

In the Court of Appeal of Alberta

Citation: Mattson v Rocky View (County), 2023 ABCA 89

Date: 20230310
Docket: 2301-0024AC
Registry: Calgary

Between:

Tim Mattson

Applicant

- and -

**Rocky View County Subdivision and Development Appeal Board
and Rocky View County**

Respondents

**Reasons for Decision of
The Honourable Justice Frans Slatter**

Application for Permission to Appeal

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[1] The applicant brought an application for permission to appeal a decision of the Subdivision and Development Appeal Board, which was made returnable for oral argument on March 9, 2023. The applicant has now applied to adjourn the application until May 31, 2023. The named respondents consented to the adjournment.

[2] This application has again brought to the forefront an anomaly in the provisions of the *Municipal Government Act*, RSA 2000, c. M-26. As presently formatted, the holder of the permit which the applicant seeks to appeal is not a party to this application. In my view the application should not proceed in this form.

Facts

[3] A neighbour of the applicant (Ke Xin Fewell) applied for and on August 9, 2022 was given a development permit. That permit authorized the construction of an “accessory dwelling unit”, and required some variances.

[4] The applicant appealed the granting of the permit to the Board, arguing that the development did not fit the definition of accessory dwelling unit and would have a negative impact on the enjoyment and value of his own property. After several adjournments the Board heard the appeal on December 15, 2022, and dismissed it on December 30, 2022.

[5] On January 26, 2023, four days before the deadline, the applicant filed his application for permission to appeal. The application was originally returnable on February 22, 2023, but was put over to March 9, 2023. The respondents named in the application were Rocky View County, and the Board. The permit holder, Ms. Fewell, was not named as a respondent.

[6] On February 24, 2023 the applicant and the named parties advised the Court that they had consented to adjourning the matter to May 31, 2023. As the assigned duty judge, I inquired as to why the permit holder was not a party to the application, and why the memorandum in support of the application had not been filed. The applicant’s counsel responded on March 6, 2023, at which time I advised that the adjournment could be spoken to on the return date, March 9, 2023.

The Proper Parties to an Application for Permission to Appeal

[7] As noted, the application as presently framed names only two respondents: Rocky View County and the Board. This was done in literal compliance with s. 688(2)(a) and 688(5) of the *Act*:

688(2) An application for permission to appeal must be filed and served within 30 days after the issue of the decision sought to be appealed, and notice of the application for permission to appeal must be given to

- (a) the Land and Property Rights Tribunal or the subdivision and development appeal board, as the case may be, and
- (b) any other persons that the judge directs.

Section 688(5) requires that notice be given to the municipality.

[8] The way these sections are drafted, they appear to assume that the applicant is the landowner, who is either appealing the denial of a permit, or the granting of a permit with conditions that are thought to be unacceptable. In an application like the present one, where the application is brought by a neighbour or other interested party (such as the municipality), there is no stated requirement to name the permit holder as a respondent, even though the rights of the permit holder are clearly engaged.

[9] Counsel for the applicant observes that it has been a long-standing practice in matters of this sort not to name any respondents other than those required by the statute. That is likely accurate, although it is common practice for the court to be presented with consent orders adding the permit holder as a respondent. Counsel recalled that on occasion judges have expressed the opinion that additional respondents should not be added. This is possibly a reference to the dissenting reasons in *587901 Alberta Ltd (cob Centre Street North Liquor Store) v Calgary (City)*, 2009 ABCA 274 at para. 10, 460 AR 326, although in that case the permit of the added respondent was not at risk.

[10] It is a fundamental principle that the courts will not adjudicate on legal rights unless all affected parties are given appropriate notice of the proceedings. It seems unlikely that the Court would be prepared to adjudicate an application for permission to appeal like this one without the permit holder being added as a respondent. If nothing else, the permit holder should be bound by the decision.

[11] The anomaly in the statute is unfortunate, but in my view s. 688(2) should properly be interpreted as listing the mandatory parties to an application for permission to appeal. Those are the parties who must be named and served within the 30 day limit: *Northern Sunrise (County) v De Meyer*, 2009 ABCA 205 at para. 14, 454 AR 88, 6 Alta LR (5th) 63. The section should not, however, be read as precluding the addition of other necessary and proper parties to the application, nor as sanctioning the exclusion of such parties. The *Act* anticipates all interested parties being involved at the application stage, because s. 688(3) contemplates representations by persons affected. In an application like this, in my view the better practice is to name the permit holder or landowner as a respondent. There is no prospect of prejudice to the landowner because it has a convenient self-help remedy if it does not want to participate: it need not show up.

[12] The present application for permission to appeal is deficient for failing to name the permit holder or landowner. The application does include in the relief requested “directions from the court with respect to notice to affected parties”, but that is not a complete answer. Section 688(2)(b)

allows the Court to direct the addition of other parties, but the Court is clearly not in a position to take the initiative in doing so. Only the applicant would know who those parties are. While the initiative must be on the applicant, it is also within the proper mandate of the municipality and the Board to ensure that all the necessary and proper parties are named. In my view they should not acquiesce in any steps in the proceeding, including adjournments, without satisfying themselves that all necessary parties have been named.

