IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

ALLSIDE EXTERIORS & RENOVATIONS LTD.	)	***K. M. Coutts*** *for the Appellant*
(Applicant) Appellant	)	***F. Li*** *for the Respondent*
- and -	)	*Appeal heard:*
THE TOWN OF MORDEN	)	***February 28, 2017***
(Respondent) Respondent	)	*Judgment delivered:*
	)	***June 30, 2017***

CAMERON JA

Introduction

[1] The applicant (Allside) appeals the dismissal of its application for a declaration of invalidity regarding a levy imposed by the respondent (Morden) as a condition of a development agreement entered into between the parties facilitating subdivision of Allside's property. The dispute between the parties turns on whether Morden had the lawful authority to demand payment for the levy.

[2] For the reasons that follow, I would dismiss the appeal. While the application judge may have made minor factual errors in reaching his

decision, those errors were immaterial to his ultimate conclusion that the levy was not unfair or imposed without notice.

Background

[3] The property in question is located along Willcock's Road in Morden (the road). In 2005 or 2006, Morden decided to pave the road. The road was located within an area zoned as agricultural, although Morden intended that the area be used for future industrial development.

[4] In 2007, the former owners of the property entered into a development agreement with Morden that allowed for the subdivision of a larger piece of property, and for an existing structure on the subdivided property, to be used as a storage business. The property at issue in this case is the parcel from the subdivision on which the storage business was located (the property). While the property was zoned as agricultural, the storage business was classified as a legal non-conforming use with the proviso that no structural changes would be permitted without the approval of Morden's council.

[5] Allside purchased the property in 2009. Shortly after purchasing the property, Allside wished to renovate it in order to increase the number of storage units. While Allside disputes when it was definitively advised that it had to apply to rezone the property to industrial development based on the structural change, the fact remains that it did so.

[6] The request to rezone was granted on the condition that Allside enter into a development agreement (the rezoning development agreement). It is undisputed that, when the rezoning development agreement was signed

on October 29, 2009, Morden verbally indicated that it expected that a levy was to be paid by Allside for its share of the cost to pave the road. In this regard, art 7 of the agreement states:

> Should [Allside] wish to remove this [rezoning] development agreement in order to change the use of the property, [Allside] acknowledges the Town of Morden may require certain actions including but not limited to payment for adjoining infrastructure be made prior to the [rezoning] development agreement being terminated.

[7] Allside asserts that, after the rezoning development agreement was signed, Morden requested payment of the levy, but Allside refused to pay it.

[8] In July 2011, Morden's Town Council passed a resolution confirming that any change to the use of the property would require payment "towards the concrete infrastructure located in front of the property."

[9] Next, in September 2011, Allside entered into an agreement to sell a portion of the property. The agreement was conditional on Allside obtaining approval to subdivide the property.

[10] In November 2011, Morden's Town Council passed a resolution approving Allside's subdivision application subject to the condition, among others, that Allside and Morden enter into a development agreement (the subdivision development agreement) which would include a condition that Allside be required to pay the levy.

[11] Allside signed the subdivision development agreement on January 17, 2012 and sold the portion of the now subdivided property. However, it still refused to pay the levy. Instead, it placed funds in the amount of its

portion of the levy in trust with its counsel and made application for a declaration that the levy was invalid and that the portion of the subdivision development agreement relating to the levy was void and unenforceable.

Decision of the Application Judge

[12] The application judge dismissed the application. He rejected Allside's position that the levy constituted a local improvement tax and was therefore subject to the provisions of section 311 of *The Municipal Act*, CCSM c M225 (the *MA*), governing how a municipality may recover expenditures. He found that Morden was able to recover its costs by way of the subdivision development agreement and that the condition that Allside pay the levy contained in that agreement was valid.

[13] In dismissing Allside's assertion that it was being treated unfairly on the basis that it did not know about the levy at the time that it purchased the property and it was being forced to pay the levy, the application judge found: i) Allside was aware of the levy prior to purchasing the property; ii) it agreed to pay the levy when it entered both the rezoning development agreement and the subdivision development agreement; and iii) Allside was only required to pay the levy when it chose to subdivide the property.

