

SUPREME COURT OF NOVA SCOTIA

Citation: North End Community Health Association v. Halifax (Regional Municipality), 2012 NSSC 330

Date: 20120924

Docket: Hfx. No. 376190

Registry: Halifax

Between:

The North End Community Health Association, The Richard Preston Centre for Excellence Society, and The MicMac Native Friendship Society

Applicants

v.

Halifax Regional Municipality

Respondent

and

Jono Developments Ltd.

Intervenor

Judge:

The Honourable Justice A. David MacAdam

Heard:

June 12, 13 and 15, 2012, in Halifax, Nova Scotia

**Final Written
Submissions:**

June 4, 2012

Counsel:

Ronald Pink, Q.C., Kelsey McLaren, David Wallbridge, for the applicants

Jocelyn Campbell, Q.C. and Jack Townsend, for the respondent

William L. Ryan, Q.C. and Maggie Stewart, for the intervenor

By the Court:

Introduction

[1] The applicants seek to quash a decision of Halifax Regional Council approving the sale of the St. Patrick's Alexandra School property to JONO Developments Ltd. A stay of Council's decision is in effect pending the determination of this judicial review: 2012 NSSC 92.

[2] The three applicants, which are community organizations that made proposals to Council for alternative uses for the school property, claim Council failed to follow its own policy and procedure for disposal of surplus schools. The applicants say the policy and procedure provided that community non-profit groups be permitted to make submissions before the property could be offered for sale to private developers. Instead, Council invited proposals from all interested parties, forcing community groups to compete with private developers. A developer, the intervenor JONO, was the successful bidder. After Council approved the sale to JONO in December 2011, the applicants learned of the policy and brought it to the attention of Council. Council rescinded the decision to approve the sale in order to re-examine the process. After receiving a staff report, Council again voted to approve the sale to JONO, subject to repeal of the policy. It is that decision which is under review.

[3] In addition to the claim that Council failed to follow its own procedure in conducting the sale, the applicants also argue that the *Halifax Regional Municipality Charter* only permits a sale of municipal property for less than market value if the purchaser is a non-profit organization. They say the appropriate appraised value was \$4.3M, while the property was sold to JONO for \$3M.

Background

[4] In September 2000 Halifax Regional Council received a staff report on the subject of "Policy and Procedure for the Disposal of Surplus Schools." The text of the policy was appended to the report. Council approved the *Procedures for the Disposal of Surplus Schools* (the Procedure) pursuant to the *Municipal Government Act*, S.N.S. 1998, c. 18. The Procedure was later continued under the *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39. Council's policy, resolution and by-law-making powers are described at ss. 58 and 59 of the *Charter*:

Resolutions, policies, by-laws

58 (1) The Council shall make decisions in the exercise of its powers and duties by resolution, by policy or by by-law.

(2) The Council may exercise any of its powers and duties by resolution unless a policy or a by-law is required by an enactment.

....

(4) The Council may exercise by policy any of the duties and powers that it may exercise by resolution.

....

Policies

59 ... (3) In addition to matters specified in this Act or another Act of the Legislature, the Council may adopt policies on any matter that the Council considers conducive to the effective management of the Municipality.

[5] Council's powers regarding municipal property are set out at ss. 61(5) and 63, which provide, in part:

Powers of Municipality regarding property

61 (5) The Municipality may

(b) sell property at market value when the property is no longer required for the purposes of the Municipality....

....

Sale or lease of municipal property

63 (1) The Municipality may sell or lease property at a price less than market value to a non-profit organization that the Council considers to be carrying on an activity that is beneficial to the Municipality.

(2) A resolution to sell or lease property referred to in subsection (1) at less than market value shall be passed by at least a two thirds majority of the Council present and voting.

(3) Where the Council proposes to sell property referred to in subsection (1) valued at more than ten thousand dollars at less than market value, the Council shall first hold a public hearing respecting the sale.

....

[6] The Procedure set out steps to be followed in disposing of surplus schools. When notice was received that a school was to be handed over to Halifax Regional Municipality (HRM or the Municipality), Building Management Services (BMS) would assess the property, prepare a budget, and schedule interim maintenance. BMS would then request "Business Unit" proposals for future use of the property. Commercial Real Estate Services was required to commission an appraisal to establish the property's "market value," as well as "its value based upon its use and zoning as a school property." If HRM did not opt to retain the property for its own use, the Procedure required the following steps:

7. On receipt of that information, CGPP [Community Grants and Partnering Program] will evaluate any interest that may have been expressed by local community groups or grant applicants for the use of the school for community purposes. CGPP shall:
 - (a) advise all such community groups that they are required to submit a written proposal within **90 days**, setting out the composition of the group, its purpose and management structure including office-bearers, the nature of the activities proposed, a financial statement, a business plan for the first five years, and a clear statement of the terms they are prepared to offer for the purchase or lease of the property; and
 - (b) evaluate all submissions and assess their viability. Any submission that is deemed feasible and meets HRM's fiscal goals for the accommodation of community programs shall be carried forward as a recommendation to Executive Management and Council.

8. In the event that **no** proposals are received from community groups or grant applications, or that any proposals which are received are not supported by CGPP, CRES shall take steps to put the property on the market, subject to Council's approval.

[7] The September 2000 staff report raised the question of criteria for evaluating competing interests. It also acknowledged a distinction between sales at market value and at less than market value. It stated:

Criteria for Evaluating Competing Interests:

Criteria for evaluating competing interest from community groups will be developed by Community Grants and Partnering Program staff in collaboration with the Grants Committee and a sub-committee to include representation from Regional Council. This effort fits within the existing terms of reference for the Grants Committee and will not require added Municipal Clerk support.

Market Sale vs. Less Market Sale:

Sale of a surplus building on the open market at full value must always be considered a desirable option, however the intent of the procedure is to allow staff and Council to evaluate all disposal options together and not independently of one another, in order to seek the best overall value for the Municipality.

[8] No criteria for evaluating proposals were ever formulated. The Municipality has disposed of eighteen school properties since the policy was adopted by Council, but has never adhered fully to the Procedure.

