SUPREME COURT OF NOVA SCOTIA

Citation: *3230813 Nova Scotia Ltd. v. Halifax (Regional Municipality)*, 2016 NSSC 340

Date: 20161215
Docket: Hfx No. 454647
Registry: Halifax

Between:

3230813 Nova Scotia Limited

Applicant

v.

Halifax Regional Municipality and Janet Helen Morris

Respondents

DECISION

Judge:	The Honourable Justice Denise Boudreau
Heard:	November 24, 2016, in Halifax, Nova Scotia
Counsel:	Brain Casey, Q.C. and Meghan E. Russell, for the Applicant E. Roxanne MacLarin, for the Respondents

By the Court:

[1] This is a request for judicial review of a decision of Halifax and West Community Council dated August 3, 2016. The decision related to the approval of a variance to a property owner (the respondent Morris) in the placing of an accessory building on her property. The applicant owns the adjacent property.

[2] The applicant and the respondent Morris own neighbouring properties in downtown Halifax. Their properties are located in the city block that is bordered by Queen Street, Sackville Street, and Dresden Row. This is an unusually shaped block; the respondent Morris' land is roughly triangular, while the applicant's land is the rectangular lot, immediately adjacent.

[3] In May 2015, the respondent Morris wished to erect a storage shed on her property. However, the proposed located of this shed was in violation of the Halifax streetwall setback bylaw requirement of a 9.5 m setback of buildings from the street. The respondent Morris therefore filed a variance application with the city, seeking a variance of the bylaw, to allow the placement of this shed.

[4] The respondent Morris' variance application provided (I have bolded her answers):

> Address of property:
> **1597 Dresden row / 1598 Queen Street, Halifax, NS**
>
> The application is to vary what requirement of the Land Use ByLaw (please check off all that apply)
> **? not sure**
>
> a. Size of yards (setbacks) **__x__**
> b. Lot coverage **___x__**

[5] By letter dated July 22, 2015, development officer Sean Audas approved the request. His approval noted that the new streetwall setback at the location of the shed would be 3.9 metres. Mr. Audas also wrote to nearby landowners advising of his approval, and advising that any appeal of his decision needed to be filed by August 7, 2015.

[6] One of the parties so advised was the applicant, who indicated its intention to appeal. It should be noted that the proposed shed, if built, would completely block a large picture window in the applicant's building.

[7] Due to errors made in the original approval, Mr. Audas provided the respondent Morris with a new approval on February 26, 2016. This new approval notes:

> *** Please note that this letter is further to the original approval letter which was sent on July 22, 2015. Through an internal review it was determined that the previous measurement noted was incorrect. As a result, a new notification is required. ***

[8] The new proposed streetwall setback was noted to be 2.4 m. Once again, notice was provided to nearby landowners, with a deadline to appeal of March 15, 2016. Once again, the applicant provided notice of his intention to appeal.

[9] By letters dated July 20, 2016, notice was given to the respondent Morris, the applicant, and the applicant's counsel John DiCostanzo, that an appeal hearing had been scheduled before Halifax Community Council to take place on Wednesday, August 3, 2016.

[10] On July 28, 2016, Mr. DiCostanzo sent correspondence to the respondent municipality, advising as follows:

> Further to our telephone conversation I wish to confirm that my client, 3230813 Nova Scotia Limited, the owner of 1594-95 Dresden Row, and the appellant in this matter, had intended to have his agent and professional architect, Peter Connell, who is familiar with the property and development regulations, to appear on his behalf. Unfortunately, Mr. Connell is on vacation and is not available on Wednesday, August 3, 2016. Therefore, my client is not in a position to properly present the information required in order to proceed with the appeal. The notice of the appeal date was provided on July 22, 2016, not providing sufficient time in order to get an alternate party involved. Under the circumstances my client is making a motion to defer the matter to an alternate date.

[11] When the matter came before Council on August 3, they decided to proceed despite Mr. DiCostanzo's request. The transcript of this part of the hearing reads as follows:

> **THE CHAIR**: A variance of appeal hearing. We do have one, 10.2 -- under 10.2.1, Case 19912, Appeal of Variance Approval, 1597 Dresden Row, Halifax.

