IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***M. Newman** and*
CANAD CORPORATION OF MANITOBA	)	***E. B. Eva***
LTD.	)	*for the Appellant*
	)	
(Applicant) Appellant	)	***K. B. Bomback***
	)	*for the Respondent*
- and -	)	*the City of Winnipeg*
	)	
THE CITY OF WINNIPEG	)	***J. D. Stefaniuk** and*
	)	***S. E. W. Birse***
(Respondent) Respondent	)	*for the Respondent*
	)	*Keter Holdings Inc.*
- and -	)	
	)	*Appeal heard:*
KETER HOLDINGS INC.	)	***January 21, 2019***
	)	
(Intervenor) Respondent	)	*Judgment delivered:*
	)	***March 11, 2019***

On appeal from *Canad v The City of Winnipeg*, 2018 MBQB 137

LEMAISTRE JA

Introduction

[1] The applicant appeals the decision of the reviewing judge dismissing its appeal of a decision of the City of Winnipeg Appeal Committee (the Appeal Committee). The Appeal Committee's decision arose from an appeal from a decision of the Board of Adjustment (the Board) approving

variances to a zoning by-law. The applicant seeks to set aside the variance order. It also seeks a direction that if the applicant makes a new variance application, a different City planner must prepare a report, a different panel of the Board must hear the application and a different Appeal Committee must hear any appeal.

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] The intervenor Keter Holdings Inc. (the owner) owns property along Regent Avenue West and sought a variance to the City of Winnipeg, by-law No 200/2006, *Winnipeg Zoning By-Law* (1 March 2008) (the zoning by-law) in order to build a hotel. The zoning by-law restricts the height of buildings in the area to 49 feet and requires a front setback of 25 feet.

[4] The owner sought two variances to permit it to build a hotel to a height of 68 feet and with a front setback of 4.5 feet.

[5] The applicant owns and operates two hotels near the owner's property and opposed the variances.

[6] After a public hearing, the Board approved the variances. In doing so, it considered and "agreed with the administrative comments contained in the report of the Urban Planning Division dated June 19, 2017" (the report).

[7] The applicant appealed the Board's decision to the Appeal Committee pursuant to sections 189 and 251 of *The City of Winnipeg Charter*, SM 2002, c 39 (the *Charter*). The Appeal Committee, comprised of four City

of Winnipeg councillors, dismissed the appeal and confirmed the variance order.

[8] The Appeal Committee provided brief oral reasons for its decision and issued the variance appeal order. The variance appeal order states that the Appeal Committee considered the evidence adduced and submissions made. It addresses the criteria in section 247(3) of the *Charter* by way of a list with checked boxes. It also contains a supporting comment made by one of the councillors during oral reasons. The supporting comment is as follows:

> I fail to really hear the damaging effect on anybody. It seems like a positive development, it has the support of the area councillor and the planning department. I was not convinced of the injurious nature of allowing this application to proceed.

[9] The brief oral reasons contain an additional supporting comment made by another councillor not included in the variance appeal order as follows: "I would also like [to] add that the setback appears to be the same as most of the setbacks on the rest of the nearby properties."

[10] The applicant appealed the decision of the Appeal Committee to the Court of Queen's Bench pursuant to section 495(1) of the *Charter*. Section 495(1) permits an appeal on a question of law.

[11] Pursuant to r 13 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, the reviewing judge granted the owner limited intervention status for the appeal "on the interpretation of and relationship between s. 247(3) of the ***Charter*** and s. 36 of the *Zoning By-law*" by way of an endorsement decision dated May 25, 2018 (at para 18).

[12] On the appeal, the reviewing judge applied the standard of review of reasonableness to the Appeal Committee's decision. He concluded that section 36 of the zoning by-law did not bar the application for a variance or require the Appeal Committee to dismiss it. He also concluded that, while the oral reasons of the Appeal Committee for dismissing the appeal were conclusory and said nothing about section 36 of the zoning by-law (see paras 26-27), its decision was reasonable on a review of the record.