The Request for Proposals

[9] The Halifax Regional School Board (the Board) declared the St. Patrick's Alexandra School (the Property) surplus to its requirements in March 2008. The closure occurred at the end of the 2010-2011 school year. The Property was valued by Colliers International (Atlantic) (Colliers) in a report dated March 30, 2011. Colliers provided three potential market values, depending on the intended use of the property: (1) the property "as is" was appraised at \$1M; (2) the prospective market value if the intention was to maintain the old school and redevelop the remainder was appraised at \$3M; and (3) the prospective market value if the intention was to demolish all the buildings and redevelop the property was \$4.3M.

[10] On June 28, 2011, HRM issued a Request for Proposals (the RFP), seeking proposals for "a comprehensive and integrated" use of the Property "through the restoration and re-use of the existing building or the re-development of the property for various commercial, institutional and other land uses, which are complementary to existing developments in the surrounding area, and which generally enhance the community." There were four scoring criteria for the assessment of proposals. These included (1) understanding the intent and objectives, with a maximum score of 30; (2) qualifications and experience, with a maximum score of 25; (3) the proponent's financial capability, with a maximum score of 25; and (4) the financial offer, with a maximum score of 20. The closing date for proposals was August 26, 2011.

[11] The RFP stated that legislation permitted "the sale of surplus municipal property at less than market value to registered non-profit organizations." In the event that a sale at less than market value was recommended, a public hearing would be required. Proponents of a sale at less than market value would be required to "demonstrate how their program and service delivery aligns with HRM's jurisdictional mandate or organizational priorities....". Such a motion before Council would require a two-thirds majority vote. The RFP did not refer to

the Procedure, nor did it provide for special consideration for bidders which were "local community groups", as set out in the Procedure.

[12] On July 20, 2011, there was a pre-submissions meeting and building tour, open to all proponents. Representatives of two of the applicants - the North End Community Health Association and the Micmac Native Friendship Society - attended.

The November 2011 staff report

[13] After the deadline for proposals passed, HRM staff evaluated the proposals and reported to Council and the Mayor on November 21, 2011. There were three proposals from developers and three from non-profit groups, those being the three applicants. Each of the applicants offered a purchase price of one dollar for the Property. JONO provided two alternative proposals. Option A was unconditional:

OPTION A:

Purchase Price: A starting bid of Three Million Dollars (\$3,000,000.00)CAD to be increased by increments of Seventy-Five Thousand Dollars (\$75,000)CAD over the highest bid to a maximum of Four Million Dollars (\$4,000,000.00)CAD

....

Applicable Conditions: NONE

....

In the event that a bid be received higher than our maximum bid, our bid will equal to Four Million Dollars (\$4,000,000.00CAD)

[14] Option B, however, was conditional on JONO and HRM reaching a development agreement:

OPTION B:

Purchase Price: A starting bid of Three Million Dollars (\$3,000,000.00)CAD to be increased by increments of One Hundred and Fifty Thousand Dollars (\$150,000.00)CAD over the highest bid to a maximum of Four Million Seven Hundred and Fifty Thousand Dollars (\$4,750,000.00)CAD

....

Applicable Conditions: Subject to a development agreement

....

In the event that a bid be received higher than our maximum bid, our bid will equal to Four Million Seven Hundred and Fifty Thousand Dollars (\$4,750,000.00CAD)

[15] The staff report described Council's options as follows:

The recommended offer of \$3,000,000 by Jono Developments Ltd. is without any limiting conditions. This offer will facilitate the sale of the subject property within a reasonable period following Council's approval for the award.

An alternative offer that Jono Developments Ltd. presented was contingent on the approval of a Development Agreement with a value of \$3,750,000. However, after considering the time value of money, municipal property holding costs, lost property tax revenue and a 5% contingency for the risk inherent in the process, the stronger financial return in today's dollars is the recommended unconditional offer of \$3,000,000.

[16] On December 13, 2011, Council voted to authorize the Mayor and the Municipal Clerk to enter into an Agreement of Purchase and Sale with JONO. On January 10, 2012, after objections were raised by the applicants, Council rescinded the December 13 motion and referred the matter back to staff. On January 24, 2012, Council passed another motion approving the sale to JONO, subject to the repeal of the Procedure. On January 31, Council passed a motion repealing the Procedure. The applicants commenced this judicial review proceeding on February 1, 2012.

Issues

[17] The issues for this judicial review are (1) whether Council owed the applicants a duty of procedural fairness; (2) if a duty of procedural fairness was owed, whether Council breached it by failing to follow the Procedure when it approved the sale of the Property, (3) whether the sale price obtained constituted market value for the Property, and (4) whether Council breached the *Halifax Regional Municipality Charter* by approving the sale of the property to JONO Developments at less than market value in circumstances where it was only permitted to sell for market value or more.

Procedural fairness

Did HRM owe the applicants a duty of fairness?

[18] The content of any duty of fairness varies from case to case. The relevant factors are set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, where L'Heureux-Dubé J., for the majority, identified five factors: the nature of the decision and the process followed; the statutory scheme; the importance of the decision to those affected; the legitimate expectations of those challenging the decision; and the procedural choices made by the decision-maker (paras. 23-27). The values underlying the duty of procedural fairness "relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision" (para 28). The non-exhaustive list of *Baker, supra.*, factors was reaffirmed in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at para. 42.

[19] No standard of review analysis governs judicial review on the grounds of denial of natural justice or procedural fairness: see *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, at paras. 30-32 and *Minister of Community Services v. T.G. and R.C.*, 2012 NSCA 43, at paras. 90-91. The reviewing court must determine the content of the duty owed in the circumstances, and then decide whether the decision-maker breached that duty. The Nova Scotia Court of Appeal described these two steps in *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, at para. 21:

The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's

perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.

[20] The applicants argue that the Procedure created a duty of fairness which required Council to follow its own policy. HRM denies that any such duty existed, and says that any duty of fairness that did arise was met.

The nature of the decision and the process

[21] In *Baker, supra.*, L'Heureux- Dubé J. cited the remark in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making" (*Knight* at p. 683, cited in *Baker, supra.*, at para. 23). L'Heureux- Dubé J. went on to say that "[t]he more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness." (para. 23).