[14] In response to its claim that it was being treated differently than other landowners, the application judge found that the storage business was the only commercial venture along the road.

Issues

[15] While Allside lists several grounds of appeal, they relate to only

two issues. First, Allside argues that the application judge erred in finding that the levy did not constitute a local improvement tax subject to the provisions of sections 311 and 315(3) of the *MA*. If not a local improvement tax, the issue then becomes whether the application judge erred when he held that Morden was capable of recovering a portion of the cost of the road by way of the subdivision development agreement.

[16] Second, Allside argues that the application judge erred in the findings of fact he made in response to its allegations that it was being treated unfairly and forced into the development agreements. In my view, this issue can be summarily dismissed. Findings of fact are reviewed on the basis of palpable and overriding error. An overriding error is one that goes to the very core of the outcome of the case (see *Benhaim v St-Germain*, 2016 SCC 48 at paras 38-39).

[17] While it is arguable that the application judge erred when he held that Allside was aware of the levy prior to purchasing the property and that it agreed to pay the levy in the rezoning development agreement, neither of these findings go to the core of his overall finding that, when it entered into the subdivision development agreement, it was aware of—and agreed to pay—the levy.

[18] Further, while the application judge arguably erred in finding that there were no other commercial ventures on the road at the time that this matter was heard, none of the existing ventures had applied to rezone their respective properties. Thus, even if incorrect, this error did not affect the core of his decision that the subdivision development agreement was not unfair in this regard.

Discussion

Did the levy constitute a local improvement tax pursuant to the MA?

[19] Whether the levy constituted a local improvement tax pursuant to the *MA* constitutes a question of mixed fact and law reviewable on the standard of palpable and overriding error. See *Housen v Nikolaisen*, 2002 SCC 33.

[20] As conceded by Morden, if the levy constituted a local improvement tax, there is no question that it could not have been enforced, as the provisions of the *MA* for the imposition of such a tax were not met.

[21] In asserting that the levy did constitute a local improvement tax, Allside relies on section 311 of the *MA*, which reads as follows:

> **Local improvement**
> **311** If approved by by-law, a municipality may undertake, as a local improvement for the benefit of all or part of the municipality,
>
> (a) the acquisition, development, upgrading or replacement of one or more of the following:
>
> . . .
>
> (iv) highways,
>
> or
>
> (b) any other project the cost of which includes a capital component.
>
> [emphasis added]

[22] Allside argues that the paving of the road constituted a local

improvement within the above definition. In support of its position, it underscores that, in cross-examination, the Director of Finance and Administration for Morden admitted that the levy for the road was a "tax levy" related to a "capital expenditure" and was created to recover a portion of Morden's costs for paving the road.

[23] Briefly, Allside submits that, if a municipality chooses to undertake a development which falls within the broad definition of a local improvement, the only way it can recover its costs is by following the processes mandated by the *MA* for the imposition of a local improvement tax.

[24] Morden argues that the levy was not a local improvement tax. Relying on the Supreme Court of Canada case of *Roberts v Portage la Prairie*, [1971] SCR 481, it submits that that there is no evidence that it intended the paving of the road to be a local improvement and that is why none of the sections dealing with municipal taxing provisions, including local improvement taxes, were followed.

[25] In *Roberts*, the plaintiff claimed damages regarding a sewage lagoon constructed by Portage la Prairie. He claimed that his lands were damaged by polluted water escaping from the lagoon. In order to avoid a limitation period imposed by *The Portage la Prairie Charter*, 1907 (Man), c 33, he argued that the lagoon was not constructed pursuant to the City's authority under the *Charter*, but rather, as a local improvement pursuant to *The Municipal Act*, RSM 1954, c 173.

[26] In rejecting the notion that the lagoon was constructed as a local improvement, Martland J, writing for the Court, stated (at p 488):

> Part VIII [the part dealing with local improvements] contains various requirements to be fulfilled before the defined works, in ss. 688 and 689, can be undertaken as local improvements. There is no evidence whatever that the sewage lagoon in question was constructed as a local improvement. The respondent built it in reliance on the authority given by its charter.

