In the Court of Appeal of Alberta

Citation: Agostini v. Parkland (County), 2006 ABCA 127

Date: 20060419
Docket: 0503-0357-AC
Registry: Edmonton

Between:

Mike Agostini, Paula McGinnis, Don Meredith, Betty Meredith, Joanne Merdith, Jean Morrison, Laura Peaire, Jana Siminiuk and Westland Park Community League

Applicants

- and -

Parkland County and the Subdivision and Development Appeal Board of Parkland County

Respondents

Reasons for Decision of
The Honourable Mr. Justice Keith Ritter

Application for Leave to Appeal the Decision of the Subdivision and Development Appeal Board of Parkland County dated October 24, 2005
In respect of Permit #05-D-057 and Permit #05-D-058

Reasons for Decision of
The Honourable Mr. Justice Keith Ritter

[1] The Applicants apply for leave to appeal a decision of the SDAB granting Burnco Rock Products Ltd. ("Burnco") two permits to carry out gravel extraction and processing operations on lands located near those of the applicants. They advance eight proposed grounds of appeal. At the application, I advised that only three of the proposed grounds had any potential merit and asked the Respondents to restrict their arguments to those grounds. The other five grounds are fact specific or raise jurisdictional issues that have been answered by one or another of the Respondents. These reasons address the three grounds that required a response from the Respondents

Issues

[2] The remaining three issues are:

(1) Did the SDAB breach the principles of natural justice and procedural fairness when, during the course of the hearing on October 24, 2005 and while oral submissions were being made to the SDAB, one of the SDAB panel members left the County Council Chambers for a break and later participated in the decisions on the two appeals?

(2) Did the SDAB make patently unreasonable findings of fact when the SDAB concluded that it was not demonstrated that the proposed developments would result in adverse effects to surface or ground water beyond those specified by Burnco?

(3) Did the SDAB make patently unreasonable findings of fact when it concluded that the evidence presented did not confirm that the proposed developments would increase the risk of illness to adjacent residents due to airborne pollutants?

Background

[3] On October 24, 2005, the SDAB held a public hearing respecting two permits granted to Burnco by the Parkland County Development Authority authorizing gravel extraction and processing operations on lands owned by Burnco legally described as the N½ 22-53-3-W5M and SE 16-53-3 W5M. Many area residents opposed the issuance of these permits. The SDAB restricted each opponent or their representative to a 10 minute presentation. If a representative appeared on behalf of more than one opponent, that representative was nevertheless restricted to a 10 minute presentation.

[4] During the 10 minute presentation by counsel for the Applicants, one of the six presiding members of the SDAB left the meeting at 7:27 P.M. and returned to the meeting at 7:29 P.M.. The

presentation continued in his absence. The time that this member was away from the hearing could therefore have been as little as one minute or close to three minutes. This means he was absent for from 10% to 30% of the counsel's presentation.

Standard of Review

[5] Leave to appeal a SDAB decision may be granted on questions of law or jurisdiction if they are of sufficient importance to merit further appeal and if the appeal has a reasonable chance of success: *Municipal Government Act*, R.S.A. 2000, c. M-26 ("MGA"), s.688(3), ***Seabolt Watershed Association. v. Yellowhead (County)***, 2002 ABCA 124, 303 A.R. 347, at para. 9. If the applicant is unable to establish a reasonable prospect that the decision may be reversed using the least deferential standard of the Pushpanathan analysis (correctness), leave should not be granted: ***R & S Resource Services Ltd. v. Red Deer (County)***, 2004 ABCA 354, 3 M.P.L.R. (4th) 212, para.12.

Analysis

1. **Were the principles of natural justice breached when a tribunal member who was not present for the entire hearing took part in the final decision?**

[6] The general rule is that he who hears must decide: see ***Mehr v Law Society of Upper Canada***, [1955] S.C.R. 344. Implicit in this rule is the notion that adjudicators must hear the case made by all parties to a dispute. Support for this proposition is found in the manual used by SDABs in Alberta. At page 34, that manual provides:

> The SDAB members must be present throughout the hearing of a specific case. . . . SDAB members should ensure that they do not leave the hearing room (e.g., for a break) while the hearing is ongoing. Any member who has to leave during a hearing may not return or participate in the decision in any way if the hearing has continued without the member.

[7] The Respondents argue that the absence of the panel member was so brief as to be meaningless and that what was said during the SDAB member's absence was summarized in written material presented to the SDAB. Finally, they argue that the Applicants, or at least one of them, was aware of the absence and should have raised it as an issue before the SDAB made its decision. I regard these points as arguably addressing the issue raised by the Applicants. However, they go no further than that. Therefore, this issue is arguable and enjoys a reasonable prospect of success. Leave to appeal this issue is granted.

2. **Did the SDAB make patently unreasonable fact findings resulting in a loss of jurisdiction?**

[8] The latter two proposed grounds can be dealt with together as they involve similar considerations. The first finding of fact relates to the safety of ground water supply. The Applicants argue that the SDAB's finding that some water wells may be negatively impacted compelled it to reject the permits because s.617(b) of the MGA requires SDABs to only approve developments that "maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta". The Applicants argue that negative impacts can never maintain or improve the physical environment.

[9] However, the MGA must be read and interpreted such that it recognizes that often a balancing of positive and negative impacts is required. Sometimes the quality of the physical environment within which human settlement exists will be improved even though it has negative impacts on a smaller scale. The SDAB recognized that some water wells might experience a negative impact. It also recognized that human settlement requires roads and other construction that require gravel. The SDAB made no error of law or jurisdiction in balancing the negative and positive impacts of the proposed developments. Leave on this ground is refused.

[10] The final contested finding of fact pertains to an alleged failure of the SDAB to follow the Parkland County's Municipal Development Plan ("Plan"). S. 3.6 of the Plan provides:

> Parkland County will seek to protect the viability of agricultural areas and to conserve agricultural land wherever possible by:
>
> > (a) directing non-agricultural land uses to non-agricultural land use areas . . .

[11] The proposed developments are discretionary uses within the zoning applicable to the development lands. A visionary statement found within a general municipal plan does not override either permitted uses or discretionary uses when other preconditions to the discretionary uses have been met. Leave to appeal on this ground is also refused.

Conclusion

[12] Leave to appeal on the first ground is granted. Leave on all other proposed grounds is refused.

Application heard on April 13, 2006

Reasons filed at Edmonton, Alberta
this 19th day of April, 2006

Ritter J.A.

Appearances:

R.C. Secord
for the Applicants

S.C. McNaughton
for the Respondent, Parkland County

A.J. Jordan, Q.C.
for Burnco Rock Products Ltd.