[22] In this case, the decision for Council was the disposition of surplus public property, specifically a school. To transfer public assets into private hands, the applicants submit, imposes an obligation to follow the prescribed process. They say the decision affects the residents of the municipality, hence the aspects of the Procedure providing for public input into the process and requiring the proposals of community groups to be considered. They say the Procedure creates an express, compulsory, and statutorily-enacted duty of fairness. The nature of the decision suggests a high degree of procedural fairness, according to the applicants.

[23] HRM submits that a decision by a municipal council to dispose of surplus property bears little resemblance to a judicial decision-making process, and argues that this factor indicates a minimal duty of fairness.

Nature of the statutory scheme and the terms of the statute

[24] In *Baker, supra.*, L'Heureux- Dubé J. said, "[t]he role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted...." (para. 24).

[25] The *HRM Charter* delegates specified powers to HRM. The municipality cannot act outside the authority granted by the *Charter*. The Procedure itself uses the word "shall", with exception of steps specifically identified as being optional. The use of "shall" indicates an imperative, not permissive, meaning: *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9(3). The legislative scheme and the Procedure indicate a high degree of procedural fairness, according to the applicants. HRM argues that the use of imperative language in the Procedure should be tempered by the use of allegedly more permissive language in the September 2000 staff report, which allegedly implies that the Procedure was only meant for staff guidance.

[26] I see no need to interpret the Procedure, which is comprehensive, through the prism of the staff report. It was the Procedure that Council enacted, not the staff report.

[27] HRM argues that the *Charter* provides Council with broad powers, giving it the flexibility required to carry out its statutory responsibilities in the public interest. HRM says the Procedure did not have the "force of law." It argues that the *Charter* is worded so as to permit Council to govern as it sees fit. Generally, HRM argues that Council was free to ignore the Procedure. It had not been followed in other school disposals. The *Charter* did not compel Council to adopt a policy for disposal of surplus properties. The Procedure had no penalty clause. The word

"policy" did not appear in the title of the document. Finally, HRM says, to treat the Procedure as mandatory would fetter Council's discretion. This, it submits, indicates a minimal duty of fairness.

Importance of the decision to individuals affected

[28] The third *Baker, supra.*, factor is the importance of the decision to the individuals affected. L'Heureux- Dubé J. discussed this factor at para. 25:

... The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[29] The applicants say Council's decision to dispose of the property and by implication, the alleged failure to follow proper procedure was significant for residents of the North End and of Halifax generally, as evidenced by the petitions and letters placed in evidence. Issues with "broader policy implications for the entire community" as opposed to "local issue[s] affecting the lives of residents of a neighbourhood" have been held to demand a moderate level of procedural fairness: *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)*, 2007 NSSC 28, at para. 93. The applicants appear to argue that this factor supports a high level of procedural fairness, in view of the existence of a Procedure providing Council no discretion on the relevant issues.

[30] HRM agrees that each applicant had "a deep-rooted desire to be the successful bidder," but says this situation does not rise to the level of significance that calls for procedural safeguards, such as a determination of a person's right to continue in a profession. The decision did not prevent the applicants from continuing in "their laudable mandates" to "serve the North End community," and did not deprive them of any vested proprietary rights." Their only entitlement, HRM says, was the right to participate in the request for proposals process. HRM says this factor further suggests a level of procedural fairness at the lower end of the spectrum.

Legitimate expectations of those challenging the decision

[31] The applicants say Council's failure to follow "established procedures" was a violation of the doctrine of legitimate expectations. Those expectations allegedly arose out of the *HRM Charter* and the Procedure. The doctrine was described in *Attorney General of Hong Kong v Shiu*, [1983] 2 A.C. 629, where Lord Fraser of Tullybelton said, at 638:

... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.

[32] In *Baker, supra.*, L'Heureux-Dubé J. said, at para. 26:

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights... As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness... Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded... Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[33] Procedural fairness will not typically apply to a legislative function. However, where the legislating body has held out that a specific procedure will be followed, and interested parties have relied on that representation, a duty of procedural fairness may arise on the basis of legitimate expectations: *Czerwinski v. Mulaner*, 2007 ABQB 536, at paras. 26-32.

[34] It has been suggested that a party claiming a duty of fairness on the basis of legitimate expectations must show that there was actual reliance. In *Sunshine*

Coast Parents for French v. Sunshine Coast School District No. 46 (Sunshine Coast)(1990), 49 B.C.L.R. (2d) 252, 1990 CarswellBC 213 (B.C.S.C.), for instance, the court stated that, as "a delegated legislature" a school board "was immune from the rule of legitimate expectation except to the extent that it attracted the rule to itself by its own procedural policy, but the petitioners being able to show no evidence that they knew of that policy cannot be said to have relied upon it. They therefore cannot be said to have formed a legitimate expectation in fact" (para. 32). Similar statements, requiring actual reliance, appear in *Furey v. Roman Catholic School Board for Conception Bay Centre* (1993), 104 D.L.R. (4th) 455, [1993] N.J. No. 170 (Nfld. C.A.) at para. 50, *Attaran v. University of British Columbia* (1998), 4 Admin. L.R. (3d) 44, [1998] B.C.J. No. 115 (B.C.S.C.) at paras. 87-88, and *Humber Heights of Etobicoke Ratepayers Inc. v. Toronto District School Board* (2003), 171 O.A.C. 21, [2003] O.J. No. 1381 (Ont. Sup. Ct. J.) at para. 32.

[35] In response to the claim that legitimate expectations cannot arise without actual knowledge, the applicants cite *Mavi, supra.*, where Binnie J., speaking for the court, said, at para. 68:

Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite.... It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking....

[36] HRM says *Mavi, supra.*, is distinguishable on its facts. *Mavi, supra.*, involved a contractual relationship between the Minister of Immigration and sponsors who gave undertakings to reimburse the government for costs of social assistance incurred by immigrants they were sponsoring. The Minister had discretion not to take enforcement action. HRM says the distinction lies in the fact that *Mavi, supra.*, involved "legitimate expectations in the context of a written agreement that the applicants saw, read and signed" before the Minister took

enforcement action. It did not involve a policy which the applicants had been unaware of at the relevant time.