> So we have a request -- I don't know if you see in the package -- from legal counsel and this is simply requesting a deferral, but I will defer to Councillor Mason as to how you'd like to proceed. Just hang tight. There.
>
> **COUNCILLOR MASON**: Thank you, Mr. Chair. While I respect the concerns that are raised in the letter, and the request for the extension, I feel that -- on the matter of a variance regarding a shed that this should go ahead. There's been adequate time to prepare, and we have the written submissions. Thank you.
>
> **THE CHAIR**: Okay…

[12] The case proceeded at that time. After hearing from staff, Council sought representations from the applicant/appellant. Mr. Pagnotella came forward as the appellant/owner of 1593-95 Dresden Row. Mr. Pagnotella stated:

> **MR. PAGNOTELLA**: I was hoping to adjourn this because we were going to bring in my architect, who would have had more information on the heritage issues of the shed being placed in this location. But I brought a friend, Gerry, who would like to speak on my behalf, and I would like to have him ---
>
> **THE CHAIR**: Sure.

[13] The friend, Mr. Gerry Post, then spoke to the issue.

[14] After having heard submissions, Council then took a vote. The result was a decision to uphold the decision of the development officer and approve the variance. The applicant seeks judicial review of that decision.

Procedural fairness

[15] The applicant's first concern relates to procedural fairness. It is the applicants' view that Council should have granted its adjournment request, and

chosen a new date for hearing which would have allowed architect Connell to be present as requested by the applicant.

[16] In terms of standard of review, generally speaking, an assessment of procedural fairness is not done by a strict application of one of the classic *Dunsmuir* tests, correctness or reasonableness (*New Brunswick v. Dunsmuir* [2008] 1 S.C.R. 190). Rather, procedural fairness is to be assessed by having regard to the particular circumstances of the case.

[17] Having said that, our Court of Appeal has indicated that an assessment of procedural fairness should not normally grant deference to the decision-maker. In other words, an assessment of procedural fairness should lean towards "correctness" rather than "reasonableness": *Bowater Mersey Paper Co. v. C.E.P. Local 141*, 2010 NSCA 19; *Nova Scotia (Provincial Dental Board) v. Creager* 2005 NSCA 9.

[18] In *Moreau-Bérubé v. New Brunswick (Judicial Council)* [2002] 1 S.C.R. 249, the court noted:

> [75] The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643, at p. 653; *Baker*, supra, at para. 20; *Therrien*, supra, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the

> parties the right to be heard, or the audi altarem partem rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as per L'Heureux-Dubé J. in *Baker*, supra, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, supra, ay p. 683); there is **no** appeal from the Council's decision (see D.J.M Brown and J.M Evans, Judicial Review of Administrative Action in Canada (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia* [1980] 1 S.C.R. 1105, at p. 1113).

[19] In relation to the specific issue of the granting of adjournments, I note the case of *Igbinosun v. Law Society of Upper Canada* 2009 ONCA 484 where the court provided a non-exhaustive list of considerations when dealing with a request for an adjournment:

> [37] … Factors which may support the denial of an adjournment may include a lack of compliance with prior court orders, previous adjournments that have been granted to the applicant, previous peremptory hearing dates, the desirability of having the matter decided and a finding that the applicant is seeking to manipulate the system by orchestrating delay. Factors which may favor the granting of an adjournment include the fact that the consequences of the hearing are serious, that the applicant would be prejudiced if the request were not granted, and a finding that the applicant was honestly seeking to exercise his right to counsel, and had been represented in the proceedings up until the time of the adjournment request. In weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date and the length of the requested adjournment should also be considered.

[20] While *Igbinosun* dealt with an adjournment in order to obtain legal counsel (which is not the case here), I consider it to be helpful guidance in assessing the merits of the case at bar.

[21] I also refer, in relation to the granting of adjournments, to Jones & de Villars, Principles of Administrative Law, Carswell 2014 at p. 340:

> The refusal by an administrative tribunal to grant an adjournment may amount to a denial of procedural fairness, if the refusal to grant the adjournment is unreasonable in the circumstances. If one party cannot be present or cannot present his or her case adequately because his or her request for an adjournment is denied, the hearing will not be fair and courts can step in to remedy the situation. However, there is no absolute right to an adjournment, and a tribunal undoubtedly has the jurisdiction to grant or to refuse an adjournment on proper grounds:
>
> …
>
> Granting an adjournment is a discretionary matter. Refusing an adjournment may amount to a breach of procedural fairness but not every refusal to grant an adjournment will amount to a denial of fairness.

