

1913 CarswellOnt 242, 24 O.W.R. 470, 4 O.W.N. 1127, 11 D.L.R. 138

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Coleman v. McCallum

Coleman v. McCallum & City of Toronto

Ontario Supreme Court (High Court of Justice)

Hon. Mr. Justice Lennox.

Judgment: April 19, 1913

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Counsel: *W. N. Ferguson, K.C.*, for the applicant.

Irving S. Fairty, for the respondents.

Subject: Contracts; Public

Construction Law --- Statutory regulation — Building permits — Application for permit — Substantive requirements.

Municipal Law --- Zoning — Enactment and approval of zoning by-laws — Jurisdiction and powers — Extent of authority.

Municipal Law --- Zoning — Judicial interpretation of zoning by-laws and statutes — General principles of construction.

Municipal Corporations — Apartment House By-law — Definition Contained in Earlier By-law — Definition in Statute — Former Definition Adopted — 2 Geo. V. c. 40, s. 10 — "Private Temperance Hotel" — Mandamus Granted for Permit — Conditions — Undertaking.

Lennox, J., granted a mandamus compelling the city architect of defendant corporation to issue a building permit for the erection of a structure at the corner of Sherbourne and Rachael streets, Toronto, holding that by-law 6061 of defendants passed by virtue of statute 2 Geo. V. c. 40, s. 10, prohibiting the erection of apartment houses upon certain streets must be taken to have adopted the definition of "apartment house" set out in an earlier by-law of the defendant corporation as to buildings, and not that of the statute under which it was passed, and that therefore the proposed structure was not a contravention of the by-law.

Motion for a mandamus compelling defendant, city architect of defendant corporation, to issue a permit for the erection of a structure at the south-west corner of Sherbourne and Rachael streets, Toronto, according to plans filed.

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Hon. Mr. Justice Lennox:

1 I think the applicant is entitled to a mandatory order, but not unconditionally.

2 On the 11th of March, 1907, the respondents, the City of Toronto, passed "No. 4861, A By-law for Regulating the Erection and to provide for the safety of Buildings;" and, subject to certain amendments not material to this application, this by-law continued in full force until the 1st of April instant. Under the head of "Definition of Terms," it was enacted by sec. 14. "The following terms of this by-law shall have the meaning assigned to them respectively. . . .

3 "Apartment or Tenement House. (32) A building which, or any portion of which, is or is intended to be occupied as a dwelling by three or more families living independent of one another and doing their cooking upon the premises." . . .

4 "Lodging House. (34) A building in which persons are accommodated with sleeping apartments, including hotels and apartment houses, where cooking is not done in the several apartments." The punctuation perhaps obscures the meaning a little but at all events it is plain that, for the purpose of "regulating the erection . . . of buildings" in the city of Toronto, suites or groups of apartments are divided into two classes, namely; (a) Suites in which the occupants do their own cooking — the building containing these is an apartment or tenement house; and (b) Suites in which the occupants do not do their own cooking — the building containing these is a lodging house.

5 Having thus eliminated from "Apartment House" a class of building which might otherwise have been called, which I think, would otherwise have been called, an apartment house, sec. 42 proceeds to provide for a special method of construction to prevent the spread of fire, in all apartment houses which are not fire proof, and to off-set the additional risk incident to the multitude of kitchens permitted in this class of building — precautions which are not enacted and which are obviously not so necessary in the case of a lodging house. This was the building law in Tor onto when the Legislature in 1912 amended sec. 541a of the Consolidated Municipal Act of 1903 as enacted by sec. 19 of the Municipal Amendment Act of 1904 by adding after clause (b) the following clauses: —

(c) In cities having a population of not less than 100,000, to prohibit, regulate and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

(d) For the purposes of this section an apartment or tenement house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons. 2 Geo. V. ch. 40, sec. 10.

6 Subsequently on the 13th of May, 1912, and without repealing or amending the definitions of "apartment or tenement house" and "lodging house" above set out, and with by-law 4861 still in force "for regulating the erection of buildings" in this city, the respondents, the city of Toronto, passed "No. 6061, A by-law to prohibit the erection of apartment or tenement houses, and of garages to be used for hire or gain, on certain streets" and by clause 1 prohibited, as the council had power to do, the erection of any apartment or tenement house upon property fronting upon Rachael, Sherbourne and other streets.

7 With this provincial law and the by-laws referred to in force the applicant in the month of March last filed plans and specifications and applied to the city council for permission to erect what he calls a temperance hotel upon property fronting upon Rachael and Sherbourne streets. There have been several alterations in the plans. Coleman originally intended and the application was launched for permission to erect a building in which cooking would be done in the several suites, and clearly an apartment or tenement house as defined by by-law 4861; a class of building prohibited upon these streets by by-law No. 6061. The plans as now on file shew only provision for one kitchen and dining room in the building and the applicant swears that finding his first application was contrary to by-law 6061: "I decided to erect and conduct on the said premises an hotel conducted as an ordinary licensed hotel is conducted, excepting that I have no license for the sale of liquor and do not intend to apply for the same.