[37] HRM says there were no promises to the applicants that the Procedure would be followed, nor is there any evidence that it was ever followed in practice. The applicants did not know about the Procedure until after the RFP process was conducted and after the initial resolution of Council to sell to JONO.

[38] Given that they were unaware of the Procedure, it is not clear why this harms the position of the applicants. If HRM was required to follow the Procedure, it could not avoid that obligation by announcing an alternative procedure to parties who did not know there was an existing binding Procedure. The question, then, is whether the applicants could have legitimate expectations arising from a policy or procedure of which they were not aware. The Procedure was a public document, enacted by a vote of Council. It was not an internal memo. The intention to follow the Procedure was implicit in Council's decision to enact it. I do not believe that the applicants' lack of actual knowledge deprived them of the right to assume that Council would abide by its own enactments. They could legitimately expect Council to follow its own Procedure.

[39] Council failed to follow the Procedure. This was acknowledged in the staff report of January 19, 2012. Further, the applicants were among the category of community groups referenced in the Policy itself, which were entitled to be consulted before a decision was made as to disposition of the property. They were aware of the Procedure before the second Council decision to approve the sale, and in fact raised the matter in letters to Council in January. They argue that legitimate expectations support a high level of procedural fairness.

Council's choice of procedure

[40] The fifth *Baker, supra.*, factor is the decision-maker's own choice of procedures. L'Heureux- Dubé J. said, at para. 27:

Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.... While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints....

[41] The applicants submit that Council made a choice of procedure when it enacted the Procedure in 2000. While the Municipality is entitled to deference in the choice of its procedures (*Heritage Trust, supra.*, at para. 105), the applicants maintain that once it has chosen a procedure, it cannot ignore it. This, it is argued, suggests a high degree of procedural fairness. HRM takes the view that the RFP process Council utilized was fair to the applicants and deserves respect as the procedural choice of the decision-maker.

[42] While the *HRM Charter* does not impose specific procedures with respect to the disposal of surplus schools, I am satisfied that Council bound itself by enacting a specific procedure in 2000. It is no answer to say that Council had never observed the enacted Procedure in any previous school disposal process, and therefore was free to ignore it. Procedural fairness on this point (as with legitimate expectations) weighs in favour of the public's right to assume that an elected municipal council will follow its own procedures on matters of public importance. It was, of course, entirely within Council's power to repeal the Procedure, but this was not done until after the RFP process was completed.

Summary on procedural fairness

[43] The applicants argue that Council was required to accord them a "significant degree" of procedural fairness in view of the public interest in the decision, the compulsory nature of the Procedure, the important interests of the applicants engaged by the decision, their legitimate expectations that the Procedure would be followed, and the requirement that Council follow its own policies once adopted.

[44] HRM says no duty of fairness arose out of the Procedure. In addition to arguing that the Procedure could not furnish the basis for a duty of fairness, HRM says there was no duty of fairness at common law. Council, it submits, was only obliged to comply with the *HRM Charter* and act in good faith. If there was a common law duty, however, HRM says it was met.

[45] In general, there is no duty of fairness owed when a municipality exercises a statutory power to sell property: *Allard Contractors Ltd. v. Coquitlam (District)*(1983), 3 Admin. L.R. 122, [1983] B.C.J. No. 2498 (B.C.S.C.) at paras. 48-49; *Abromovich v. Snow Lake (Town)*(1996), 108 Man. R. (2d) 81 at para. 26, affirmed at 113 Man. R. (2d) 164 (Man. C.A.); Ian MacF Rogers, *The Law of Canadian Municipal Corporations* (Toronto: Thomson Reuters, looseleaf) at §212.4.

[46] In the applicants' view, the Procedure was adopted under legislative authority and was therefore not discretionary: *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2 at 6-7; *North End Community Health Association v. Halifax (Regional Municipality)*, 2012 NSSC 92, at paras. 26-27. A municipal council may not bypass a statutorily-enacted process: *Friends of the Public Gardens v. Halifax (City)*(1984), 65 N.S.R. (2d) 297, [1984] N.S.J. No. 83 (S.C.T.D.) at paras. 56-58; *Sobeys Inc. v. Charlottetown (City)*(1996), 137 Nfld. & P.E.I.R. 227, [1996] P.E.I.J. No. 11 (S.C.T.D.) at paras. 13-21. The applicants also cite *Pytko v. Halifax District School Board* (1993), 124 N.S.R. (2d) 1, where Saunders J (as he then was) held that "ignoring its own guidelines" was sufficient reason to quash the Board's decision to close a school (para. 84). (The Court of Appeal dismissed the appeal on the basis of mootness, and offered no opinion on the reasoning: 133 N.S.R. (2d) 217.).

[47] The applicants have not alleged bad faith. HRM says it acted in good faith by soliciting and evaluating proposals through a transparent, fair, and unbiased process, and selecting the bid that best satisfied the applicable criteria. As to the requirements of the *HRM Charter*, HRM says it was only required to comply with s. 61(5)(b), which permits the municipality to "sell property at market value when the property is no longer required for the purposes of the Municipality." In this case, the determination that the school was no longer required for municipal purposes was made by staff, not by Council resolution; but HRM notes that the statute does not require a resolution of Council. Further, HRM submits that it sold the property for market value.

[48] The applicants fell within the class of community organizations that Council had identified as having specific procedural rights under the Procedure. Council could have chosen to change the Procedure as enacted, but did not do so until after the applicants raised the issue. Moreover, the *HRM Charter*, by which Council was bound, made special provisions for non-profit organizations in the disposal of municipal property. The question is not whether HRM could sell the Property, but whether, having enacted a Procedure and thereby representing that it would be followed, HRM was entitled to simply ignore it.

[49] I am satisfied that Council owed a duty of procedural fairness to the applicants in the process of disposing of the property. That duty extended no further than to act in good faith and observe HRM's own Procedure, as enacted by Council.