Grounds of Appeal

[13] The applicant raises three grounds of appeal:

1. the reviewing judge erred by failing to find that the Appeal Committee erred in law and breached the duty of procedural fairness by failing to provide reasons;

2. the reviewing judge erred both in his interpretation of section 36 of the zoning by-law, and by failing to find that the Appeal Committee failed to make the determination required by section 36; and

3. the reviewing judge erred by failing to find that the Appeal Committee applied the wrong test and that the outcome was unreasonable.

[14] The applicant asserts that there was no evidence to support a finding that section 36 of the zoning by-law was satisfied or that three out of the four criteria in section 247(3) of the *Charter* were met. It argues that the owner could configure the hotel differently and build it without the need for a variance. It says that the injurious effect arose due to conditions created by

the owner rather than any physical characteristic of the property and, therefore, the variance should not have been approved.

[15] The respondent and the owner agree on the issues on the appeal. They argue that the reviewing judge chose and applied the correct standard of review of reasonableness. They submit that he conducted a detailed and thoughtful analysis of the issues regarding section 36 and the Appeal Committee's reasons.

Standard of Review and Issues

[16] This is a statutory appeal from a decision of a judge reviewing a decision of an administrative tribunal. Accordingly, the role of this Court is to determine whether the reviewing judge chose and applied the correct standard of review. These are questions of law and are to be reviewed on the standard of correctness (see *Dr Q v College of Physicians and Surgeons of British Colombia*, 2003 SCC 19 at paras 43-44; and *The Armstrong's Point Association Inc v The City of Winnipeg et al*, 2013 MBCA 110 at para 3).

[17] There is no issue regarding the standard of review chosen by the reviewing judge. The parties agree that he correctly chose the standard of reasonableness. Accordingly, the essence of this appeal is whether the reviewing judge applied the principles correctly to determine whether the decision of the Appeal Committee was reasonable.

Analysis

[18] Section 36 of the zoning by-law permits a variance only where it has an injurious effect on the owner's property and specifies that injurious effects

do not include conditions created by the owner. It states:

> **VARIANCE ORDERS**
> 36. Where an owner requests a Variance Order from the provisions of this By-law, the person or body with the authority to approve a variance must not grant a Variance Order unless in the opinion of the person or body, the provisions of this By-law have an injurious effect on the owner's property. For purposes of this determination, injurious effects includes physical characteristics of the owner's site that make it difficult or impossible to comply with the provisions of this By-law, but does not include conditions created by the owner or conditions generally shared with other properties in the same area. Without restricting the generality of the foregoing, only the provisions of Parts 4 and 5 may be the subject of a Variance Order.

[19] Section 247(3) of the *Charter* establishes four criteria which must be met before a variance may be granted:

> **Criteria for approving variances**
> **247(3)** An application for a variance with respect to a property may be approved if the variance
>
> (a) is consistent with Plan Winnipeg and any applicable secondary plan;
>
> (b) does not create a substantial adverse effect on the amenities, use, safety and convenience of the adjoining property and adjacent area, including an area separated from the property by a street or waterway;
>
> (c) is the minimum modification of a zoning by-law required to relieve the injurious effect of the zoning by-law on the applicant's property; and
>
> (d) is compatible with the area in which the property to be affected is situated.

[20] The applicant asserts that the Appeal Committee did not mention section 36 of the zoning by-law when it dismissed the appeal and, therefore, the Appeal Committee failed to consider whether section 36 was satisfied. It argues that, in light of this failure, the Appeal Committee's decision was unreasonable and the reviewing judge erred when he found it to be reasonable.

[21] I am not persuaded that the Appeal Committee did not consider whether the requirement in section 36 was met. As stated by LeBel J in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (at para 57): "a decision maker's decision on the merits may imply a particular interpretation of the statutory provision at issue even if the decision maker has not expressed an opinion on that provision's meaning."

[22] In my view, the decision of the Appeal Committee is consistent with a reasonable interpretation of section 36 as allowing the variance and this was implicit based on the record (see *Agraira* at paras 57-58, 63).

