

SUPREME COURT OF YUKON

Citation: *Town of Faro v. Knapp, Dufresne et al*,
2010 YKSC 72

Date: 20101102
S.C. No. 10-A0109
Registry: Whitehorse

BETWEEN:

TOWN OF FARO

Petitioner

AND:

**ANGELIKA KNAPP dba A. KNAPP ACCOUNTING SERVICES
and NORTH STAR ADVENTURES, a partnership between
ANGELIKA KNAPP and ERIC DUFRESNE,
ANGELIKA KNAPP and ERIC DUFRESNE**

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Lori Lavoie
Angelika Knapp
Eric Dufresne

Counsel for the Petitioner
Appearing on her own behalf
Appearing on his own behalf

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a petition by the Town of Faro that the respondents shall immediately discontinue their use and occupation of Lot 1028 in that Town as a full-time residence in accordance with previous orders of this Court, April 28, 2009, and the Court of Appeal, August 19, 2010. The petition also asks that it be heard on short notice.

[2] The petition was filed on October 29, 2010, together with the affidavit of Heather

Campbell, which is fairly voluminous in that it contains both the decision of the Supreme Court and the Court of Appeal, as well as excerpts of correspondence between the Town's counsel and Ms. Susan Roothman, who acts for the respondents in those matters, but not on the current petition. Those documents were only provided to the respondents at the outset of the hearing this afternoon.

[3] The Town opposes an adjournment saying that, in a previous letter dated September 23, 2010, to Ms. Roothman, they laid out quite candidly their intentions, which were to give, essentially, the respondents an opportunity to make an application for a discretionary accessory residential use of the property by September 30th, about one week later, with an undertaking that Town Council would consider the application and then render its decision no later than October 15th. In the event that either the respondents decided not to make such an application, or if Council were to deny the application, then the respondents were to discontinue their use and occupancy, that being their full time residential use and occupancy of the property, no later than October 30th. In the event that they refused to comply with that direction, then the Town Council would seek an immediate remedy in this Court.

[4] The response to that letter came from Ms. Roothman October 15, 2010, stating that because there is no formal application or prescribed form with which to make an application for discretionary accessory residential use pursuant to the zoning bylaw, the Town has no authority to mandate her clients to make such an application. I am informed today that a previous email exchange indicated that the Town Council had indicated to the respondents, or their lawyer, that they would accept such an application by way of a letter.

[5] In a later letter from the Town's lawyer dated October 27th, there was a reference to settling the terms of the order from the Court of Appeal decision:

“Please be advised that we would like to settle the Order by November 15, 2010 and have it filed by November 22, 2010. Thereafter, we have been instructed to seek the court's intervention to ensure the timely preparation and filing of the Order;”

[6] To the extent that counsel for the Town of Faro advises me today that the effect of her petition, and I am paraphrasing here, is to enforce both the previous Order of the Supreme Court and the Order of the Court of Appeal, then there have been mixed messages between the correspondence of September 23rd and that of October 27th. It would appear that there was some latitude of time in terms of the filing of the Court of Appeal Order, and that there was no particular sense of urgency. The respondents have occupied the property for a number of years, I think going back to about 2002, and there would not be any particular prejudice suffered by the Town if they are given further time to respond to the petition that they only received today.

[7] What I am going to do is adjourn this over to November 23rd at 3:00 p.m. in Whitehorse to be spoken to. I am going to expressly give the respondents a further opportunity to make an application to the Town of Faro for a discretionary accessory residential use of the property under the bylaw. They can make that application by letter. To the extent that there is an absence of any reference to procedure in the bylaw, and I do not know that there is, but I am accepting the respondent's word for it at the moment, then they can seek directions from the Town Council as to what particulars are required to be included in the application, and any other procedural matters that they

should be aware of, so that their application will be favourably and fairly considered by the Town.

[8] If that application is made in a timely fashion before the 23rd of November, then it would be open to the respondents to seek a further adjournment, if it is required, in order to allow for the Town to consider and make a decision on the application. It may be that if they make their application within the week, a decision could be rendered prior to the 23rd of November. As counsel indicated in the letter of September 23rd, that kind of decision could be made within about a two-week period. If, however, and I am looking at you, Ms. Knapp, if you choose to rely on the position that because there is no formal application procedure, there is no obligation on you to make an application under the bylaw, as suggested by Faro's lawyer, then you may have to live with the consequences of that when this matter is again spoken to on the 23rd of November.

[9] It may be that you want to raise that very argument in response to the petition; I do not know, but there may be adverse consequences that will fall upon you if you choose not to make the application. That is not to pre-judge the matter, but it is to give you an opportunity to make the application. If you choose not to, fine, but there may be, and I emphasize may, because I do not know the details here, there may be adverse consequences and you may have to live with those consequences as a result of the hearing of the petition.