Breach of the duty of fairness

[50] There is no dispute that the Procedure was not followed when Council approved the sale of the property to JONO. The applicants say Council's failure to observe the Procedure was a denial of procedural fairness. Council, they argue, breached the Procedure (1) by requesting proposals from community groups and

private developers at the same time; (2) by not canvassing the applicants in advance, although they had expressed interest in the property; (3) by directly comparing the applicant's proposals to those of developers; (4) by having no CGPP evaluation of the applicants' proposals; and (5) by the failure of CGPP to forward the applicants' proposals to Council. The applicants say, the Procedure was mandatory for as long as it remained in force, from September 19, 2000, until January 31, 2012. As such, they say, the decision should be quashed.

[51] HRM says the applicants had an opportunity to make proposals for the disposal of the property, and those proposals were scrutinized in accordance with the RFP process. The applicants' proposals were considered by HRM staff. HRM says this satisfies any applicable duty.

[52] A duty is owed, particularly where the decision-maker has created a procedure which it says it will follow. The fact that the decision-maker has not followed its own process in the past does not entitle it to ignore its procedural obligations in this instance. The fact that there were apparently no complaints about such procedural failures in the past does not now make it proper. If it was wrong the first time, it continued to be wrong as Council continued to ignore its own Procedure.

[53] Although one might characterize legitimate expectations as requiring knowledge of the specific expectation, this is not necessarily the case. The legitimate expectation is that Council will follow procedures which it has established and publicized, regardless of whether individual members of the public have actual knowledge of the procedures in question. The issue is whether the Procedure was an undertaking that members of the public were entitled to expect Council to follow. In this case, the Procedure was adopted by way of a resolution of Council. Residents of the municipality were entitled to expect that Council would follow its own prescribed procedure. By failing to do so, Council failed to meet its duty of fairness to the applicants.

[54] While this breach is sufficient reason to quash the second resolution to sell the property to JONO for illegality, I will proceed to consider whether Council also breached the *Halifax Regional Municipality Charter*.

Did Council breach the HRM Charter?

[55] As noted earlier, the applicants argue that the *Halifax Regional Municipality Charter* only permits a sale of municipal property for less than market value to a non-profit organization. The Colliers report provided three potential market values, ranging from \$1 million ("as is") to \$4.3 million (demolition and redevelopment). The JONO proposal, as approved by Council, was to re-develop the property with low-rise residential, high-rise residential, commercial, and institutional development. The applicants submit that this proposal is a redevelopment scheme as contemplated by the third, and highest appraisal in the Collier report. The applicants claim that the proper market value was \$4.3M, while the property was sold to JONO for \$3M. They argue that Council breached the HRM Charter by approving a sale of the property at less than market value.

Standard of review

[56] The standard of review of Council's decision on the price at which to sell the Property must be established in accordance with the analysis set out by the majority in *Dunsmuir v New Brunswick*, 2008 SCC 9. The court must first decide whether the existing jurisprudence has already determined the standard of review applicable to the issue. If not, the court must determine whether the question is reviewable on a standard of correctness or reasonableness. The relevant factors include "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case": *Dunsmuir, supra.*, at para. 64. Municipal decisions may be reviewed on either

standard, depending on the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, at paras. 12-13.

[57] The two standards of review are concerned with the degree of deference to be accorded to the decision under review. In applying the correctness standard, the court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.": *Dunsmuir, supra.*, at para. 50.

[58] As to the more complex workings of the reasonableness standard, which replaced the previous standards of reasonableness and patent unreasonableness, the majority in *Dunsmuir, supra.*, said, at paras. 46-47:

What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[59] The applicants say the decision to sell the property for what they say is less than market value should be reviewed on a standard of correctness. HRM says the proper standard is reasonableness.

Has the standard of review been determined in the caselaw?

[60] HRM submits that the jurisprudence has determined the standard of review applicable to judicial review of decisions respecting disposal of municipal property. The Municipality cites *Hublely v. Halifax (City)*(1909), 7 E.L.R. 360, 1909 CarswellNS 72, where Meagher J. said, at paras. 8-9:

It was also argued that there was no material before the Council upon which it could properly or at all exercise a judgment upon the question as to whether it was required for the purposes originally declared, or either of them. I do not conceive I have anything to do with that aspect. So long as the council exercises an honest discretion without fraud (gross misconduct may perhaps be added), it is not liable to have its determination of matters within its jurisdiction overturned or disregarded by the courts....

One may be convinced that the action of the council is altogether stupid and unwise in the general civic interests, but even that conclusion would not constitute ground for judicial interference.

[61] HRM says that a similar view is expressed in Ian MacF. Rogers, *The Law of Canadian Municipal Corporations*, 2d edn. (Carswell, looseleaf) at §212.4:

The determination of the council, which should be expressed in a by-law or resolution, as to the time when, the manner in which, the price for which, and the person to whom any property of the corporation which the council may lawfully sell, shall not be open to question, review or control by any court, if the purchaser is a person who may lawfully buy and the council acted in good faith. Even

though the council had no material on which to base its judgment on the question whether the property was still required for the purposes for which it was acquired, so long as the council has exercised an honest discretion without fraud, it is not liable to have its determination overturned by the court....

[62] The author goes on to state that "[t]he statutory authority of sale exercised by a municipality, being an executive power, is subject only to the general duty of good faith and compliance with statutory conditions and there is no duty of procedural fairness." HRM says the reasoning set out in *Hublely, supra.*, as restated by Rogers, indicates that Council's decision is entitled to "great deference" and that a standard of reasonableness is therefore indicated.

[63] I am not satisfied that the authorities relied upon by HRM answer the question as to what standard of review applies to Council's determination of "market value" under the *HRM Charter*.

Standard of review analysis

Privative clause

[64] The *HRM Charter* contains no privative clause respecting Council's decisions. Section 207 provides, under the heading "procedure for quashing by-law":

207 (1) A person may, by notice of motion that is served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the Council, in whole or in part, for illegality.

(2) No by-law may be quashed for a matter of form only or for a procedural irregularity.

(3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the Municipality and determine the scale of the costs.

(4) An application pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, must be made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be.

[65] The applicants describe s. 207 as creating a statutory right of appeal. Clearly, however, the section actually contemplates judicial review. The introduction to the applicants' own brief indicates that this proceeding is a judicial review, and this is clear as well in the other parties' submissions.

