems that could arise from flooding could reasonably be dealt with" [p. 535]. The argument of the respondent that the engineering reports and proposed solutions which the appellant wanted to put forward were somehow inaccurate or ineffective to solve the flooding problem misses the point of the trial judge's finding. All the evidence supports the finding that the council refused to hear any information whatsoever regarding the potential flooding problem and therefore failed to take proper account of factors relevant to its statutory mandate. This finding leads inevitably to the conclusion that the respondent failed to exercise its discretion in accordance with proper principles.

V. The Appellant's Remedy

18 It is, of course, not for this court to address the merits of the appellant's application for subdivision or to substitute its own decision for that of the municipal council. As Cartwright J. pointed out in Smith & Rhuland Ltd. v. R., [1953] 2 S.C.R. 95 at 107, 107 C.C.C. 43, [1953] 3 D.L.R. 690, the courts recognize that the legislature has conferred the discretionary power of decision on the administrative body under review and not on the courts. In its review capacity, it is the court's function merely to ensure that the decision is properly made within the statutory framework and on the basis of considerations relevant to the decision-making function with which the administrative body is charged.

19 The appropriate remedy in such a case, therefore, is for the matter to be sent back to the respondent for the council to hear and determine the appellant's application on proper principles. Accordingly, although these reasons differ from those of the trial judge in that the improper exercise of discretion is based on the failure to take into account all relevant considerations rather than on the taking into account of an improper consideration, the result is the same as that reached by the trial judge. Whereas flooding is indeed a proper consideration for the municipal council to take into account in evaluating an application for subdivision, the factors relevant to the potential flooding problem, including, for example, the extent to which it is remediable by the appellant, must equally be taken into account.

20 It may be noted that, despite the substantial lapse of time since the appellant's application was initially submitted, no particular hardship is worked on the respondent by virtue of its being ordered at this date to reconsider the appellant's application. Indeed, the respondent concedes that it has been open all along to the appellant to submit a new application for subdivision, which will be considered on its merits, and it would appear that the appellant's reluctance to do so until now simply reflects a desire to ascertain those considerations which may be taken into account in the evaluation of any future application. Accordingly, the appeal should be allowed and the trial judge's order that "the Defendant (Respondent) hear and determine, according to law, an application for approval of subdivision submitted by the Plaintiff (Appellant)" should be restored. The appellant is entitled to its costs both here and in the courts below.

Appeal allowed.

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