8 3. Following out my changed scheme, I had the plans altered so as to cut out all the separate kitchens, sinks, etc., and provided on one floor reading rooms, dining rooms, lavatories, baths, wash-house, catering department, and servants quarters and lavatories similar to that provided for in the ordinary licensed hotel, and it is my intention, and the plan of my building is drawn for use in this manner only, that none of the guests at my hotel shall be allowed to wash in my rooms or to cook in my rooms, and that the work of their rooms shall be done by my servants, and the light shall be furnished by me, and the heat shall be furnished by me and the meals shall be furnished by me in the general dining room, and in general the whole building shall be under my control and supervision."

9 As shewn by Mr. Benk's affidavit in the end, as at the beginning, the permit was refused upon the ground that the erection of the proposed building "would constitute a contravention of by-law No. 6061." Upon the argument it was mentioned, but only as affecting the size of the bed-rooms, that a new by-law was passed on the 1st of April instant. I have obtained a copy of this by-law 6401. It too is "a by-law for regulating the erection, and to provide for the safety of buildings," and it repeals No. 4861. Passed at a time when this motion was standing for argument, it may be that the city is not entitled to rely upon it, but as there were several stages in the applicant's proceedings I have decided to take this by-law into consideration in arriving at a conclusion. The only points to be noted are: (1) For "apartment or tenement house" this by-law adopts the definition contained in 2 Geo. V. ch. 40, sec. 10, above quoted. Under this definition, if the council had chosen to leave the matter there the narrowing effect of the definitions in the old by-law would have been avoided; and by a re-enactment of prohibitory by-law 6061 the probable object of the council might have been accomplished; (2) But, instead of this, this repealing by-law re-enacts, word for word, the definition of the former by-law as to what constitutes a lodging house, and thus again excludes from "Apartment or Tenement House" any building of the apartment house class in which cooking is not done or provided for in the several apartments.

10 (3) Under the new by-law bed-rooms shall have a floor area of at least one hundred square feet, in hotels, apartment, tenement, and lodging houses; and

11 (4) Section 42, for special safeguards against fire in apartment houses, is re-enacted.

12 After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a temperance hotel. Hotels of course are not prohibited. I prefer, however, not to rest my decision wholly, or mainly, upon this view of the question.

13 Take it, however, that it is not an hotel, is the applicant entitled to be permitted to erect the proposed building upon the proposed site? I am of opinion that he is. The refusal, as I have stated, was based upon by-law

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No. 6061, but the question cannot be determined by this by-law alone. It prohibits the erection of an "apartment or tenement house" upon the site in question. When it was passed building by-law No. 4861 was in force and this latter defined and constituted an apartment house where separate cooking is not done, as I have already quoted, "a lodging house." The proposed building as now shewn by the plans and specifications and described in the affidavits is a lodging house within the meaning of this definition. That it is called an hotel is immaterial as an hotel, by the same definition is also a lodging house. It is manifest then that by-law 6061 prohibited apartment and tenement houses as defined under this caption in the building by-law, only, and not those designated lodging houses in the same building by-law.

14 It was argued that you must adopt the unlimited description of the statute of 1912, but this contention is based on a misconception of the function of the statute. The statute is not intended to prohibit anything. It gives the power to prohibit and limits its extent. Within that limit the council can act, short of that limit they may stop — as they did here. Beyond that limit they cannot go. To adopt the full measure of the statutory definition, or rather limitation, the council had only to repeal the definitions quoted; and failing to do this these definitions govern.

15 Is the situation altered by the new by-law? I cannot see that it is, and I have already indicated the reason, namely, that it re-enacts the former definition of a lodging house. A lodging house as defined under the former by-law was not prohibited by No. 6061. A lodging house under the new by-law is just what it was under the old and is nowhere prohibited.

16 The wisdom or unwisdom, or the fairness or unfairness of the powers conferred by the Legislature, or, the exercise of these powers by the council, are not matters for me to deal with, but statutes, and *a fortiori* by-laws, purporting to control or take away rights ordinarily incident to ownership, quasi-expropriation without payment, confiscation as it is often called, must be construed strictly and the meaning must not be left in doubt — they must be definite and certain to all intents.

17 On the other hand having regard to the easy stages by which the applicant has developed his present proposals there should be some guarantee of the good faith of the applicant and that not only will a building be erected of the character now indicated but that afterwards it will be used for the purposes and in the manner declared.

18 Therefore upon the applicant amending the plans on file so as to provide that each of the bed-rooms shall have a clear floor area of 100 square feet at least and upon undertaking by his counsel that the building in question shall not at any time without the consent of the municipality or the Court be diverted from the uses and purposes or be occupied or used in a manner inconsistent with the uses and purposes now declared by the applicant and that in the event of the sale of the property due notice of this undertaking and of the order now to be made shall be given to the purchaser and he will be required, in and by the conveyance to him, to bind himself and his heirs and assigns to observe and abide by the conditions above set out and such order as the Court may make.

19 And the applicant for himself and his heirs and representatives in estate undertaking to abide by such order or judgment as the Court may make or pronounce touching the matters hereby provided for an order of peremptory mandamus reciting or embodying the foregoing conditions and an undertaking will issue to the purport and effect in the notice of motion claimed.

20 There will be no costs.

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