[66] This application is to quash Council's resolution for illegality. I note that ss. 207(2) provides that a by-law may not be quashed "for a matter of form only or for a procedural irregularity." The other subsections refer to by-laws, orders, policies and resolutions. This suggests that an order, policy or resolution may be quashed on grounds broader than those on which a by-law may be quashed, that is, on the grounds of form or procedural irregularity.

[67] The absence of a privative clause is less significant as a factor than the existence of one would be: *St. George's Lawn Tennis Club v. Halifax (Regional Municipality)*, 2007 NSSC 26. The absence of a privative clause is of little significance in determining the standard of review in this case.

Purpose of the legislation and the provision

[68] The purposes of the *HRM Charter* are set out at s. 2, which states:

2 The purpose of this Act is to

(a) give broad authority to the Council, including broad authority to pass by-laws, and respect its right to govern the Municipality in whatever ways the Council considers appropriate within the jurisdiction given to it;

(b) enhance the ability of the Council to respond to present and future issues in the Municipality; and

(c) recognize that the functions of the Municipality are to

(i) provide good government,

(ii) provide services, facilities and other things that, in the opinion of the Council, are necessary or desirable for all or part of the Municipality, and

(iii) develop and maintain safe and viable communities.

[69] Council cannot exercise any authority not granted by the *HRM Charter*. The sections governing the disposal of municipal property set the limits of Council's authority. Council may sell property at market value, or to a non-profit organization for less than market value. The purpose of ss. 61 and 63 is to prevent malfeasance by barring the sale of municipal property to private enterprises at less

than market value. Further, the *HRM Charter* specifically tasks the court with determining the question of illegality. As such, the applicants say, this factor suggests that no deference is due to Council's decision.

[70] HRM relies on ss. 61-65 and 70 of the *HRM Charter* as a statutory mandate for the municipality to acquire, manage, and dispose of property. These sections, it is submitted, provide HRM with broadly-worded powers respecting dealings with property, and with weighing competing interests. HRM says these statutory purposes support deference to its decision to sell the Property to JONO. HRM appears to emphasize the decision to sell, as opposed to the determination of price.

The nature of the question

[71] In *St. George's Lawn Tennis Club, supra.*, the Associate Chief Justice said, at para. 39:

Finally, I must consider the nature of the question. In my view, the question of whether Council failed to adhere to s. 217 of the *Municipal Government Act* involves an interpretation of the said *Act* and hence is a question of law. This often suggests little deference to the body under review although it is not, in itself, determinative of the matter (see *N.S.T.U. v. Nova Scotia Community College*, 2006 NSCA 22 (N.S. C.A.).)

[72] The applicants say the determination of the conditions under which Council may sell surplus municipal property is a question of law. This involves the interpretation of the term "market value" in the statute. Further, the question of "illegality" is one to be determined by the court under the statute, pursuant to s. 207(3).

[73] The applicants say the Council's decision in selecting from several competing bids was an adjudicative one. In *Nanaimo (City) v. Rascal Trucking*

Ltd., 2000 SCC 13, the Supreme Court of Canada considered the standard of review applicable to a municipality's decision to select a successful bid to purchase municipal property. Major J. distinguished between "the standard of review applicable to a municipality's adjudicative function as opposed to its policy making. The decision in question was clearly adjudicative as it involved an adversarial hearing, the application of substantive rules to individual cases and a significant impact on the rights of the parties." (para. 28).

[74] HRM says the question here was not adjudicative, but was a discretionary determination under the statute, and therefore demands deference: *Dunsmuir, supra.*, at para. 53. Even if there is a question of law respecting whether the property was sold for market value, HRM says, it is intertwined with the "central question" of "whether Council's decision to exercise its discretion by selling the School Property to JONO instead of the Applicants was reasonable." Primarily, however, HRM says the question of whether the property was sold for market value is one of mixed fact and law and therefore demands deference. Further, Council was interpreting the *HRM Charter*, its own statute, a situation which will usually call for deference: *Dunsmuir, supra.*, at para. 54. HRM says the statement in *St. George's Lawn Tennis Club, supra.*, that Council interpreting its own enabling statute is a question of law that is displaced by the subsequent *Dunsmuir, supra.*, decision. HRM also seeks to distinguish *St. George's, supra.*, on the basis of dissimilar facts and statutory provisions, claiming that the provision at issue in *St. George's, supra.*, involved a prohibition on municipal action, while ss. 61 and 63 of the *HRM Charter* provide Council with discretion.

[75] HRM says *Nanaimo, supra.*, is distinguishable in that it involved an adversarial hearing and did not involve "the application of substantive rules to individual cases," and that it had no impact on the rights of the applicants, as they had no right to the property. The only right they might have had, it is submitted, was to submit a response to the request for proposals. As such, HRM says, this was not an adjudicative decision-making process.

[76] The parties are at odds with respect to the nature of the question. It seems to me that the question is twofold. Council was required to interpret the *HRM*

Charter to determine the scope of its power to sell the property. In particular, Council was required to determine whether it had authority to sell the property in the circumstances it faced when it made the decision. This was a question of law, requiring an interpretation of the enabling statute. A second question to be addressed, however, was what valuation constituted market value. This could be considered an issue of mixed fact and law.

Relative expertise

[77] Another factor in determining whether the decision-maker is entitled to deference is whether the decision-maker has greater expertise than the court on the question to be determined. On this point, Major J. made the following remarks in *Nanaimo, supra.*, where the issue involved a question of jurisdiction. He said, at paras. 30-33:

A consideration of the nature of municipal government and the extent of municipal expertise further militates against a deferential standard on the question of jurisdiction. Furthermore, these factors reflect the institutional realities that make municipalities creatures distinct and unique from administrative bodies.

First, in contrast to administrative tribunals, that usually adjudicate matters pertaining to a specialized and confined area, municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence. Yet, unlike provincial governments, municipalities do not have an independent constitutional status.... While administrative agencies are equally statutory delegates, they are not a substitute for provincial legislative and executive authority to the extent that municipalities are. Municipalities essentially represent delegated government.

Second, municipalities are political bodies. Whereas tribunal members should be and are, generally, appointed because they possess an expertise within the scope of the agency's authority, municipal councillors are elected to further a political platform. Neither experience nor proficiency in municipal law and municipal planning, while desirable, is required to be elected a councillor. Given the

relatively broad range of issues that a municipality must address, it is unlikely that most councillors will develop such special expertise even over an extended time. Finally, as opposed to administrative tribunals, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise.