[27] Similarly, in *Riverside Realty & Construction Ltd et al v The City of Winnipeg*, 2015 MBQB 20, Simonsen J considered the argument that an obligation in a subdivision development agreement requiring the payment of a levy for the construction of roads constituted a local improvement. After considering the ability of municipalities to recover money for development charges, she stated (at para 33):

> [L]ocal improvement levies are imposed for the benefit of all property owners within a particular area, and prior to approval, are subject to a specific process under the *Act* (for example, s. 358 regarding local improvement levies for sewers). Once approved, they are assessed against each property owner within the affected area based on an additional assessment on the owner's annual tax bill. Here, there was no requirement that each property owner benefitting from the roadways make payment; rather, it was the developers who were to do so and they could pass the cost on to the eventual purchasers as they saw fit, not necessarily in accordance with the approach prescribed by the *Act* for local improvement levies.

[28] Taxation for local improvements is dealt with in Part 10, Division 4 of the *MA*. There are certain conditions which must be met if a municipality wishes to engage in such an endeavor. For example, it must prepare a plan or proposal which must describe the service, the area affected, the estimated cost of the service and the proposed method for calculating the tax (sections 313-314). Notice of the plan must be given and a public hearing must be held (section 318). Those affected by the plan are entitled

to object (section 319). In this case, Morden did none of the above, thus evidencing its intention not to proceed by way of local improvement.

[29] In my view, the ability for Morden to recover the cost of the road was not limited by the fact that its construction may have fallen within the broad power granted to municipalities to undertake local improvements.

[30] For example, while not necessarily the only source of alternate authority, section 250(2)(b) of the *MA* empowered Morden to construct or improve the road. It states:

> **General powers**
> **250(2)** Without limiting the generality of subsection (1), a municipality may for municipal purposes do the following:
>
> b) construct, operate, repair, improve and maintain works and improvements

[31] Similar to *Roberts* and *Riverside*, the road in this case was not constructed as a local improvement. It was constructed, at the very least, pursuant to Morden's general powers.

[32] Based on the above, I would reject Allside's contention that the levy constituted a local improvement tax.

Could Morden recover a portion of the funds expended by way of levy in the development agreements and did the agreements provide for such recovery?

[33] Allside argues that Morden has not demonstrated any statutory authority enabling it to create and enforce the levy.

[34] Morden argues that, pursuant to the *MA* and *The Planning Act*,

CCSM c P80 (the *PA*), it was entitled to impose the levy as a condition of the subdivision development agreement.

[35] Again, consideration of the above involves questions of mixed fact and law, reviewable on the standard of palpable and overriding error.

[36] There is no question that municipalities have broad powers to enter into agreements. I earlier stated that section 250(2)(b) of the *MA* provided Morden with the authority to construct the road. Accordingly, section 250(2)(d) allows for a municipality to "enter into agreements" with listed entities, "regarding anything the municipality has power to do within the municipality".

[37] Further, section 253(1) provides:

> **Scope of agreements**
> **253(1)** The power of a municipality referred to in clause 250(2)(d) to enter into agreements includes the power to enter into agreements pertaining to land, improvements, personal property, works, services, facilities, utilities or private works within or outside the boundaries of the municipality.

[38] Applications for subdivision are governed by the *PA*. Section 135 specifically provides:

> **Conditions of approval**
> **135** A subdivision of land may be approved subject to one or more of the following conditions, which must be relevant to the subdivision:
>
> . . .

> 3. A condition that the applicant enter into a development agreement with the government, the municipality or a planning district, as required, respecting
>
>> (a) the construction or maintenance — at the owner's expense or partly at the owner's expense — of works, including, but not limited to, sewer and water, waste removal, drainage, public roads, connecting streets, street lighting, sidewalks, traffic control, access, connections to existing services, fencing and landscaping.

In my view, this provision applies to the levy for the pavement of the road.

[39] Combined with the powers found in sections 250(2) and 253(1) of the *MA*, it is evident that Morden had the authority to enter into the subdivision development agreement, including the condition requiring payment of the levy.

[40] Therefore, for all of the above reasons, I would dismiss the appeal with costs.

Cameron JA

I agree: Mainella JA

I agree: leMaistre JA