[23] The Appeal Committee had the report, which specifically addressed the injurious effect of the zoning by-law on the property.

[24] The Appeal Committee confirmed the minimum variance of the zoning by-law granted by the Board to relieve the injurious effect on the owner's land (see section 247(3)(c) of the *Charter*). In my view, it could not have done so without first finding that an injurious effect existed.

[25] Furthermore, the Appeal Committee received extensive submissions; considered the evidence; applied the section 247(3) criteria; and issued the variance appeal order. A review of the record, and in particular the submissions of the parties, demonstrates that the issue raised by the applicant

with respect to section 36 of the zoning by-law was squarely before the Appeal Committee. Therefore, the Appeal Committee implicitly, if not explicitly, rejected the applicant's argument that section 36 did not permit the variance because the owner created the injurious effect on its property.

[26] The reviewing judge found that the Appeal Committee could reasonably conclude, as a threshold question, that section 36 did not preclude the owner from applying for the variances. His decision was consistent with the interpretation given to section 36 in the unreported case of *The Armstrong's Point Association Inc v The City of Winnipeg et al* (15 February 2013), Winnipeg CI12-01-78685 (Man QB), aff'd 2013 MBCA 110. I see no error in him so concluding.

[27] The applicant also submits that the Appeal Committee's reasons are conclusory and do not explain the decision to confirm the variance order. It argues that, because the Appeal Committee's reasons are inadequate, the reviewing judge erred when he found its decision to be reasonable.

[28] As Abella J stated in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (at para 16):

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable

> outcomes, the *Dunsmuir* [*Dunsmuir v New Brunswick*, 2008 SCC 9] criteria are met.

[29] Where reasons are either non-existent or insufficient, it may be appropriate for the reviewing judge to supplement the reasons (see *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at paras 22-23). Deference owed to decisions made by administrative tribunals upon review requires consideration of the reasons offered or which could be offered (see *Newfoundland and Labrador Nurses' Union* at para 12).

[30] The reviewing judge found that the Appeal Committee provided reasons, but that the reasons were "curt" (at para 25). He stated (at para 48):

> [The applicant] rightly raises a concern about the reasons provided in this case. In my view they approach the low water mark of what should be acceptable for a public administrative tribunal. There is merit to the notion that some further attention should be given by an Appeal Committee to express itself more fully than what has occurred here. Had it done so, this proceeding may never have occurred. However, the authorities binding upon me require a deferential review to be undertaken, and that is what I have done.

[31] Because he found that the reasons were deficient, the reviewing judge carefully considered the record; the reasons that could have been offered by the Appeal Committee with respect to the four criteria under section 247(3); and whether the outcome was within the range of possible reasonable outcomes (see *Newfoundland and Labrador Nurses' Union* at paras 14-18). He acknowledged the importance of recognising the Appeal Committee's expertise when considering the *Charter* criteria for a variance and its importance to the principle of deference.

[32] The reviewing judge concluded that the record supported the decision of the Appeal Committee that the criteria for granting the variance had been met. In doing so, he noted, "insufficient reasons are not a stand-alone ground for setting aside a decision" (at para 37).

[33] The reviewing judge correctly applied the standard of review of reasonableness and afforded deference to the Appeal Committee's decision (see *Dunsmuir v New Brunswick*, 2008 SCC 9).

[34] As stated by Moldaver J in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 (at paras 40-41):

> [U]nder reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. . . .
>
> Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable.*

[35] Here, the applicant has failed to show that the Appeal Committee's decision is unreasonable.

[36] In the circumstances, I have not been persuaded that the reviewing judge committed any error when applying the applicable legal principles to determine whether the decision of the Appeal Committee was reasonable.

[37] In the result, I would dismiss the appeal.

Costs

[38] Unless counsel file written submissions on the issue of costs, I

would order costs follow on the success of the appeal according to Tariff C. Any written submissions are to be filed no later than March 29, 2019 and be no more than five pages in length.

leMaistre JA

I agree: Hamilton JA

I agree: Pfuetzner JA