The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for *intra vires* decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

[78] The applicants say Council is not expert at statutory interpretation and should receive no deference, even though it was exercising a power provided by statute. They refer to the Associate Chief Justice's comments in *St. George's Lawn Tennis Club, supra.*, at para. 34:

... While on matters of planning and development generally, Council could be expected to have a higher level of expertise than the Court - on this issue (whether Council failed to adhere to s. 217 of the Municipal Government Act) which involves an interpretation of the relevant statute, it is my view that the Court has the greater level of expertise. This suggests little deference is owed to Council on this issue.

[79] HRM says the issue is not one of statutory interpretation, but of Council's exercise of discretion to sell the property, intertwined with the question of whether the property was sold for market value. The question of value, HRM says, is one on which Council, with staff support, has expertise. As evidence of this expertise, HRM cites the affidavit of Peter Stickings. In particular, HRM points to his statement that "[t]he best of my knowledge, information and belief, since the approval of the Procedures for Disposal of Surplus Schools by HRM Council on September 19, 2000, eighteen (18) schools have been managed through a disposal process...." The summary attached as Exhibit B to his affidavit indicates that of 15

schools disposed of between 2001 and 2009, 14 were sold for market value. HRM does not explain how these factual assertions support the conclusion that Council possesses greater expertise on the relevant question than the court does.

Summary on standard of review

[80] The applicants submit that Council is permitted by the *HRM Charter* to sell surplus property in certain specific and clearly-defined conditions. Applying the *Dunsmuir, supra.*, factors, they say there is a right of appeal (there is not); that the court has greater expertise than Council in statutory interpretation; that the *HRM Charter* provides Council's authority and provides the court with authority to quash the decision for illegality; and that the issue is a question of law. This analysis, they say, calls for a correctness standard. HRM responds that three of the four *Dunsmuir, supra.*, factors point to a reasonableness standard, while the fourth - the absence of a privative clause - is not determinative.

[81] I am satisfied that Council was required to be correct in interpreting the scope of its power to sell the property under the *HRM Charter*. That is to say, the standard to be applied to Council's determination of whether it could sell the property for less than market value was correctness. However, the determination of what the market value actually was is a question to be reviewed on a standard of reasonableness.

Did Council's decision meet the necessary standard?

[82] In approving the sale of the property to JONO, a private developer, Council was bound by ss. 61 and 63 of the *HRM Charter* to ensure that the property was sold for "market value." Pursuant to s. 61(5)(b), HRM may "sell property at market value when the property is no longer required for the purposes of the Municipality." An exception is provided by s. 63(1), which provides that the Municipality "may sell or lease property at a price less than market value to a

non-profit organization that the Council considers to be carrying on an activity that is beneficial to the Municipality."

[83] The applicants argue that market value cannot mean the actual sale price. They claim that "market value" should be held to be the appraisal of \$4.3 million in the Colliers Valuation Report. The term "market value" is not defined in the *HRM Charter*. According to the applicants, "market value" refers to the property's assessed value for purposes of the *Assessment Act*, R.S.N.S. 1989, c. 23, or its appraised value, as suggested by the Procedure.

[84] The starting point in statutory interpretation is E. A. Driedger's "modern principle" of statutory interpretation, as described in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, by which "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (para. 26).

[85] The Nova Scotia Court of Appeal stated in *Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.*, 2007 NSCA 89, that "[l]aws setting out municipal powers should be interpreted broadly and with regard to their purpose, not narrowly and with undue strictness" (para. 3). The issue in that case was HRM's power to pass a particular by-law. The court held, at para. 3, that "[p]rovincial law gives HRM the authority to make by-laws respecting solid waste, including regulating its disposal, collection and removal and matters incidental or conducive to the exercise of that authority. On a broad and purposive reading, rather than a narrow and strict one, this gives HRM the authority to enact its by-law." The modern approach to drafting municipal statutes was to confer authority "in broader and more general terms" than in the past, reflecting "the evolution of the modern municipality which requires greater flexibility in carrying out its statutory responsibilities" (para. 88).

[86] The applicants rely primarily on the *Interpretation Act*, R.S.N.S. 1989, c. 235. Subsection 9(5) of the Act declares that every enactment "shall be deemed remedial and interpreted to insure the attainment of its objects" by consideration of the following factors, among others:

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[87] The applicants say the purpose of limiting HRM's power over the sale of surplus municipal properties is to prevent undue advantages to private parties in the marketplace and thereby protect the value of public property. The provisions were also intended to prevent municipalities from competing to attract commercial enterprises by offering financial assistance in the form of reduced property prices.

[88] The applicants point out that the *Charter's* provisions on property taxation are cross-referenced with the *Assessment Act*, which provides for assessment of

property to provide a coherent basis for municipal property taxes. The *Assessment Act* defines "market value" as "the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer..." (s. 42(1)). According to the applicants, "market value" and "assessed value" are "inextricably linked." They also argue that to interpret "market value" to mean sale price would deprive the phrase "less than market value" of any meaning. They cite several cases where disposal at below market value was not permitted: *Shaddock v. Calgary (City)*, [1959] 29 W.W.R. 49 (Alta. Dist. Ct.); *Miller et al. v. Salmon Arm (District) et al.*, 2004 BCSC 674.

[89] The applicants say Council's decision to sell the property to a private developer for a price below market value did not meet the standard of correctness, in that the decision did not comply with the parameters for selling municipal property as imposed by the *HRM Charter*. In selling the property to JONO, Council was bound by the requirement to sell at market value. By approving the sale at a price below market value, it is submitted, Council contravened the *Charter* and failed to meet the correctness standard.

[90] Even if the proper standard is reasonableness, however, the applicants say the decision cannot stand. They emphasize the "contextual" aspect of the reasonableness standard, as discussed in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, where the court said, at paras. 18-19:

... As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, per Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past: *Dunsmuir*, at paras. 54 and 57. To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.

The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.

[91] By contrast, the applicants say, the decision to sell the property was an adjudicative one on a question of law. It is not comparable to a decision to pass a bylaw.