[13] In any event, if an applicant has any doubts about the appropriate parties, an early application should be brought for directions. It is not an efficient use of resources to simply set the matter down for argument, and then adjourn it over, without confirming that all necessary parties have proper notice. If nothing else, the issue of the appropriate parties should be dealt with on the first return date, even if an adjournment of the oral argument is appropriate.

[14] Counsel for the applicant wrote that “. . . our client was asked by our office to provide notice of this application to the development permit applicants”, and “we have been advised that he has done so”. Since no affidavit of service was filed, it was unclear what had happened, although counsel advises that the permit holder was given a copy of the application. That being said, she was not given the Webex link, and did not appear this morning, suggesting that she may not fully understand that her rights are engaged.

[15] The absence of the permit holder also prevents consideration of any prejudice that might accrue because of the proposed adjournment of the application. For example, there is no indication on this record whether the permit holder has commenced or intends to commence construction of the accessory dwelling unit in reliance on the permit.

[16] In short, the application for permission to appeal must be amended to name the permit holder as a respondent.

The Timing of Applications for Permission to Appeal

[17] The provisions of the *Act* make it clear that challenges to development permits must be expedited and prosecuted diligently: *Tymchak v Edmonton (Subdivision and Development Appeal Board)*, 2011 ABCA 337 at para. 12, 91 MPLR (4th) 112; *Van Panhuis v Lamont (Town of)*, 2000 ABCA 201 at paras. 21-23. The appeal to the Board must be filed within 21 days: s. 686(1)(b). The Board is required to hold an appeal hearing within 30 days: s. 686(2). It must render its decision within 15 days of conclusion of the hearing: s. 687(2). An application for permission to appeal to the Court of Appeal must be filed within 30 days: s. 688(2). These tight deadlines are partly in place because construction in Alberta is seasonal. A permit holder is entitled to know in a timely way if the permit is valid.

[18] Rule 14.40 requires filing and service of the application for permission to appeal, together with any required affidavit, and a memorandum of argument. The *Information Note* after R. 14.40 includes:

All of the materials should be filed simultaneously, unless the application must be filed first to preserve a time limit. . .

With respect to applications for permission to appeal, R. 14.44(3) provides:

(3) Applications to preserve a time limitation may be brought on the notice a single appeal judge directs.

No application for relief was brought under this provision.

[19] In this case, the application was filed on January 26, 2023 and was returnable on March 9, 2023. That was within the acceptable range. The present application to adjourn the application for three months to May 31, 2023 is *prima facie* unreasonable. It should not be accommodated, at a minimum, before finding out the permit holder's position on the application and the adjournment. Does the permit holder intend to do anything in reliance on the permit?

[20] The Registry will often accept an application for permission to appeal for filing, even if the accompanying affidavit and memorandum are not included. It is presumed that such partial filings are made to preserve the time limitation to appeal. As noted, the applicant filed his application for permission to appeal four days before the deadline, and he did not include any affidavit or memorandum of argument. While that is a practice that is accommodated, it does not mean that the applicant can delay filing the necessary affidavit and memorandum indefinitely or unreasonably. The *Rules* and the *Information Note* contemplate the filing of the missing material without any delay.

[21] Counsel advises that he was not counsel at the Board hearing, he did not have the necessary background documentation, and he was only retained a few days before the application was filed. It has, however, now been over six weeks since the filing of the application, and the memorandum of argument has still not been filed.

[22] The applicant also explains that the memorandum of argument had not been filed because he was awaiting the filing of the record by the Board. It is not obvious that the applicant required the full record to file his materials on the application for permission to appeal. Given that the statutory regime contemplates expediting these applications and appeals, the memorandum and support material must now be filed to ensure that the permit holder knows the basis of the application, and the application is ready to be heard without any further delay.

Conclusion

[23] In conclusion, the application to adjourn must be granted, because the permit holder does not have proper notice of these proceedings. An adjournment to May 31, 2023 is, however, unreasonable without knowing the position of the permit holder. The application is adjourned until March 29, 2023.

[24] The application for permission to appeal is amended by adding Ke Xin Fewell as a respondent. The amended application is to be personally served on her no later than March 16, 2023.

[25] The applicant's memorandum of argument and any other material he proposes to rely on must also be filed and served on the respondents no later than March 16, 2023, together with a copy of these reasons.

Application heard on March 9, 2023

Reasons filed at Calgary, Alberta
this 10th day of March, 2023

Slatter J.A.

Appearances:

T.W. Bardsley
for the Applicant

M. Mitton (no appearance)
for the Respondent Rocky View County Subdivision and Development Appeal Board

K.L. Becker Brookes
for the Respondent Rocky View County