[22] In the present case, I consider the following as important factors:

1. The *Halifax Regional Municipality Charter* S.N.S. 2008, c.39, at s. 251(1A) (5), provides that a party seeking to appeal a refusal to grant a variance, is to receive seven days written notice of a hearing date. There is, strictly speaking, no proviso in the *Charter* relating to a hearing in the case of the granting of a variance. In any event, the evidence indicates that eleven days clear notice were provided to the applicant (Mr. DiCostanzo's letter indicated receipt of the notice on July 22).

2. Having said that, I accept that the period in question (July 22 – August 3) is a time of year where many people take vacation. It would not be

unreasonable, in my view, for parties to not be available during that time, especially where they had no prior notice that matter might be scheduled within that period.

3. I have no evidence that this appeal was ever the subject of previous adjournments. I have no evidence, or even suggestion, that the applicant was manufacturing a reason to delay the hearing. I believe the applicant honestly sought Mr. Connell's attendance.

4. I have no evidence of any particular urgency to this appeal hearing. I understand the respondent Morris wants to build her shed and that, from her point of view, delays might seem to be inconvenient. Some of that delay is attributable to the error/correction of the approval (July 2015 – February 2016); some of the delay is simply the time that such matters take. I see no urgency to the appeal that was before Council on August 3, 2016.

5. There is no appeal of this administrative decision. Furthermore, as the applicant is the neighbouring/abutting landowner, I find that this matter has significant importance for this applicant.

6. I cannot know, or presume, what the architect Connell could have contributed to this debate. Mr. Dicostanzo's letter refers to his being

"familiar with the property and development regulations". At the time of the hearing itself, Mr. Pagnotella indicated that Mr. Connell would have "information on the heritage issues" relating to the property and shed.

7. The transcript of the hearing on August 3 shows that the motion was debated, with councillors speaking for/against. Questions were asked of Mr. Audas about his interpretation of the relevant by-law. One councillor, in particular, spoke against the variance:

> **COUNCILLOR MOSHER:** Thank you, Mr. Chair. So the variance is here because, as Councillor Watts said, you're not allowed to do this as of right. So you're coming and asking for a concession from Council. So we don't have to support the Development Officer. It's up to Community Council members to uphold his decision or not.
>
> And I feel that it does violate the intent of the Land Use By-Law, and to -- for a minimum setback in the zone required 9.5 metres, and requesting a variance of 2.4 metres, I think that is significant. So I don't consider the -- a variance is supposed to be minor in nature. I think that's significant.
>
> You know, I understand we can't talk about loss of property values, and light, and view planes, and things like that, but I do think that's a factor. I mean -- so, I think it violates the intent of the Land Use By-Law under one. You know, it may be unique to this property and there may not be any intentional disregard, but I can't support it, and I don't think this is minor in nature. Thank you, Mr. Chair.

Council went on to their vote:

> **THE CHAIR:** Okay. Thank you. Any other speakers? Question being called for. All in favour? Contra- minded? Three/three. So the appeal is –
>
> **UNIDENTIFIED MALE:** Lost.
>
> **THE CHAIR:** -- lost. Okay. So what that means is that the shed can be built.
>
> **UNIDENTIFIED MALE:** Yes.
>
> **THE CHAIR:** Okay. Thank you.

I quote these citations to point out that the result here was not a foregone conclusion. There was some debate and, in fact, it would appear that the vote was three/three. It is reasonable, in my view, to believe that the applicant's architect, familiar with all of the relevant considerations, could have contributed and assisted in the analysis of this issue.

8. Lastly, but importantly, in my view, the Chair's decision to proceed with the matter is woefully lacking in explanation or reasons. I am certainly not suggesting that a detailed legal analysis, considering all the factors of *Igbinosun*, would have been expected in such circumstances. Even so, it is completely unclear to me why the Chair felt that the matter should go ahead that day. He appears to have

> simply deferred the question to Councillor Mason. The Chair's reasons are unsaid and unexplained.

[23] In all of the circumstances, I find that the applicant was denied procedural fairness in Council's decision to proceed with the hearing on August 3, 2016. As a result, I am quashing the decision reached by Council on August 3, 2016 relating to the variance approval for 1597 Dresden Row, Halifax. The matter is returned to Council for rehearing/reconsideration.

[24] As a result of this decision, I decline to consider the applicant's further arguments.

[25] Should the parties be unable to agree on costs, I shall accept written submissions within 30 days of this decision.

Boudreau, J.