[92] The applicants also suggest that the reasonableness standard may require reasons for the decision to sell the property. In *Catalyst Paper Corp., supra.*, the court spoke of the possible need for formal reasons "for decisions that involve quasi-judicial adjudication by a municipality" (para. 29). Council has provided no reasons for its decision, and there is therefore no reasoning path for the court to examine. As a result, the applicants say, the decision must fail on a reasonableness analysis. In any event, the decision to sell the property to JONO for a price below market value is not a possible or acceptable outcome of the application of ss. 61 and 63. As such, they argue, the decision must be quashed.

[93] HRM says the provisions in question must be interpreted in light of the purpose of the *HRM Charter*, as set out at section 2. The phrase "market value," HRM argues, must be interpreted broadly, in light of the Legislature's intention to give the municipality broad governmental authority. Counsel argues that the interpretation of "market value" advanced by the applicants would undercut these purposes by limiting HRM's power to dispose of surplus properties.

[94] Further, HRM says it is the applicants' interpretation that would have absurd results, since it would prevent Council from selling a surplus property to a for-profit entity for a price lower than the appraised value. This would prevent the municipality from ridding itself of such properties, which would have ongoing maintenance and holding costs. HRM adds that the applicants' interpretation would result in an advantage for non-profit organizations, since the municipality would be motivated to transfer properties that could not be sold for the appraised value or higher.

[95] In summary, HRM submits that "market value" is the price that could be obtained on the open market from a willing buyer. While an appraisal may be a consideration in determining proper market value, the ultimate determinant will be the market itself. As Nunn J. said in *Toronto Dominion Bank v. 2047545 Nova Scotia Ltd.* (1995), 143 N.S.R. (2d) 27, 1995 CarswellNS 30 (S.C.), affirmed at 148 N.S.R. (2d) 228, "the market value at the time of resale was significantly less than at the time the building was acquired by the defendant company. A reasonable starting place was the appraisal.... However, appraisals are not finally determinative for market value is best determined in the market itself" (para. 52).

[96] HRM says the valuation that most accurately reflected market value was Collier's "as is" appraisal of \$1 million. The two higher proposals -- \$3 million to maintain the school and demolish the remainder, and \$4.3 million to demolish all the buildings and redevelop the site - were framed as "prospective market values." The latter, HRM says, were estimated future values of the property. According to the "Canadian Uniform Standards of Professional Appraisal Practice," such prospective value opinions "are intended to reflect the current perceptions of market participants as to the future." The two higher appraisals therefore rested on certain "extraordinary assumptions" or "limiting conditions": that the property could be rezoned; that multi-unit residential buildings would be permitted on the site; that the maximum yield of residential units would be similar to the maximum unit yield permitted on the Halifax Peninsula R-3 zone; and that the allowance for demolition and cleanup would be reasonable.

[97] As for the JONO bids, HRM concluded that JONO's unconditional offer of \$3 million represented the greatest return, having a net present value of \$3,110,900.65. (JONO's second option was contingent on a development agreement being concluded.) As such, HRM says, market value for the property was \$3 million, and the decision to sell complied with s. 61 of the *HRM Charter*.

[98] An appraisal is an estimate, albeit one provided by a person with knowledge and experience in valuing property. Such estimates are often accepted, including by courts, when there is no other readily available evidence of market value. However, as the phrase suggests, "market value" is the value of a property on the market. This means the "open" market, in circumstances where there are no unique or temporary factors that may serve to drive up or down the price being offered. These circumstances are, in part at least, reflected in the different appraisal figures contained in the Colliers report.

[99] The JONO bid that Council accepted was valued at \$3 million, but also included a series of step-up amounts in the event of a higher competing bid. As the applicants point out, JONO's bid, in fact, contained a range of bids. The text of "Option A" was as follows:

Purchase Price: A starting bid of Three Million Dollars (\$3,000,000.00) CAD to be increased by increments of Seventy-Five Thousand Dollars (\$75,000.00) CAD over the highest bid to a maximum of Four Millions Dollars (\$4,000,000.00) CAD

[100] As such, if the price that could be obtained from a willing seller is the measure of market value, JONO's own bid disclosed a willingness to pay up to \$4 million in the event there were competitive proposals from other bidders. Of course, JONO's preference would presumably be to obtain the property for the lowest amount possible. However, this does not change the fact that JONO indicated a willingness to pay up to \$4 million.

[101] Market value being the amount that a willing buyer will pay on the open market, the question is what constitutes market value in these circumstances. Obviously, one figure meeting that definition could be the actual sale price. However, there is another figure that meets the definition as well. JONO was prepared to pay \$4 million for the Property "as is" in the event that there were competing bids. Council was willing to accept \$3 million. I infer that Council would have accepted \$4 million. Consequently, there was a willing buyer and a willing seller at a price of \$4 million. JONO's willingness to pay \$4 million in the event there was a competing bid meant that it was a willing buyer at that price. By starting at \$3 million, JONO was attempting to obtain the property at a price lower than it was actually willing to pay.

[102] The *HRM Charter* provides that Council may not sell municipal property at less than market value unless the sale is to a non-profit organization. To sell the property for a price less than a willing buyer was willing to pay amounted to a sale at less than market value. In other words, the price ultimately agreed to was lower than the price the buyer had expressed a willingness to pay for the property "as is." The *HRM Charter* did not permit Council to sell the property at this price in these circumstances. In these circumstances, "market value" was not the estimate, but the amount a willing buyer would pay.

[103] The market price for the property was \$4 million. The agreed selling price of \$3 million was therefore an amount less than market value.

[104] Keeping in mind that the standard of review with respect to Council's determination of price is reasonableness, I am not satisfied that Council met that standard. The materials before Council made it explicit that the buyer was willing to pay \$4 million for the property. In these circumstances, I do not believe "market price" could reasonably be regarded as any amount less than this. Council's decision to sell the property for \$3 million was not within a reasonable range of decisions in circumstances where the buyer had informed Council that it was prepared to pay \$4 million.

[105] Obviously, if the standard was correctness, the decision failed to meet that standard as well.

[106] The application is allowed.

MacAdam, J.