

COURT OF APPEAL FOR ONTARIO

RE: THE CORPORATION OF THE TOWNSHIP OF NORTH
FRONTENAC (Applicant/ Respondent) – and – EDITH MAE
WHITEMAN (Respondent/Appellant)

BEFORE: Goudge, Simmons, and Juriansz JJ.A.

COUNSEL: Peter S. Mirsky for the appellant
T. Anthony Ball for the respondent

HEARD: April 28, 2004

On appeal from the judgment of Justice Cheryl Robertson of the Superior Court of Justice dated July 24, 2003.

ENDORSEMENT

[1] Edith Whiteman appeals from the judgment of Justice Robertson dated July 24, 2003 ordering her to remove any trailers and motor homes from her property in the Township of North Frontenac within fourteen days. In a brief handwritten endorsement, the application judge rejected Ms. Whiteman's claim that she has a legal nonconforming right to continue to use the property as she has since acquiring the property in 1977, and declined to grant Ms. Whiteman equitable relief.

[2] The evidence of Ms. Whiteman is that shortly after purchasing the property in 1977 with her late husband, they and other family members parked five trailers on the property. Ms. Whiteman and her husband, her children, and her brothers and sisters-in-law have used the property for summer recreation since that time.

[3] Ms. Whiteman's evidence also indicates that, while the trailers are used in the summer, they remain on the property through the winter. A motor home replaced one of the original trailers in 1989, and is removed from the property each year from October until May. The application judge found that the original five trailers, except possibly one, have been replaced.

[4] The affidavits of Christopher Snider, a neighbour, and of Kenneth Lindey, a By-law Enforcement Officer for the Township, confirm that at least four trailers remain on

the Whiteman property on a year-round basis. The trailers are connected to water, power and septic systems on the property and cannot be removed because of landscaping features.

[5] At the time that Ms. Whiteman acquired the property, By-law 624 applied to the property. As Ms. Whiteman's claim to a legal non-conforming use originates under this By-law, it is necessary to reproduce certain provisions.

[6] Under By-law 624, the property was zoned "Resort/Vacation." Section 5.1(a) stated: "No building or structure shall hereafter be erected or altered ... except in conformity with the provisions of this By-law." Sections 4.2(b) and 6.1 stipulated that "not more than one Seasonal Dwelling House" could be erected and used on land zoned "Resort/Vacation". Section 3(15) defined "Seasonal Dwelling House" to mean "a single-family dwelling house used as an occasional resort for recreation, relaxation or vacation purposes, but not occupied continuously or as a principal residence."

[7] By-law 685, which came into effect on January 5, 1989, replaced By-law 624. By-law 685 zones the property "Seasonal Residential" and permits the use of "a seasonal dwelling". A "seasonal dwelling" is defined to mean "a dwelling used as a secondary place of residence for seasonal vacations and recreational purposes and not as the principal residence of the owner or occupant." Section 8.20 defines "dwelling" as follows: "... a building occupied, or capable of being occupied, as a home or residence by one or more persons and containing only one dwelling unit. This definition shall not include a modular home."

[8] By-law 685, unlike By-law 624, specifically refers to trailers and mobile homes. By-law 685 was amended by By-law 19-95, which amended the definition of trailer and allows the temporary use of a trailer as long as it is located on a vacant lot, complies with all zoning provisions, and a permit is obtained from the Township if the trailer remains in place for more than eight consecutive weeks. Ms. Whiteman concedes that she is in breach of the current by-law as amended, as all the trailers are on the property for more than eight consecutive weeks without a permit.

[9] Counsel for Ms. Whiteman submitted that Ms. Whiteman's use of the property was in compliance with By-law 624 and that she acquired a legal non-conforming use in relation to the trailers when By-law 685 replaced By-law 624. He argued that trailers are not buildings and pointed out that s. 34 (4) of the *Planning Act* did not deem trailers to be structures until 1983. He submits that Ms. Whiteman and her family have used the property for general recreation purposes and, according to the terms of the legislation in place in 1977, cannot be said to have placed any buildings or structures on the property. Therefore, he continued, Ms. Whiteman has a legal nonconforming right to continue to

use the property in the same way it has been used since 1977 even though subsequent legislation deemed trailers to be structures and the subsequent by-law regulates trailers specifically.

[10] We do not accept the characterization of Ms. Whiteman's use of the property as one involving activity but not structures. The evidence that the five trailers are permanently attached to the property and were used by several families provides an adequate basis to conclude that the trailers breached By-law 624's stipulation that there be only one single family Seasonal Dwelling House on the property. In our view, By-law 624 permitted one trailer on the property to be used seasonally as a single family dwelling and, accordingly, Ms. Whiteman acquired legal nonconforming rights under By-law 624 with respect to one trailer only. We therefore agree with the application judge's decision in relation to four of the five trailers (including the motor home) that are on the property.

[11] In view of our conclusion that Ms. Whiteman acquired a legal non-conforming use for one trailer under By-law 624, it is unnecessary to consider the legal effects of the replacement of the four trailers that took place after By-law 685 replaced By-law 624, or of section 2.3 of By-law 685, which the appellant raised for the first time during the argument of the appeal.

[12] Furthermore, assuming that equitable principles apply in the context of the enforcement of statutes, we are not persuaded that the application judge made any legal error in declining to exercise any discretionary equitable jurisdiction in Ms. Whiteman's favour. At its highest, the evidence is that the Township Council, at a meeting in August 1979 attended by the Whitemans, took the position that having two trailers on the property did not contravene By-law 624. This evidence is not a sufficient basis to permit Ms. Whiteman to continue to have five trailers, used by several families and permanently attached to the property, and to remain in violation of the current by-law's trailer permit requirements or the current by-law's stipulation that there be only one seasonal dwelling on the property.

[13] The appeal is allowed in part. The application judge's judgment is amended only to the extent that one of the trailers or the motor home currently on the property is exempt from the operation and enforcement of the judgment.

[14] As success is divided, there will be no order as to costs of the appeal.

"S.T. Goudge J.A."
"J.M. Simmons J.A."
"R.G. Juriansz J.A."