[10] The other thing that you should be aware of, because you are representing yourselves, is that the Town is seeking what are called solicitor and client costs in this petition. That is unusual in the sense that normally the successful party on a civil action

gets costs under a schedule in the *Rules of Court* and those are calculated on the basis of the complexity of the matter, the steps that are taken, and so on, and there is a certain formula that is used there. But costs on a solicitor and client basis are the actual lawyer's fees that the lawyer charges to the Town of Faro to represent the Town on this application, so they can be significant, and that may be something that you would want to take into account as well.

[11] Ms. Lavoie, have I omitted anything?

[12] MS. LAVOIE: Your Honour, you have adequately summarized all matters. I do have one concern, though, with respect to the date of the 23rd --

[13] THE COURT: Yes?

[14] MS. LAVOIE: -- in that I have a surgical procedure that I cannot have rescheduled on that date, and I would ask that we, in light of that, consider structuring this in such a manner that we actually set up a time frame to submit the application, the date to submit the application, the date to have the decision made, and then thereafter appear before you again to deal with the matter, if that's still necessary. And so that would mean, in my mind, just bumping it one week later. For example, requiring that the application, if it is going to be made, be made by the 12th of November.

[15] THE COURT: I am not going to go that route --

[16] MS. LAVOIE: All right.

[17] THE COURT: -- and here is why. Because of the apparent vagueness about the process for submitting such an application, and again, I am not pre-judging anything here because I do not know, I want there to be an opportunity for the respondents to make their initial application by letter requesting what particulars are required by the Town Council and any procedural issues that they should be aware of, and then there may be a back and forth in terms of further correspondence exchanged. I want that to happen before the matter is spoken to so that if the application is in a so-called perfected form by the time we next speak to the matter, then the respondents can, if a decision has not yet been made, seek a further adjournment . It should not be more than a couple of weeks because you have indicated in your letter that the Council can make that decision on a fairly expedited basis.

[18] MS. LAVOIE: That's correct, and --

[19] THE COURT: So all that means is that my adjournment order will vary the date from November 23rd to November 30th.

[20] MS. LAVOIE: Thank you very much. I do --

[21] THE COURT: At 3:00 p.m.

[22] MS. LAVOIE: Thank you, Your Honour. May I bring to your attention one further matter?

[23] THE COURT: Yes.

[24] MS. LAVOIE: And that is I worry about there being back and forth to

the extent that we are left in a position that there will always be the argument that they -- that Ms. Knapp and Mr. Dufresne weren't provided with enough information to put their application together. In that original September 23rd letter it said that such application be submitted to the Town along with all supporting documentation and written submissions addressing how the intent of the bylaw will be maintained if such discretionary accessory residential use is approved. So again, it didn't address procedure, certainly, but it did address what the Town expected in terms of submission.

[25] THE COURT: Okay, that is helpful, thank you. Any questions from your side?

[26] ANGELIKA KNAPP: Yes, because I rely on at the time we were still represented by Ms. Roothman that she made that argument replying to it that there was no formal application process, that the Town has no, if I recall correctly, is not allowed to require -- has no mandate to request --

[27] THE COURT:
"The Town has no authority to mandate our clients to make an application that does not exist pursuant to the Bylaw."

[28] ANGELIKA KNAPP: That's correct.

[29] THE COURT: Okay. If you want to rely on that, you are --

[30] ANGELIKA KNAPP: No, I'm saying at that time I had legal advice and this came to the -- because we discussed the matter of what Ms. Lavoie just read because the bylaw doesn't lay it out what needs to be -- what the documents need --

[31] THE COURT: Yes.

[32] ANGELIKA KNAPP: As you just said, the bylaw doesn't speak of it because the only two forms I am aware of through the proceedings in the zoning bylaw is Appendix A and B, and A is a development permit and B is an amendment to change the zone, and that's the only forms which are described in the bylaw.

[33] THE COURT: Yes.

[34] ANGELIKA KNAPP: Anyway, this is --

[35] THE COURT: I understand what the problem is, okay? I do.

[36] ANGELIKA KNAPP: That was the --

[37] THE COURT: There is no prescribed form, and that makes your job more difficult. You already have from Ms. Lavoie what she thinks the expectations of the Town Council are on the application to a certain extent, and that is in the September 23rd letter, but I am not going to tie your hands here. If you want to ask the Town what else they need from you in order that your application will be favourably and fairly considered, then it is open to you to ask the Town for that. It is not the ideal situation. Yes, it would be better if it was all laid out in black and white, but it is not, so you have got to make the best of a bad situation, or do nothing, and risk the potential consequences. I do not think I can say anything more than that.

[38] ANGELIKA KNAPP: Okay. So I am free to make the decision by then, or to ask them and then make the decision based on the information I receive from them.

[39] THE COURT: If you are going to apply by way of a letter, I would suggest you start that process immediately, so that you are as far along in the process as you can be by the time November 30th comes. All right.

GOWER J.